The Antinomies of Legitimacy: On the (Im)possibility of a Legitimate International Criminal Court

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Abstract

This paper critically analyzes the concept of legitimacy as it applies to international criminal law. Using the referral of the situation in Darfur to the International Criminal Court (ICC) – and the resultant disagreement between Sudan, the African Union, and the ICC – as an entry point, it examines the discourse about the referral as a contest of legitimacy. After placing this specific example in the context of theories of legitimacy, it argues that there are no objective criteria for determining the legitimacy of an international criminal tribunal. Legitimacy as a concrete concept is best understood as a Kantian antinomy – an unanswerable question that borders on the metaphysical. Yet this indeterminacy can be turned to the advantage of the critical theorist, offering pragmatic, normative, and pluralist alternatives for the reconstitution of international criminal tribunals such as the ICC.

Keywords

critical approaches to International Law – International Criminal Law – legitimacy – Kant – Public International Law
Darfur and Al-Bashir – a Debate on Legitimacy

1.1 Introduction
The tremendous controversy over the March 2009 indictment of Sudan’s President Omar al-Bashir1 by the International Criminal Court (“ICC”) was largely predictable. The Government of Sudan (“GoS”) reacted with unsurprising scorn, while human rights groups hailed the Court’s boldness in pursuing a man many see as responsible for the intense, widespread suffering in war-torn Darfur. Darfur had long been a cause célèbre in the West, adopted by movie stars, singers and ambitious young politicians2 frustrated with Western intransigence over the ongoing crimes in southern Sudan. Activists applauded the ICC’s position, vigorously defending the Court against the objections raised by Sudan, the African Union (“AU”) and others: that the ICC action was illegal; that its relationship with the Security Council was colonialist; and that there was an international double standard in operation, one that saw fit to extraordinarily extend the jurisdiction of the ICC first to a non-party state, and then to the customary immunities of a head of State. The proponents of intervention in Darfur argued that the Court’s actions were manifestly legal, supported by both the Security Council and past precedent in international law.

In truth, that rhetorical contest about Darfur was never an argument about legality. From the outset, even before the ICC began its investigation into Darfur, started charging both GoS officials and rebels, and then ultimately indicted al-Bashir, the struggle has been about the propriety of the Court’s involvement. Each step of the process has been challenged or defended on the basis not of its lawfulness, but its correctness. Whether certain acts are legal or not has certainly been used by all involved in support of their positions, but the larger point that animates both sides is the debate over whether the ICC intervention is legitimate in one sense or another.

This paper explores the idea of legitimacy in international criminal law (ICL), paying special attention to the ICC. It argues that while it is impossible

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1 The first indictment against al-Bashir alleged a number of crimes: forcible transfers of the civilian population; rape; torture; and, mass killings. Charges of genocide were rejected in 2009, but confirmed on appeal in 2010. See Prosecutor v Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09, Pre-Trial Chamber 1, Decision on the Prosecution’s Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir (4 March 2009); and Second Decision on the Prosecutor’s Application for a Warrant of Arrest (12 July 2010).

to develop common standards of legitimacy for the Court, there is value in engaging in debates about legitimacy. The flexibility and indeterminacy of the concept creates discursive space from which to critically analyze ICL, its exclusions, and the potential for reforming its norms and institutions so as to be more inclusive of alternate perspectives. This critical alterity wedges open the discourse around ICL, forcing it to become more inclusive of non-Western views. Though it may be difficult to define, the idea of legitimacy can be an instrument for re-inscribing the ICC and other international criminal tribunals as truly international – in their scope of application, in their sources of law, and in their responsiveness to international crime and suffering.

The first part of this paper uses the Darfur indictments to introduce the idea of legitimacy and its centrality in debates about the ICC. The following section discusses foundational questions of legitimacy in ICL, in particular whether purely legal standards are appropriate criteria. Part Three describes the search for a complex standard of legitimacy – sparked by David Easton but refined by contemporary political scientists and international lawyers – that can accommodate the multiple criteria deemed relevant to assessing the Court. The fourth part uses Kant’s critical reflections on metaphysics to describe the impossibility of determining the legitimacy of the ICC. Kant’s four antinomies demonstrate that while there is no objective, universal standard of legitimacy for the ICC, the pursuit of that standard opens up new intellectual terrain for ICL scholars. The final section picks up on this thread by reexamining seemingly well-settled concepts such as the ‘fair trial’ to show that this indeterminacy is inescapable. It argues that the value of legitimacy discourse lies in its introduction of alternate, suppressed and critical perspectives to debates about the propriety of ICL and ICC action. Legitimacy discourse, thus, offers pragmatic, normative, and pluralist alternatives for the reconstitution of international criminal institutions.

1.2 The Rhetoric of Darfur

Immediately after the Security Council referred Darfur to the ICC, that chamber was faced with serious allegations posed by Sudan’s Ambassador to the UN. The referral was attacked as a hegemonic exercise reminiscent of colonialism: the resolution failed to consult African states or the African Union, and was riddled with exceptions to its jurisdiction in order to protect the United States, even though the same arguments would apply to Sudan. Ultimately,
the resolution “exposed the fact that this Criminal Court was originally intended for developing and weak States, and that it is a tool for the exercise of the culture of superiority and to impose cultural superiority. It is a tool for those who believe that they have a monopoly on virtues on this world”. The AU adopted a similar position, especially after the indictment of al-Bashir, accusing the ICC of pursuing “a justice with two speeds, a double standard justice, one for the poor, one for the rich”, and of exploiting the doctrine of universal jurisdiction to selectively pursue African leaders. According the AU Peace and Security Commissioner, certain AU members believed that al-Bashir's indictment proved “a glaring practice of selective justice”; the ICC is now said to be “race hunting.”

At the same time, the ICC and its various organs have joined with human rights organizations in portraying the referral and the al-Bashir indictment as appropriate because each advances important humanitarian goals. This discourse both defends the ICC's work and attacks its opponents. The Pre-Trial Chamber of the ICC has stated that it has jurisdiction over al-Bashir in part because it is a core goal of the ICC Statute, as stated in its Preamble, to end impunity for the sorts of serious international crimes that he is accused of committing. Similarly, then-Chief Prosecutor Luis Moreno Ocampo described the Court's position as the morally correct one, which gave the international community the opportunity to perform the right action: “The court's recent decision could provide a last chance for the world to react properly, to transform “never again”

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4 Ibid.
9 Decision on the Prosecution’s Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir, supra note 1, para. 42.
from a promise into a reality.”10 By extension, the AU position “shows a disdain for those in Darfur . . . and makes a mockery of the AU as an international body;”11 the AU criticism is not constructive, but “is simply to protect someone who stands accused of the most serious crimes against humanity”;12 and its approach “feeds, rather than combats, the culture in which abusers think they will suffer no consequences for their actions.”13 Those who object to the ICC are delegitimating themselves by aligning with perpetrators, not victims; by contrast, the ICC’s reversal of this position enhances its own legitimacy.

Even the scholarly debate about the legality of the referral and al-Bashir’s indictment is deeply intertwined with questions of propriety and legitimacy. Professors Akande and Gaeta, for example, disagreed on the legal basis for the indictment, even as they agreed that the correct result was al-Bashir should be brought before the Court.14 In disagreeing with this conclusion, others have argued that understanding legitimacy-based critiques helps explain why the ICC lacks jurisdiction over al-Bashir.15 In this construction, legality-based arguments are at least co-equal to, and in some cases subsumed under, legitimacy-based positions. As Klabbers and Piiparinen argue, legitimacy discourse has become central to international law: “The question is no longer ‘who decides on the application of law?’ but rather ‘who decides what qualifies as legitimate?’”16

In a sense, the struggle over the propriety of the Darfur referral began long before the ICC even existed. The legitimacy of international criminal courts and tribunals has always been contested. The post-war military tribunals, as well as the ICTY and even the ICTR, have all been criticized for their apparent failings, especially their alleged selectivity and bias. Defenders of those tribunals argued that even if these allegations have some basis in fact, they do not (seriously) detract from the work of those tribunals, whose value derives from the noble pursuit of accountability for atrocity. These debates recycle the same legal and political controversies, to no avail.

One possible route out of this apparent dead end has been the turn towards legitimacy study, an attempt to systematize a coherent set of evaluative criteria by which an institution or an act ought to be judged. The clarity offered by such an approach is tempting, promising as it does to cut through the intellectual stalemate of the present situation. If we can organize the varied rhetorical volleys – launched by courts, prosecutors, states, international organizations, human rights NGOs, victims, and perpetrators – perhaps we can overcome the inadequacies of purely legal argumentation to arrive at the right answer, and as Ocampo suggested, act properly.

2 Constructing a Framework for Legitimacy in International Criminal Law

While the content of any particular legitimacy framework and the resultant evaluations of legitimacy might be contestable, those contests only have meaning because of the significance of “legitimacy”. In international law, legitimacy “is a subjective quality, relational between actor and institution, and is defined by the actor’s perception of the institution.”\(^\text{17}\) It is the justification of authority,\(^\text{18}\) and legitimate institutions have “the prestige of being considered binding.”\(^\text{19}\) In the context of ICL, and particularly international criminal tribunals such as the ICC, legitimacy claims primarily centre on the moral validity of a system (or key aspects of it), and the obligations of states and individuals to comply

with its decisions. Legitimacy discourse thus goes to the heart of international criminal justice institutions.

The difficulty is that there are a number of moral criteria by which to judge the ICC and other international criminal tribunals. A legitimate international criminal tribunal relies upon fair trial procedures; or, it must be ‘democratic’ in nature; or, it must vigorously pursue those who commit human rights atrocities, even if the trials are procedurally deficient. Each one of these assessments prioritizes a separate normative scheme, highlighting in turn the deficiencies of its competitors. The unrestrained pursuit of human rights violators diminishes the procedural protections afforded to defendants, as well as the rights of sovereignty that protect a multiplicity of state interests including (perhaps unfortunately) the ability to shield perpetrators from accountability mechanisms. The prioritization of democratic procedures confounds for it seemingly endorses the deep politicization of the ostensibly neutral legalism that otherwise surrounds the judicial sphere and justifies courts themselves. Of course, the insistence on fair trial procedures as the only indicia of legitimacy quarantines the courtroom from the very real political acts and decision-making that underpins those trials. The ICC is a system – of adjudication, of governance, of norm-projection and of accountability – and pinning its legitimacy to one or another aspect of its work isolates that process from its institutional and social context.

The debate between those who focus on fair trials and those who warn of the Court’s democratic deficit is illustrative. The normative legitimacy of a criminal trial is logically distinct from its relationship to a political institution, democratic or otherwise, because of the unique tasks a trial performs, and the unique context within which it takes place. It is, for example, unclear

22 N. Amoury Combs, Fact-finding Without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions (Cambridge: Cambridge University Press 2010), pp. 339–357 (arguing that even though the evidentiary record is often deeply flawed and deficient, convictions on that evidence are nonetheless legitimate and justifiable). See also T. Broude, ‘The Legitimacy of the ICJ’s Advisory Competence in the Shadow of the Wall’, 38 Israel Law Review (2005), 189–210, at 206–208 (arguing that procedural flaws can hurt the legitimacy of a decision, even if the substantive decision is correct; however, it is arguably more important to get the substance of the decision right, and so substantive legitimacy is arguably more important than procedural legitimacy).
why popular assent is “relevant to guilt or innocence”, which is ostensibly a factual determination.23 Undemocratic structures are only problematic in ICL when they result in unfair or improper procedures;24 otherwise, democratic processes are usually apparent through the domestic adoption of international lawmakers.25

This argument is not wholly satisfactory in part because it only seems relevant to the question of the trial itself, even though the ICC (and ICL itself) is much more than the product of its trials. Sentencing, for example, is an essential component of any criminal law process. In international criminal trials, the question of who is or is not also put on trial is also integral to the legitimacy of the international criminal justice institution. One might applaud the exertions of the post-Second World War military tribunals for their “honest effort” in trying defendants,26 while simultaneously expressing profound concern with its failure to prosecute Allied perpetrators of comparably severe crimes, such as the fire-bombings of German towns, or the destruction of Hiroshima and Nagasaki. Similarly, a trial may be illegitimate to some victims if it fails to recognize their status, either by reducing their participation in the process, or by only charging the defendant with a subset of the possible crimes that could have been laid. Beyond the criminal law aspects of the ICC, one must consider its position as an institution of public international law, especially since international law has long been regarded as internalizing Western, colonialist biases.27 The ICC is governed by an Assembly of States Parties, which determines inter alia rules of procedure and evidence, as well as substantive jurisdiction, and has a particular relationship with the United Nations Security

23 Fichtelberg, supra note 20, at p. 780.
24 Ibid., at p. 781.
26 E. van Sliedregt and D. Stoitchkova, ‘International Criminal Law’ in S. Joseph and A. McBeth (eds), Research Handbook on International Human Rights Law (Cheltenham: Elgar, 2010), pp. 241, 254 (“The Tribunals were cautious in imposing criminal liability. Conscious of the context in which they were operating and the legal shortcomings of the process, they made an honest effort to avoid imposing any form of strict liability . . . [and] set in motion a new trend in the development of international standards for legal conduct.”).
27 A. Anghie, ‘Francisco De Vitoria and the Colonial Origins of International Law’, 5 Social and Legal Studies (1996), 321–336, at 332 (“In particular, we see in Vitoria’s work the enactment of a formidable series of maneuvers by which European practices are posited as universally applicable norms with which the colonial peoples must conform if they are to avoid sanctions and achieve full membership”).
Council. The lack of democratic process in the operation of the Assembly of States Parties might well undermine the legitimacy of at least some of the ICC’s work, especially in relation to non-parties. Similarly, any legitimacy challenges faced by the Security Council— including a democratic deficit— might serve to undermine the legitimacy of the ICC in so far as the two entities interact through referrals to one another. Assertions of jurisdiction are logically prior to trials and in the ICC can mean simply investigations without any actual court proceedings; yet there can be deep controversy about the way in which the Court asserts its jurisdiction. Even as fair trial processes seem crucial to the legitimacy of the ICC, they cannot account for all the ways in which the Court might be seen as illegitimate.

The incompleteness of the various legitimacy frameworks— fair trials, democracy, human rights enforcement and so on— highlights four important points about the normative frameworks at play. First, in an international legal institution such as the ICC, there are likely to be multiple normative legitimacy frameworks at play, depending on the variety of functions performed by the institution and the nature of its governance. A second point is a corollary of this: the legitimacy of the ICC must be considered in a disaggregated fashion. As noted above, democratic process may be irrelevant to the ICC system in respect of certain procedures or roles it undertakes, and quite relevant to others. Third, there seems to be an assumption that the perception of an institution is irrelevant to its legitimacy, as long as the institution follows the correct procedures. Finally, if we are concerned about power dynamics between states, we might additionally be concerned about cultural relationships between


29 The Security Council can refer situations to the Office of the Prosecutor for investigation. In turn, the ICC can refer states to the Security Council for falling to cooperate with the ICC. See Art. 13(b) and Art. 16 of the Rome Statute of the International Criminal Court, (17 July 1998) 2187 U.N.T.S. 90, 37 I.L.M. 1002.

30 One prominent example of an investigation without a trial is the ICC’s determination that there is no basis to intervene in Afghanistan. Office of the Prosecutor – International Criminal Court, Report on Preliminary Examination Activities (November 2013).

31 See Akande, supra note 14; Gaeta, supra note 14; Kiyani, supra note 15.
them. It is unclear that the notion of proper trial procedure is sufficient to legitimate the ICC, because that viewpoint presumes the propriety of (1) a trial, even in the absence of state or popular consent to it, and (2) a particular trial framework that may be alien not only to the individual defendant but the victim community as well. The implication then is that not only are there different applicable normative frameworks for each function of the ICC, but that each of these functions may be assessed in different ways by a variety of audiences. The prioritization of fair trial procedures may be an important way to measure the legitimacy of certain aspects of the Court’s work, but it is predicated on particular assumptions about trials and, even in the face of widespread agreement about those assumptions, remains an incomplete understanding of legitimacy.32

A more thorough approach would seem to require combining the various concerns of the Court into one holistic legitimacy assessment. But how to connect legal legitimacy to political legitimacy? The two are related, but the criteria for assessing both are markedly different. A trial and an election are each unique creatures, speaking different languages and pursuing different ends, and the possibility of reconciling their apparently incommensurable differences into a coherent evaluative framework seems remote.33

3 International Criminal Tribunals and the Legitimacy of Systems

In order to move past the normative dogmatism that characterizes contemporary debates between democratic deficits, fair trial procedures, and human rights goals, a framework for understanding legitimacy must create the space for simultaneous competing understandings of what makes a complex organization such as the ICC legitimate.

32 And likely an unattainable standard as well. See J. Alvarez, *International Organizations as Law-Makers* (Oxford: Oxford University Press 2005), pp. 521–584 (arguing that idealized forms of procedurally fair adjudicative mechanisms do not exist in international law, and are unlikely to as long as international judicial bodies function as both dispute settlers and lawmakers).

33 Although in many American jurisdictions, the two do speak to each other through the election of judges and prosecutors, which itself often turns on the political interpretation of those officials’ anti-crime strategies. However, these elections offer no normative criteria upon which electors can base their evaluations; instead, each voter is left to choose according to her own personal evaluations of candidates, based on her own internal preferences.
This holistic, interactive perspective underpins the political scientist David Easton’s approach to legitimacy. For Easton, to speak of legitimacy is to speak of one’s inner conviction of the moral validity of a system (or key aspects of it), a conviction that leads to support for that system even in the face of repeated actions that might negatively affect the interests of the audience.34 This is not significantly different from those understandings of legitimacy advanced above; applied to the present situation, states would support the ICC in pursuing al-Bashir and other heads of State, for example, if they believed in the moral authority and fairness of the Court.

Legitimacy provides stability to the system by grounding the relationship between the regime and authorities of the political system on the one hand and its membership on the other, thereby defining the permissible limits of activity.35 The audience places demands upon the system, and the system responds in part by attempting to generate support for itself. As the environment within which the system operates changes, the types of demands placed upon and the level of support for the system fluctuate as well.36 If the system is unable to meet the demands placed upon it, its level of support will decline and ultimately threaten the viability of the system.37 While this might describe the function of particular institutions and systems in a domestic context, the international system poses unique problems. Easton warns, however, that there is a very low sense of legitimacy in the international context because compliance with international systems is usually based on self-interest, and there is often no real distinction between the authorities and the membership.38 The actors to be constrained are often the same ones who make the rules about what in fact constrains them, and these rules can be adjusted to meet their self-interested needs.

Yet in at least some spheres of public international law, particularly with the rise of international legal institutions, state governments are ceding their exclusive decision-making authority. With the rise of international human rights and ICL, states are also ceding their position as the exclusive members of the ‘international community’, however thinly defined it may be. In creating

35 Easton, A Systems Analysis, supra note 34, pp. 279–280.
37 Ibid., pp. 120, 124.
and joining an international criminal tribunal, for example, member states are conceding significant amounts of sovereignty and making themselves vulnerable to prosecution by independent authorities. As well, while the Assembly of State Parties is at once an authority of and the membership of the ICC, there are other key authorities within the ICC that are distinct from the membership: the Office of the Prosecutor, the Registrar, the ICC judges, and even domestic law enforcement and judicial actors through their enforcement and complementarity roles in the ICC system. While the Court was established by states, the diffuse nature of the system and its constituent organs grants it some degree of independence from particular state interests. Easton's ideas may therefore remain a useful entry point into discussions of the legitimacy of ICL.

One of the important details of Easton's work is its disaggregation of a system's constituent components. Each system has its regime, its authorities, its audiences, and three types of legitimacy – ideological, structural, and personal – that each aspect of the system interacts with. Every regime has ideologies, values and principles that provide limits on the regime's authorities, as well as context for assessing their legitimacy.\(^\text{39}\) Ideological legitimacy is found in both partisan and legitimating ideology. Partisan ideologies are beliefs that deal with support for particular authorities in the system, and legitimating ideologies go to the heart of the regime and its principles (e.g., the justifications and objectives of the Court).\(^\text{40}\) The authorities are seen as having the 'moral right to rule', and the structures and norms that govern them acquire validity from the same ideological principles, deeming the patterns of organization within the system as legitimate.\(^\text{41}\) It is here that the arguments about impunity and human rights protection carry their greatest weight, as those objectives are seen to be integral to international criminal justice institutions. From this perspective, the indictment of al-Bashir bolsters the legitimacy of the ICC because of its strong attachment to powerful moral values – the arrest and punishment of an alleged génocidaire.\(^\text{42}\)

\(^{39}\) Ibid., at p. 289.  
\(^{40}\) Ibid., at p. 291.  
\(^{41}\) Ibid., at pp. 292–293.  
\(^{42}\) In spite of the Pre-Trial Chamber’s confirmation of genocide charges against al-Bashir, there remains considerable debate about whether genocide is actually occurring in Darfur. Relatedly, there have been allegations that the Government of Sudan obtained legal advice on how to adjust its conduct in Darfur so as not to meet the special intent requirement for genocide. M. Osiel, Making Sense of Mass Atrocity (Cambridge: Cambridge University Press, Cambridge 2009), at p. 137.
The ideology of the system needs to “capture the imagination” of the membership, and it does so by first enabling the expression of the membership’s needs and wants, and secondly by using the membership in order to achieve particular goals of the system.43 Ideological legitimacy is contingent,44 and depends upon the performance of the regime, as well as its continuing ‘psychological appeal’.45 This conjunctive construction conceives of legitimacy discursively, as something capable of accommodating shifting goals and ongoing reassessments of legitimacy.46 There are two implications here. The first is that legitimacy depends upon the audience assessing the institution as much as it does on the institution itself, and that there may be – depending on the makeup of the relevant membership – a number of different audiences that are relevant to this assessment. Discourse implies then that legitimacy is not just a static theory or goal to be obtained, but a dynamic and contingent source of power. For the ICC, this dynamism is found in the interactions between member and non-party states, NGOs, international organizations and others, with the disagreement over the propriety of indicting al-Bashir a prime example. The second implication is that this discursive conception of legitimacy introduces a core democratic concept: in order for an entity to be politically legitimate, the terms of its relationship with its membership and its audiences must be revisable.47 It is this dynamic relationship that explains to some degree the disjunct between African states being the largest group of states to ratify the ICC Statute, while at the same time objecting in large numbers to the pursuit of al-Bashir.

Regardless of how a belief in legitimacy arises, once it exists, it produces independent effects. An authority that occupies a role within the system is granted that authority by an initial agreement on ideological grounds, but the continuing legitimacy of that authority derives from the acceptance of that role in the structure of the system, the propriety of the means by which that authority was granted, and the authority’s conformity with the evolving norms

44 Easton, *Framework*, supra note 36, at pp. 120, 124.
46 Steffek, * supra* note 19, at pp. 260–263.
47 Revisable in the sense that the terms by which an institution’s legitimacy is measured can be changed – with meaningful effect on the organization – by the audience offering the interpretation. J.-M. Coicaud, ‘International democratic culture and its sources of legitimacy: The case of collective security and peacekeeping operations in the 1990s’, in J.-M. Coicaud and V. Heiskanen (eds), *The legitimacy of international organizations* (Tokyo, United Nations University Press, 2001), pp. 256–308.
that define the rights and obligations of that position.\textsuperscript{48} In this way, cultural norms and processes can be internalized as aspects of structural legitimacy.\textsuperscript{49} This sociological theory of legitimacy is “rooted in an audience’s shared belief that the actions of an entity are desirable, proper or appropriate within some socially constructed system”.\textsuperscript{50} Institutions are understood as legitimate then not solely because of the processes that created them, but because of their resonance with the shared identity of the audiences they address.\textsuperscript{51} Uganda, for example, self-referred a situation to the ICC and hosted the 2010 Kampala Review Conference, but has become a vocal critic of the ICC since the indictment of al-Bashir, on the basis that the case demonstrates an unpalatable change in priorities.\textsuperscript{52}

The final element of this tripartite framework is the personal basis of legitimacy. The authorities of the system must be seen, in their individual capacity, through their behaviour and symbolism, as worthy of moral approval. The strength of personal legitimacy may even be enough to permit the violation of structural norms.\textsuperscript{53} In Darfur, then-Chief Prosecutor Ocampo was alternately lauded and derided for his approach to the case. While human rights groups in particular supported his decision, others objected to the manner in which he pursued both investigations and the accused. Ocampo was accused of cutting corners, and in particular of failing to properly investigate the crimes in

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\item \textsuperscript{48} Easton, \textit{A Systems Analysis}, supra note 34, at p. 299.
\item \textsuperscript{49} \textit{Ibid.}, at p. 301.
\item \textsuperscript{50} S. Bernstein, ‘Legitimacy in Global Environmental Governance’, \textit{1 Journal of International Law and International Relations} (2005), 139–166, at 156.
\item \textsuperscript{51} Steffek, \textit{supra} note 19, at p. 256.
\item \textsuperscript{52} Ugandan President Yoweri Museveni explained that “opinionated and arrogant actors using their careless analysis have distorted the purpose of that institution. They are now using it to install leaders of their choice in Africa and eliminate the ones they do not like”. I. Musa Ladu, ‘Museveni attacks ICC at Uhuru’s swearing-in’, \textit{Daily Monitor} (Kampala, 10 April 2013), available online at http://www.monitor.co.ug/News/National/Museveni-attacks-ICC-at-Uhuru-s-swearing-in/-/688334/1744026/-/3b57r9/-/index.html (accessed 13 September 2014).
\item \textsuperscript{53} Easton, \textit{A Systems Analysis}, supra note 34, at pp. 302–303. Katharina Coleman argues that not only can organizations and individuals be legitimated, but so can actions. One of the virtues of having a strong sense of legitimacy is that it creates normative space for certain kinds of activities that would otherwise appear impermissible. See K. Pichler Coleman, \textit{International Organisations and Peace Enforcement: the Politics of International Legitimacy} (Cambridge: Cambridge University Press, 2007), pp. 40–41. Robert Cover makes a similar point, arguing that “[e]very legal order must conceive of itself in one way or another as emerging out of that which is itself unlawful.” See R. Cover, “The Supreme Court 1982 Term – Foreword: Nomos and Narrative”, \textit{97 Harvard Law Review} (1983), 4–68, at 23–24.
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Darfur. Antonio Cassese criticized all aspects of the investigation into Darfur;\(^54\) Louise Arbour, the former Chief Prosecutor of both ad hoc tribunals, criticized the failure to independently gather evidence in Darfur itself, and instead rely on second-hand information gathered by human rights groups and other investigators, including Cassese’s UN-mandated Commission of Inquiry.\(^55\) Other criticisms include Ocampo’s failure to use sealed warrants when attempting to arrest key defendants, including al-Bashir, and his inflammatory public statements about the case. Crucially, different audiences give different credence to these complaints. For scholars and legal professionals, the technical deficiencies undermine the credibility of the court. For states opposed to the ICC, the only issue may be his statements about the cases, whereas supporters of the ICC may be unimpressed by this conduct, but feel these defects are overridden by the moral imperative of pursuing heinous criminals.

The thread running through Easton’s position is what Bodansky describes as the relationship between popular and normative legitimacy. Normative legitimacy concerns whether an institution is legitimate according to its adherence to some set of standards, whereas popular legitimacy concerns whether it is perceived as legitimate by an audience, irrespective of the normative framework that may (or may not) guide its practices.\(^56\) While it might be said that ‘normative’ legitimacy is really the popular legitimacy of an élite, in the sense that legitimacy depends on some audience, the two are conceptually distinct: a repressive government may be popularly legitimate, but still seen as normatively illegitimate for its violations of human rights or other norms.\(^57\) Popular acceptance cannot be the sole criterion when democratic processes can easily sanction deeply harmful actions.\(^58\) The dialectical relationship between

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\(^{56}\) Bodansky, supra note 18, at pp. 601–602.

\(^{57}\) Bodansky himself draws on the National Socialist party electoral victories in Weimar Germany, but more contemporary (and perhaps less extreme) examples exist in contemporary times. Yoweri Museveni, Omar al-Bashir, and Bashir al-Assad are all strongmen of one type or another, implicated in serious and sometimes massive human rights abuses in their countries, even as they retain large measures of popular support.

\(^{58}\) Unless one subscribes to the position that all democratically-sanctioned institutions and actions are legitimate. Of course, while popular legitimacy may be measurable in some instances of democratic governance (most commonly through election results), it becomes increasingly difficult in other contexts, such as that of international courts and
popular and normative legitimacy suggests that the very idea of legitimacy is highly contingent, dependent upon historical understandings and the shared norms of the particular audiences implicated. Moreover, it implies an evaluative component to legitimacy; for many audiences, their perception of an institution’s legitimacy is directly connected to their perception of its adherence to a particular normative standard.

Ascertaining (and justifying) the appropriate normative standards is therefore crucial to legitimacy discussions. Unsurprisingly, international lawyers have tended to prefer ‘legality’ and adherence to legality as paramount. Thomas Franck prioritized the compliance pull of an institution and its rules. Legitimacy is therefore a matter of degree – the degree to which the rule in question is an accurate depiction and prediction of state conduct, and of the pressure to comply felt by the state (even where the state fails to comply). But this account seems incomplete for a number of reasons: it is state-centric; it sees state obligations to comply as based largely on their membership in the international community of states; and it understands the rules that states must comply with as legitimate because of the process of their development, not their substance. While legislative and adjudicative institutions are important to the legitimacy of the international system, Franck does not explain what legitimates those bodies.

Another way of interpreting this problem is that it veers too close to the idea that legality and legitimacy are the same. Institutions and actions that accord with the existing rules are legitimate; but if law and legitimacy are seen

tribunals, where there is no direct relationship between those institutions and the people and situations over whom they generally exercise jurisdiction.

Bernstein, supra note 50, p. 162.

T. Franck, The Power of Legitimacy Among Nations (Oxford: Oxford University Press, Oxford 1990), p. 24 (arguing that legitimacy is “a property of a rule or rule-making institution which itself exerts a pull toward compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process”).

Ibid., 43. Franck’s belief that legitimacy is not merely compliance is a shared one. See Hurd, supra note 17; Easton, A Systems Analysis, supra note 34, at pp. 289ff; R. Price, ‘Emerging Customary Norms and Anti-Personnel Landmines’ in C. Reus-Smit (ed.), The Politics of International Law (Cambridge: Cambridge University Press, Cambridge 2004), pp. 106–130, at p. 113 (noting the disjunct between rhetoric and practice, such that a breach of a norm does not invalidate or delegitimize it, because “states often agree to a regulative norm more fully in rhetoric than in practice”).

Franck, The Power of Legitimacy, supra note 60, at p. 198.

Ibid., at pp. 193–203.
to coincide, then there is no viewpoint from which to criticize law. Also, the discursivity of legitimacy suggests that legitimacy assessments are about inducing some sort of change, although this must be balanced against the retention of certain parts of the legal status quo. For example, the increasing intrusion of international institutions into the sovereignty of states, especially in the absence of legislative processes, cannot be explained by reference to legality, which relies upon the formality of law to legitimate itself. Again, though, if law and legitimacy are conflated, then no one can tell what to keep and what to change. At the same time, legality does have some bearing upon legitimacy. Formal legality can be one of a number of factors involved in multi-pronged framework, and it is arguable that legality can protect norms from delegitimation even when they are breached, if that breach is justified by reference to legal discourse. Yet even though internal coherence and consistency undoubtedly contribute to the legitimacy of an institution, it cannot be a sufficient measure. ‘Adherence to legality’ is too narrow a normative framework. More critical forms of analysis that permit the incorporation of extra-legal concerns – distributive justice, human rights, international

64 Coicaud, supra note 47, at p. 96. Franck did later argue that the guiding principle for legitimate international law-making is that of fairness. See T. Franck, Fairness in International Law and Institutions (Oxford: Oxford University Press 1995). While this gives him an external viewpoint from which he can assess institutions and actions, it is unclear that his model of fairness can guarantee distributive justice even when there is procedural fairness, or, more importantly, whether it can reconcile competing notions of fairness in disparate areas of international law. Different audiences will have different concepts of what is fair, and different disciplines will also have different standards for measuring fairness. What constitutes fairness in international environmental law may not suffice for international criminal law. In the end, without a more substantial normative framework attuned to the nature of the particular international institution, fairness as legitimacy is no stronger than Fichtelberg’s position of fair trials as legitimacy.


66 Coicaud, supra note 47, at p. 97.

67 Kumm argues that the legitimacy of an international intrusion upon state sovereignty depends on the balancing of multiple factors, including its formal legality, as well as: (1) the collective nature of the problem to be addressed; (2) the proportional benefit to be derived from pre-empting local governance; (3) the procedural legitimacy of the institution that is acting; and (4) whether the outcome of the intrusion is deeply unjust or extremely costly. Kumm supra note 65, at pp. 921–931. Outcome legitimacy was also considered by Easton in his discussion of legitimacy and performance.

68 Price, supra note 61, at p. 114.

69 Bernstein, supra note 50, at p. 155.
development – into areas that are not purely legal seem better prospects for encapsulating the myriad considerations that go into an ICL system.

The problem is not uncommon. A similar position is taken by Brunnée and Toope, who attempt to distinguish law from other theories of compliance and governance. For them, the legitimacy of law has three elements: (1) a widely shared social understanding of what is a legal norm; (2) adherence to the criteria of legality as articulated by Lon Fuller; and, (3) what they refer to as continuing practices of legality. The problem is that while the authors merge Fuller’s primarily procedural criteria for the legality of law with a notion of social practice and reinforcement, they do not consider supplementary criteria that might clarify their employment in specific contexts, such as that of ICL. This flaw stems from a criticism that Hart and Joseph Raz levelled at Fuller, which was that his criteria for the morality of law were not really moral values at all. It is possible to imagine laws that meet Fuller’s criteria, and are so popular as to be reinforced both socially and legally, yet unconscionably unjust. The absence of a substantive normative framework restricts the applicability of the interactional model. In fact, it is arguable that their theory cannot fully explain the legitimacy of at least one of the norms they discuss (the anti-torture norm). That norm, as articulated in the UN Convention Against Torture, contains a prohibition against torture, but also a requirement for punishment. Yet the interactional model cannot fully explain either this crimi-

72 Ibid., pp. 53–54.
73 See H.L.A. Hart, ‘Positivism and the Separation of Law and Morals’, 71 Harvard Law Review (1958), 593–929; L.L. Fuller, ‘Positivism and Fidelity to Law – A Reply to Professor Hart’, 71 Harvard Law Review (1958), 630–672; J. Raz, The Authority of Law (Clarendon Press, Oxford 1979), pp. 210–232. It should be noted that to say something is not a moral value is distinct from saying that it has no moral value, and there is clearly moral value to the criteria that Fuller describes in that they promote the autonomy of the individual, and the value of reciprocity between government and citizen. The question is whether these procedural criteria – while promoting autonomy and reciprocity – can provide the necessary moral content that legitimates legal norms. On this distinction (and the mis-apprehension of Hart and Raz’s objections to Fuller), see M.J. Bennett, ‘Hart and Raz on the Non-Instrumental Moral Value of the Rule of Law: A Reconsideration’, 30 Law and Philosophy (2011), 603–635.
75 The prohibition against torture is in Article 2; the criminalization of torture is in Article 4. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punish-
nalization or this punishment. Clarity and procedural propriety are present in the norm, as well as social reinforcement, but it is argued here that the justification of punishment for the violation of that norm requires some further support. This is not to say that it is unjust to prohibit and punish practitioners of torture, but that something additional is required in order for this norm to be legitimated. Social practice and procedural criteria are crucial to legitimacy evaluations, especially popular legitimacy, but they don’t necessarily offer the complete normative justification for particular norms, even ones as uncontroversial as the anti-torture norm.

It may be that the mandates of specific institutions are able to offer more concrete terms of analysis, in ways that Franck and others cannot realistically incorporate into legitimacy theories that purport to cover all of international law-making. Buchanan and Keohane offer a proposal for assessing the legitimacy of global governance institutions (GGIs) through a ‘complex standard’ of legitimacy:

We then need a standard of legitimacy that is accessible from a diversity of moral standpoints and less demanding than a standard of justice. It should appeal to various actors’ capacities to be moved by moral reasons, but without presupposing more moral agreement than exists.

For Buchanan and Keohane, legitimacy requires content-independent reasons for compliance. These reasons arise through a moral standard, which they argue is more persuasive and more stable in part because it is not a standard of moral unanimity, but minimal agreement. Of the number of criteria that a legitimate institution must meet, three are most relevant for our purposes, and reflect Easton’s notion of ideological legitimacy: it must be minimally morally acceptable; demonstrate comparative benefit and support institutional

76 The basic objection then is that the interactional model does not engage with either theories of criminalization or theories of punishment, yet purports to legitimate norms of criminalization and punishment.


78 Ibid., at pp. 30–31.

79 Ibid., at pp. 34–35.
The notion of minimal moral acceptability addresses both moral content, as well as procedures for determining that content. However, it is not the definitive and final statement of the institution’s normative goals. Rather, it is recognition of the basic grounds upon which states can agree to act in coordination with one another. This minimal moral platform has three elements: the institution should not persist in violations of the least controversial human rights; it should respect (but not necessarily promote) human rights; and it ought to encourage the development of more determinate and stringent moral content. In other words, some set of norms must be established at the outset in order to develop the cooperative relationships necessary for international institutions; in Easton’s terms, this is the ideology that must ‘capture the imagination’ of the membership.

The idea of comparative benefit focuses on the instrumental aspect of the institution and whether it effectively performs its functions better than the alternatives, while respecting other criteria such as minimal moral acceptability. Relatedly, institutional integrity demands that the institution’s practices or procedures do not undermine the pursuit of the basic goals that justify its existence. As Easton argues, the continuing legitimacy of an institution is dependent in part on its performance; it is a dynamic concept. If the Security Council’s decision-making process (e.g. the use of the veto) means that it is incapable of achieving one of its primary goals, such as preventing massive human rights atrocities or ensuring international peace and security, then that may detract from its legitimacy. If the ICC relies on extraordinary jurisdictional arguments that alienate states, causing them not to cooperate, then that may well undermine its basic objectives of increased human rights protection through increased accountability. One of the key difficulties here, of course, is the lack of agreement on the proper purposes of the ICC and inter-

80 Ibid., at pp. 40–42.
81 Ibid., at pp. 42–43.
83 Buchanan and Keohane, *supra* note 77, at pp. 43–44.
84 Ibid., at p. 45.
86 With the caveat that accountability for international crime may itself be an independent goal for the ICC, separate from any instrumental benefit that it may offer to human rights protections.
national criminal tribunals in general, but it importantly proposes an instrumental understanding of legitimacy.

In terms of accountability it is not enough that the GGI has accountability mechanisms, for highly accountable institutions can be illegitimate because the terms of accountability are skewed. The standard of accountability, to whom the institution is accountable, and whose interests are to be represented through the accountability holders and mechanisms, are all part of the terms of accountability. If, for example, the terms of accountability do not ensure the meaningful participation of or the consideration of the legitimate interests of those affected by the institution, this may well become an area of struggle for the ICC. Identifying institutional stakeholders is relatively straightforward – the states that make up the Assembly of States Parties are ostensibly the only authorities to whom the ICC, as an international organization, is accountable. Yet there are many others to whom the Court is accountable, some of whom are more concrete and foreseeable than others.

As with any criminal court, defendants’ interests must be considered by the ICC; hence the emphasis on fair trial procedures. Of course, another issue for criminal courts is the proper role of victims within trials, as well as their position as general participants in ICC governance. If the ICC is a court with widespread jurisdiction over human rights atrocities, then perhaps – at the risk of returning to the debate over global democracy – it is responsible to humanity in some way? Looking beyond individuals, is the ICC accountable to institutions? It has a formal relationship with the Security Council, but as an (ostensibly) independent organization, the ICC has no direct obligations to the Council. Should it? Similarly, does it owe a duty of consideration to other regional organizations such as the African Union, which has been very active in representing its members’ interests to both the Council and the Assembly of States Parties, only to have its concerns generally set aside?

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87 M. Damaška, ‘What is the Point of International Criminal Justice?’, 83 Chicago-Kent Law Review (2008), 329–365 (arguing that international criminal law is beset by confusion as a result of the multiple and often contradictory goals it pursues).
88 Buchanan and Keohane, supra note 77, at p. 47.
89 Benjamin Schiff argues that there is a hierarchy of constituencies whose input is relevant – states; International organizations; NGOs; victims; expert observers; and perpetrators. B. Schiff, ‘Evolution of ICC Legitimacy’, paper presented at International Studies Association Annual Meeting (New Orleans, LA, 19 February 2010; on file with author) 6.
90 Any liberal criminal court, that is, which the ICC purports to be.
These structural requirements for a legitimate international institution offer valuable process-oriented criteria for legitimacy, even as they assume some minimal normative content. Crucially, that normative content is indeed minimal – it does not impose the static formalism implied by legality as legitimacy. At the same time, this framework addresses the exclusions implied by the prioritization of more substantive normative standards such as fair trial rights or democratic process, by shifting from an either/or proposition to a complex, conjunctive standard. This model draws directly from Easton’s insights into the various sites of legitimacy production and contestation that exist within complex systems. It offers connective points between sociological perspectives, legalism, democratic theory and international relations. It opens up the domain of ICL to the concerns of states, victims, scholars and others about the law and politics of international courts. In this understanding, the conduct of trials are as important as the composition of the judiciary, the decision-making processes of the Assembly of States Parties, the reputation of the Chief Prosecutor, or the rate of convictions – each one is a valid area of legitimacy study, and none is separable from the others. Legitimacy assessments are not all-or-nothing competitions, but modes of understanding institutional and participant interconnections.

4 Antinomies and the Impossibility of Legitimacy

Yet this flexibility comes at the cost of certainty. One of the attractions of Fichtelberg’s position is that it offers a specific typology by which to measure legitimacy: does the Court conduct trials in accordance with particular procedural norms? The answer is still not black and white, but there are at least definite criteria for measurement. Easton’s all-encompassing, systemic understanding of legitimacy, on the other hand, creates the space for even more normative confusion by bringing competing understandings into one framework, but offering no way of choosing between them, or even balancing them. Even the introduction of popular legitimacy – as opposed to the purely normative standards of fair trial-ism – offers little by way of resolution, because of the multiplicity of audiences whose views are plausibly relevant to understanding and assessing the Court. The ‘holistic’ framework that accommodates competing legitimacy standards cannot resolve them without engaging in the same sort of selective prioritization of normative standards that created the need for this comprehensive structure in the first place.

The promise of legitimacy theory is therefore a chimera, undone by the contradictory and indeterminate nature of international law, which itself is really...
an amalgam of disciplines and methodologies that promise universalism but are grounded in specific goals, ideals and interests. This antinomy between the general and the particular is the essential contradiction that lies at the heart of international law, and finds itself replicated in its manifold sub-disciplines: in the classical paradoxes of custom and state recognition, and the contemporary contradictions of the post-colonial nation-state and ‘humanitarian’ war. The very nature of international law is self-contradictory in this sense.

These types of problems are nothing new, and were confronted by Immanuel Kant, albeit at a much more abstract level. Although Kant wrestled not with particular legal regimes or concepts but with foundational metaphysical problems – the dawn of time, the complexity of matter, the free will, and the search
for God – his “Antinomies for Pure Reason”\textsuperscript{98} serve as a useful methodological tool for understanding contemporary attempts at categorization and systematization in international law, particularly through concepts such as legitimacy.

The starting point for each of Kant's antinomies is a pair of equally appealing but mutually opposed propositions. The first antinomy considers the perplexity that the world has a definite beginning in time, as against the infinity of both time and space.\textsuperscript{99} Each thesis and its anti-thesis is unprovable, for so long as the arguments in favour of the thesis are not self-contradictory, the anti-thesis will have “on its side equally valid and necessary grounds for its assertion.”\textsuperscript{100} Adopting either proposition immediately entails equally persuasive counter-assertions: “There \textit{must} be, yet there also \textit{cannot} be, a first event in time, a largest quantity of the world in space, a simple substance, a first or free cause, a necessary being.”\textsuperscript{101} In each antinomy, either proposition might be true, but cannot persuade the neutral observer because each fails to acknowledge the other position.\textsuperscript{102} The partisans talk past one another; they might win a debate through appeal to their audiences’ intuitions and predilections, but Kant is concerned with the fact they can never \textit{prove} their position.\textsuperscript{103} Neither thesis nor anti-thesis can be demonstrated as true without regard to some other set of conditions, and that attention to the external immediately particularizes the thesis/anti-thesis in the context of those specific relationships. Its universal appeal is erased by its dependency on an empirical anchor.

\begin{footnotes}
\item[Ibid., A426/B454 and A427/B455 (posing “The world has a beginning in time, and in space it is also enclosed in boundaries” against “The world has no beginning and no bounds in space, but is infinite with regard to both time and space.”).]
\item[A. Wood, 'The Antinomies of Pure Reason', in P. Guyer (ed.), \textit{The Cambridge Companion to Kant's Critique of Pure Reason} (Cambridge: Cambridge University Press, 2010), at p. 248 (“The impossibility of each alternative can be represented by an argument for and against the existence of an object corresponding to each cosmological idea. This threatens us with a set of contradictions: There \textit{must} be, yet there also \textit{cannot} be, a first event in time, a largest quantity of the world in space, a simple substance, a first or free cause, a necessary being.”).]
\item[M. Grier, 'The Logic of Illusion and the Antinomies', in G. Bird (ed.), \textit{A Companion to Kant} (Oxford: Wiley, 2006), at p. 199.]
\item[They are “sophistical theorems which may neither hope for confirmation in experience nor fear refutation by it.” Kant, \textit{supra} note 98, A421/B449.]
\end{footnotes}
In important ways, the observers and interpreters of the ICC’s legitimacy resemble the partisans of Kant’s antinomies, talking past one another as they defend or attack the Court on the basis of differing criteria. Even the most comprehensive of approaches, one that recognizes that the component organs and actions of the Court must be assessed by different criteria, lends itself to this problem. The multiplicity of evaluative standards create an unmanageable complexity where an observer must add and subtract the pluses and minuses of each aspect of the Court’s work in respect of each case and each situation, in order to decide whether the Court overall is legitimate.

The problem is not mitigated by evaluating each body, decision or action of the Court separately. Each observer will have its own interpretation, grounded in its own particular relationship to the Court, its organs, personalities, and goals. The Pre-Trial Chamber rulings on al-Bashir will be of little interest to the parties indicted for their roles in violence in Côte d’Ivoire; the Prosecutor’s misconduct in Lubanga will affect defendant’s perceptions of legitimacy more so than it will those who prioritize the ultimate conviction of international criminals above all else; and scholars will have different perceptions of the ICC’s exclusive emphasis on African states, and reluctance to involve itself in Afghanistan or Palestine. Ultimately, “legitimacy is so infinitely malleable that any judgment on its presence ultimately depends on the perspective of the decision maker.”

What then of legitimacy? It either contains too much or too little to deliver the certainty presupposed by the question, “Is the ICC legitimate?” And even if we can decide on the criteria, we must then choose amongst its arbiters, each of whom carries a unique perspective specific to the object. As with Kant’s antinomies, the challenge seems unanswerable.

Yet Kant himself did not see this as a serious problem. The antinomies were not questions Kant sought to definitively answer or paradoxes he used to bedevil, but provocations that he felt would challenge the very modes of reasoning employed in response to them. Antinomies would, he wrote, “rouse philosophy from its dogmatic slumber and . . . stimulate it to the arduous task of undertaking a critical examination of reason itself.”

Kant’s interest lay in the (transcendental) illusion that any of the antinomies could be definitively answered. The propositions at the heart of each
antinomy suggest the possibility of resolution, one way or another, as both cannot co-exist. Yet the only way to adopt one of these statements is to dispense with the idea that it can be proven, or demonstrated to be an objective, neutral answer derived from pure reasoning. For Kant, the illusion is an inevitable consequence of the natural process of human reasoning and the tendency to expansively pursue rational coherence and systematization.107 The error lies not in the illusion, but its ‘transcendental realism’: the belief that the objective solution is attainable, and that the exertions of critical thinking can eventually prove one proposition or the other. In actuality, the declarative statement of the thesis/anti-thesis only hold salience in deeply contextualized understandings of specific conditions as they relate to particular objects of study.108 Abstractions that apply across all space and time threaten to concretize the illusions, when they ought to only act as “imaginary focal points” that guide critical reasoning.109 This regulative role of the transcendental illusion enables transcendental idealism – critical reasoning that takes place in pursuit of this unattainable ideal, recognizing the contingency (and fallibility) of the outcomes of that process.110 Antinomies were not just metaphysical questions for philosophers to turgidly circle around, but calls to reconsider the basic premises of that undertaking. Construction of the antinomy is what allows one to escape it.

If we understand legitimacy through the lens of Kantian antinomies, we can see that the impossibility of the objective answer does not strip the concept, or indeed the process of analysing legitimacy, of its value. Given that legitimacy discourse seeks to apply evaluative methods to actors and/or actions, it acts as another persuasive tool that can be used to advocate for or against the object of study. For Franck, this might mean explaining why the institution deserves compliance; for others, such as the AU, it might mean explaining why states should withdraw from the ICC altogether. This then is the functional benefit of legitimacy discourse – it allows the space for different audiences to express and contest their views, aligning itself with Skinner’s desire to “treat our nor-

107 S.J. Al-Azm, The Origins of Kant’s Arguments in the Antinomies (Oxford: Oxford University Press, 1972), p. 204 (“The illusion is natural and unavoidable simply in the sense that no matter how meticulous and careful we are in our thinking about experience we cannot fully guard ourselves against hypostatizing our ideas.”).
108 Grier, supra note 102, at p. 204.
109 Kant, Critique of Pure Reason supra note 98, B672.
110 Grier, supra note 102, at p. 205 (“In the absence of the assumption that there is a truth of the matter independent of us, one that is complete and explicable, one that lies there as an object to be known, our theoretical investigations would lack purpose.”).
ative concepts less as statements about the world than as tools and weapons of ideological debate.” Declarations about legitimacy and its criteria are precisely such concepts: contested, unstable, and, in that their alleged objective universality cannot be proven, unknowable. The claims of universality implied in declarations of (il)legitimacy are repostulated as contingent subjectivities, creating space for accommodating and interrogating additional conceptions of legitimacy.

5 Fair Trials and the Critical Potential of Legitimacy Discourse

As Kant declares in his antinomies, the search for certainty remains futile. Consider in this respect the notion of the fair trial that, in spite of the all-embracing eclecticism of legitimacy discourse, remains a focal point for assessments of ICL. As the dissent between Fichtelberg and Morris illustrates, the concept of a fair trial also remains the primary shield against the critical purchase of alternate legitimacy analyses. These collateral attacks against the institutional frameworks of ICL focus their attention on everything but the trial, which as the one thing that a court must be able to do well, is presumably the most difficult aspect to invalidate. This continued centrality of the fair trial recognizes that whatever else may constitute a full and proper assessment of legitimacy, an unfair trial will almost always undermines the Court. If the ICC is intended to assign responsibility for international crimes, then fair trials are essential to validating its declarations. Fair trials thus may not be sufficient for legitimizing a tribunal, but they are necessary to doing so. We may not know what legitimacy is, but perhaps we can know what it is not.

Of course, determining that fair trials are essential to international criminal tribunals is not the same as determining fair trials in fact take place; it remains an open question whether fair trials exist in a meaningful sense in international

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112 That the Court wrongly asserts its jurisdiction over the President of Sudan may have little bearing on the trial of a general whose government long ago consented to the Rome Statute. On the other hand, denying that same general the right to counsel suggests that the Court’s core functions are fatally compromised.
113 Speaking about the ICTY, then-Chief Prosecutor Richard Goldstone said, “[w]hether there are convictions or whether there are acquittals will not be the yardstick. The measure is going to be the fairness of the proceedings.” Quoted in M.S. Ellis, ‘Achieving Justice Before the International War Crimes Tribunal: Challenges for the Defense Counsel’, 7 Duke Journal of Comp and International Law (1997), 519–537, at p. 519, note 37.
law. The defects of the post-war international and military tribunals may have been shrugged off as anomalies spawned by the novelty of the discipline, but the failures of contemporary international criminal tribunals to offer fair trials range from the systemic to the spectacular. That international criminal tribunals depend on state cooperation undermines defendants as much as prosecutors, making it difficult to gather evidence, protect witnesses, or enforce judicial orders that protect the defendant.114 The ICC’s wide-ranging authority to refashion the case to be met by defendants is a serious problem as well. The reimagining of the Katanga115 case was the latest in a pattern of manipulation of ICC Regulation 55, which undermines a host of important procedural protections: judicial impartiality; the right to an expeditious trial; the right to know the case to be defended; and even the right to silence.116 Iconic cases such as Lubanga,117

115 In Katanga, the defendant was sentenced to 12 years in jail after an extraordinary recharacterization of the case by the judges contrary to what had been charged. During judicial deliberations after the end of the first trial, the Trial Chamber chose to sever the case of two co-defendants; “recharacterized” the facts to allege a new mode of participation that the Prosecution had not charged, and the Pre-Trial Chamber had not confirmed; and extended his trial by a year. See Prosecutor v Germain Katanga, ICC-01/04-01/07, Judgment – Minority Opinion of Judge Christine Van den Wyngaert (7 March 2014) para. 1 (describing the process as “fundamentally unfair” and having “violated several of the accused’s most fundamental rights”). The former co-defendant was acquitted on all charges immediately; Katanga was eventually convicted on five counts and sentenced to 12 years imprisonment. See Prosecutor v Mathieu Ngudjolo Chui, ICC-01/04-02/12, Verdict (18 December 2012); Prosecutor v Germain Katanga, ICC-01/04-01/07, Sentence (23 May 2014).
117 The Trial Chamber described the actions of Luis Moreno Ocampo, the then-Chief Prosecutor, in not meeting court-imposed disclosure obligations in the following terms: “The Prosecutor, by his refusal to implement the orders of the Chamber and in the filings set out above, has revealed that he does not consider that he is bound to comply with judicial decisions that relate to a fundamental aspect of trial proceedings… he appears to argue that the prosecution to comply with, or disregard, the orders of the Chamber…” The Trial Chamber later stated that, “[n]o criminal court can operate on the basis that whenever it makes an order in a particular area, it is for the Prosecutor to elect whether or not to implement it, depending on his interpretation of his obligations.” For these reasons, the Court issued a stay of the proceedings as an abuse of process. The trial resumed and Lubanga was eventually convicted after the OTP acceded to the Court’s directions. See Prosecutor v. Thomas Lubango Dyilo, Case No. ICC-01/04-01/06, Redacted Decision on
Milošević,ächt and Šešelj, are, for different reasons, equally tainted. Finally, Nancy Combs’ exhaustive study of evidence gathering and interpretation at the ICTR, SCSL and Special Panels for East Timor suggests that international criminal trials only offer the appearance of fair trials as the convictions laid down by those tribunals are often profoundly unsafe. That this analysis also seems to apply to the ICC and ECCC is unsettling and suggests that international criminal tribunals may not even be able to perform their basic task of determining guilt or innocence. Moreover, the regular inability of international criminal tribunals to meet the Western liberal fair trial standard to which they otherwise claim adherence suggests that international criminal justice may require a profound rethinking of what constitutes a fair trial.

In the absence of such reconsideration, it is worth considering the position of the fair trial within legitimacy debates. While the ‘fair trial’ standard is usually marshalled as evidence of the legitimacy of International Criminal Tribunals (ICTs) and in defence of broader criticisms that focus on selectivity problems and democratic deficits (as in the contrast between Fichtelberg and Morris), it may be that in fact the fair trial is more a sword than a shield. Paradoxically then, the continued emphasis on fair trials as the indicia and guarantors of ICL’s legitimacy is what ultimately destabilizes the discipline.

the Prosecution’s Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary or Alternatively to Stay Proceedings Pending Further Consultations with the VWU (8 July 2010), paras 21 and 27.

One of the chief concerns with the Milošević trial was the replacement of Presiding Judge Richard Mays with Judge Iain Bonomy, who not only had not been present at the trial until then, but had not even been appointed to the International Criminal Tribunal for the former Yugoslavia (ICTY). The trial continued as normal after Bonomy’s appointment, even though the Prosecution had been presenting evidence in his absence for almost two years and was about to close its case at that point. M.A. Fairlie, ‘Adding Fuel to Milosevic’s Fire: How the Use of Substitute Judges Discredits the UN War Crimes Tribunals’, 16 Criminal Law Forum (2005), 107–157.

In a similar scenario to Milošević, the ICTY removed Judge Frederik Harhoff from the case of Vojislav Šešelj, and replaced him with Judge Mandiaye Niang. A key difference is that this change happened once closing arguments had ended, such that Niang would participate in the deliberations stage of the trial without having heard any testimony or other evidence. Prosecutor v Vojislav Šešelj, IT-03-67-T, Décision relative à la continuation de la procedure (13 December 2013).

“By using the Western trial form, international criminal proceedings cloak themselves in the form’s garb of fact-finding competence, but it is only a cloak.” Combs, supra note 22, at p. 179. For Combs, many convictions are only tenable if the understanding of fair trial and the evidentiary threshold is significantly revised. Ibid., at pp. 343ff.

Ibid., at p. 365.
Emphasizing fair trials leads to an interrogation of the concept's application and meaning in ICL; that examination in turn dissolves fundamental assumptions about the nature and capacity of international criminal justice. The fair trial becomes vulnerable, and in turn challenges the very purposes of the law and institutions it supposedly legitimates. It thus becomes its own contested sub-terrain in the field of legitimacy, its content and its significance conditional on the same processes of subjectivization. By bending our understanding of ICL’s capabilities, legitimacy discourse points at the fragility of the legalist mindset that valorizes ICL and its tribunals. Even a minimalist account of legitimacy as fair trials cannot claim objectivity or universality because it can only come to terms with itself by opening up to larger questions about the content and purpose of ICL. The instrumentalization of fair trials as a shield for ICTs can thus be turned into a sword, obviating the need for more sophisticated and more nuanced approaches to legitimacy.

This is not to say that legitimacy study – even if legitimacy is a largely indeterminate concept – is a futile endeavour. By broadening the discussion to questions beyond legality, the concept of legitimacy lays bare the continual intersection of legal and political concerns in ICL. In this sense, legitimacy discourse is valuable in at least three ways. First, from a pragmatic point of view, legitimacy analyses act as additional rhetorical and persuasive tools that can be marshalled by political actors and other interested participants in favour of particular subjective viewpoints. With respect to Darfur, the legitimacy of the ICC has been repeatedly challenged in this way by Sudan and the African Union. Unable to obtain satisfactory legal outcomes, those actors have contested the political terrain within which those questionable legal decisions are made. In this way, the indeterminacy of legitimacy works to their advantage. Of course the instability of legitimacy helpfully lends itself to instrumentalization by all interested parties, including those that defend the status quo.

Secondly, legitimacy study brings new normative frameworks to bear on ICL and international criminal tribunals. It pushes beyond the rationalist formalism of courtroom trials and the familiar narratives of “good versus evil” that underpin these mechanisms of adjudication, and which together threaten to obscure the very real power dynamics and partisan interests that influence the ostensibly neutral processes of international criminal justice. It may be legitimate to try and punish al-Bashir for the large-scale suffering in Darfur, but it may not be legitimate to do so by rewriting the history of ICL and customary international law, by recrafting the rules about treaty interpretation, or by granting further powers to a controversial Security Council that faces ongoing legitimacy challenges of its own. Legitimacy discourse, especially that which
accompanies the debate about Sudan, refocuses attention on these hidden mechanisms and strips away the pretence of objectivity that enshrouds them.

Finally, legitimacy discourse is an intensely pluralist and critical activity. It creates the space for a normative reframing of the substance of international criminal justice, and the modes of argumentation used in it. Asking whether a practice is legitimate poses important questions to the law and its status quo: questions about the recognition of the importance of wartime sexual violence as an international crime, or the pre-eminence of international criminal trials as primary responses to mass atrocity, or indeed the proper scope of the head of state immunity from criminal prosecution for massive human rights violations. In expanding the *leitmotif* of Kant’s rejection of metaphysics, it further challenges the *way* in which those questions are answered, and by *whom*, through its recognition of the multiple stakeholders, constituencies, and audiences that are otherwise denied the formal right to call an institution to account.

The open texture of legitimacy discourse thus helps liberate international criminal justice from the exclusive domain of legal technocrats and the implied universality of Western liberal norms and institutions. Made in good faith or not, the AU objections to the al-Bashir indictment highlight the sharp contrasts that can exist within an organization’s membership, and the varying concerns that lead to such fractures. The anti-ICC move of the AU may be self-serving, but it also expresses important concerns about the legitimacy of the ICC process that it shares with more dispassionate observers. Similarly, the disregard of the AU as a meaningful stakeholder by both the Security Council and the Pre-Trial Chamber\textsuperscript{122} challenges the legitimacy of a process that is unable to acknowledge the equality of certain states and certain organizations in a decision-making process allegedly built on parity and impartiality.

The inability of legitimacy discourse to provide definitive answers is thus to be cautiously welcomed. In both the wide, complex understandings of legitimacy proposed by Easton and others, as well as the narrower views of Fichtelberg, observers confident in the priority of their own normative perceptions simply speak past one another. If nothing else, the study of legitimacy demonstrates that at least in the field of ICL, no answer is independent of the audience’s subjective beliefs or position. The recognition of this contingency – its points of friction and contestation, its subjectivity and particularity – creates the space for reframing the boundaries of international criminal justice so it is a less rigid field, one that is necessarily more inclusive of different

\textsuperscript{122} Jalloh et al., *supra* note 94.
actors and epistemologies because the traditional arbiters of legitimacy are often the same as the traditional authors of social and political power.123

In Kantian terms, approaching legitimacy from a position of transcendental idealism instead of transcendental realism inculcates a critical ethos in the discipline. Legitimacy’s innate indeterminacy should be embraced because it opens the field up to this prospect of a critical alterity, free from the illusory promises of legalism and other reductive approaches. The discourse’s value lies then in its sprawling analysis of the terms under which international criminal justice and its institutions are understood and practiced, and the demand for a much-needed critical re-examination of the discipline itself. The instability of legitimacy is thus a valuable tool for the necessary destabilization of international criminal law’s orthodoxy.

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123 M. Koskenniemi, ‘Legitimacy, Rights and Ideology: Notes Toward a Critique of the New Moral Internationalism’, 7 Associations (2003), 349–373, at 373 (“[Legitimacy] is not a standard external to power, against which power might be assessed, but a vocabulary produced and reproduced by power itself through its institutionalised mechanisms of self-validation.”).