International Law and Legitimacy: A Critical Assessment

Javier Alexis Galán Ávila

Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

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Examining Board

Prof. Dennis Patterson, European University Institute, Supervisor
Prof. Nehal Bhuta, European University Institute
Prof. Wouter G. Werner, VU University Amsterdam
Prof. Damiano Canale, Bocconi University

This thesis has been submitted for language correction.

ABSTRACT

Legitimacy has become an increasingly important topic within international law. The reasons behind this recent surge in the interest of the justification of authority are intimately related to the transformations that the international legal order is undergoing. From a consensual normative order, centred on interstate relations, international law has evolved into a complex and dense normative framework encompassing subject areas that until recently seemed alien to international law. The increasing influence of international law has sparked an intense discussion about the suitability of the conventional basis of its legitimacy. In particular, due to the direct impact on individuals of international legal norms in areas previously covered by national law, a legitimacy gap has opened up, making the legitimation of international law a pressing concern.

This dissertation offers a critical account of legitimacy and its use in international law. On the conceptual side, the dissertation illustrates the broadness of the concept and analyses some of the reasons for why legitimacy is highly contested and why these disagreements are unlikely to disappear. On the descriptive side, the thesis questions the often-presumed link between legitimacy and the stability of a social arrangement - the international legal order in this case - by examining alternative explanations and by contesting the idea of legitimacy as a matter of individual beliefs. As a way forward, the dissertation offers an alternative reading of legitimacy, which proposes a shift of focus from legitimacy to legitimation, moving from a static to a dynamic perspective. In contrast to existing explanations, this account is not centred on ascertaining whether a certain social arrangement is legitimate or not, but rather on describing and analysing the means through which actors attempt to expand or restrict the permissible boundaries of action.

Acknowledgments

As soon as one starts reading the acknowledgments of various dissertations, one quickly begins to notice certain common elements or tropes. A recurrent one is the insistence that despite the fact that the undertaking of a dissertation is usually seen as a solitary activity, this is not the case in reality. In order to do research one needs the help of others. Sometimes, to make the point clearer, the acknowledgments contain the famous African saying that 'it takes a village to raise a child.' While there is truth in that, and I am keenly aware of the social dimension of writing a dissertation, this dissertation has been for its most part a solitary experience. This is not to suggest that I was hidden in some remote location away from everyone. Rather, due to certain circumstances, the thesis here presented has had a bumpy gestation which made its completion a psychologically exhausting experience.

The only exception to an otherwise lonely experience has been Sarah Auster. While some friends have had to endure some of my complaints and moaning, Sarah has been the only person who has gone through the whole ordeal and who has helped me the most in what was at certain points a quixotic exercise. She knows that without her beside me – literally and figuratively - this thesis would not have seen the light of the day and I might still be drowning in the enormity of the topic that I foolishly decided to tackle. There is much more to say about her, but she knows already what my thoughts are.

As many have said before, the European University Institute is a very special place. Thanks to its peculiar structure I have had the chance of having amazing experiences and meeting remarkable people. Within the Spanish-speaking community, I had the luck of meeting Javier, Ricardo, Jonathan, German, Pichi, Pedro, Andrés and Alejandro, among others. They were quite a diverse group of people but I had a lot of fun with them. Among them, I need to single out Javier, Ricardo, and Jonathan. Our first year in *dall'Ongaro* was quite a rollercoaster and it has been a hard year to beat. I also had the luck of meeting great friends outside the Spanish-speaking community. There have been many, but I need to mention

specifically Bosko, Milena, and Payam. We have shared great moments since the beginning of the PhD.

I would also like to thank the members of the committee for their comments, suggestions, and support. Both Nehal Bhuta and Damiano Canale have been helpful in different moments. Even though I did not have any formal relationship with them, they were always open to talk and discuss my work, and all that despite my abrasiveness! Wouter Werner has been a great source of inspiration. Since I met him, or had the luck of being accepted at the VU University Amsterdam, my views of what an academic international lawyer could be and could do changed considerably and definitely for the better. This dissertation is clear evidence of his influence. In other words, he has been my role-model, both academically and personally. Last but not the least, I would like to thank my supervisor, Dennis Patterson, for his guidance during the whole process. As others have said, the advantage of Dennis as a supervisor is the freedom that he gives you for your research. His only concern is that the dissertation reaches his demanding standards. This is something to be highly appreciated. Although I am afraid that I may not have reached his standards, I have taken advantage of his open-mindedness and explored my limits without worrying about following any orthodoxy.

Finalmente, me gustaría agradecer de corazón a mis padres, Francisco y Mercedes. Sin ellos no estaría aquí, literalmente. Aunque ellos saben que no suelo extenderme mucho hablando y cuando hablo salen quejas más que nada, también saben que estoy eternamente agradecido por su continuo apoyo y cariño.

TABLE OF CONTENTS

I – INTRODUCTION 1

I.1. INTRODUCTION 1

I.2. LEGITIMACY AND ITS VARIATIONS 4

I.3. THE SUBJECT OF THE DISSERTATION 7

I.4. FROM LEGITIMACY TO LEGITIMATION 12

I.5. OUTLINE 15

II - GLOBALIZATION AND INTERNATIONAL LAW 19

II.1. INTRODUCTION 19

II.2. THE MULTIDIMENSIONAL CHARACTER OF GLOBALIZATION 20

II.3. GLOBALIZATION AND INTERNATIONAL LAW 29

II.3.a. The Evolution of International Law 31

II.3.b. In the Shadow of International Law: Transnational Law 39

II.4. WHAT HAS ALL THIS TO DO WITH LEGITIMACY? 46

III – INTERNATIONAL LAW AND LEGITIMACY: ACCOUNTS 53

III.1. INTRODUCTION 53

III.2. FRANCK'S THE POWER OF LEGITIMACY AMONG NATIONS 56

III.3. BRUNNÉE AND TOOPE'S INTERACTIONAL THEORY OF INTERNATIONAL LAW 63

III.4. INTERNATIONAL CONSTITUTIONALISM THROUGH THE LENS OF KUMM'S FRAMEWORK 69

III.5. BUCHANAN'S PHILOSOPHICAL ACCOUNT OF LEGITIMACY 72

III.6. CONCLUSION 77

IV - LEGITIMACY AND ITS PROBLEMS 79

IV.1. INTRODUCTION 79

IV.2. LEGITIMACY AND ORDER 84

IV.3. THE STRUGGLE FOR LEGITIMACY 89

IV.3.a Classifications of Legitimacy 90

IV.3.b. Conceptual features of legitimacy 98

IV.3.c. Is this a problem? 103

IV.4. THE EXPLANATORY LIMITS OF LEGITIMACY 110
IV.4.a. The two sides of legitimacy *111*
IV.4.a.i The 'objects' of legitimacy 112
IV.4.b.ii. The 'subjects' of legitimacy 114
IV.4.b Legitimacy and Stability *117*
IV.4.b.i. Adaptive preferences 122
IV.4.b.ii. Coordination 124
IV.4.b.iii. Free-riding 126
IV.4.c. The Role of Beliefs *127*
IV.5. CONCLUSION 139

V – FROM LEGITIMACY TO LEGITIMATION: A PROCESSUAL UNDERSTANDING OF SOCIAL LIFE AND INTERNATIONAL LAW 141

V.1. INTRODUCTION 141
V.2. ALTERNATIVE INTERPRETATION OF WEBER 143
V.3. SOCIAL LIFE AS PROCESS 147
V.3.a. Process in international law: a brief comparison *152*
V.4. FROM LEGITIMACY TO LEGITIMATION 157
V.5. LEGITIMACY CRISES THROUGH THE LENS OF LEGITIMATION 163
V.6. CONCLUSION 171

VI – CONCLUSION 173

BIBLIOGRAPHY 183

I – Introduction

I.1. Introduction

On March 24, 1999, the day the North Atlantic Treaty Organization (NATO) began bombing the former Federal Republic of Yugoslavia without the authorization of the Security Council (SC), the then Secretary General Kofi Annan issued a carefully restrained statement lamenting the failure of diplomacy to reach an agreement concerning the situation in Kosovo within the framework of international law. Nevertheless, he accepted that there are occasions in which 'the use of force may be legitimate in the pursuit of peace.'[1]

Much has been written about the NATO intervention in Kosovo and how it has (or has not) affected international law. The event has spawned an enormous literature that still continues to grow.[2] The interest of this work does not lie in the reconstruction of how events unfolded during the crisis but is rather related to Annan's use of the word 'legitimate'. Although he might not have been aware of it at thetime, his reading of the situation reflected the sentiments of many international lawyers. As Martti Koskenniemi comments, 'most lawyers – including myself – took the ambivalent position that it was both formally illegal and morally necessary.'[3] This conflict between what is legal and what should morally be done highlighted once more what seems to be an everlasting tension between legitimacy and (international) legality.[4] The Kosovo intervention, and the subsequent debate surrounding it, thus constitutes one of several enduringly prominent cases in discussions about legitimacy within the field of international law.

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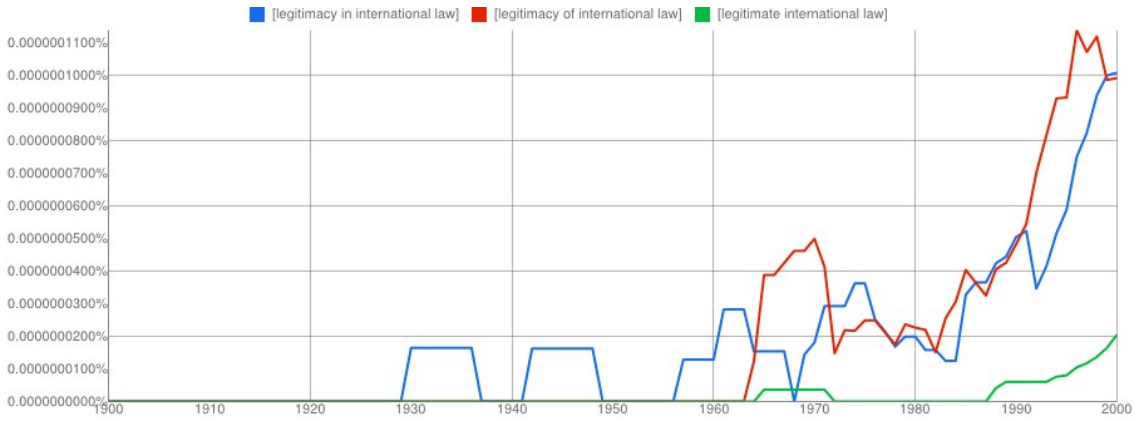
[1] United Nations, Department of Public Information, *Secretary-General Deeply Regrets Yugoslav Rejection of Political Settlement; Says Security Council Should Be Involved in Any Decision to Use Force*, SG/SM/6938, 24 March 1999

[2] See e.g. Ilan Fuchs and Harry Borowski, 'The New World Order: Humanitarian Interventions from Kosovo to Libya and Perhaps Syria?' (2015) 65 Syracuse Law Review 304

[3] Martti Koskenniemi, ''The Lady Doth Protest Too Much' Kosovo, and the Turn to Ethics in International Law' (2002) 65 Modern Law Review 159, 162, see also accompanying footnote.

[4] For a classical statement see Carl Schmitt, *Legality and Legitimacy* (Jeffrey Seitzer tr, Duke University Press 2004 [1932])

A quick search shows that while discussions addressing legitimacy can be found dating back to the 1930s, from the 1960s onwards there has been a substantial rise in interest in the concept within the English-speaking world and a skyrocketing increase since the end of the Cold War,[5] as illustrated in the following graph:



Source: Google Ngram Viewer

The graph shows that the intense debates about legitimacy with regard to the Kosovo crisis were not an outlier but part of a larger trend. The reasons for the increasing interest in legitimacy within the discipline are manifold. As I shall explain in more detail in the following chapter, the recent intensification of interest is directly related to the institutional transformations taking place within the international legal order. From a consensual normative order, centred on interstate relations, international law has evolved into a complex and dense normative framework encompassing subject areas that until recently seemed alien to international law. While some elements of the consensual order still exist, they are being supplemented and in some instances displaced by novel forms of authority. As a result, we find a stratified international legal order composed of diverse layers, one on top of another.[6] Moreover, authority has notably shifted from the state to the international

[5] This is not surprising given that, as Koskenniemi perceptively notes, for the majority of international lawyers the end of the Cold War was treated as a return to situation 'where the rules of civilised behaviour would come to govern international life.' Accordingly, discussions in more overtly moral tones were deemed appropriate and necessary, which in turn explains the rise of legitimacy discourses, see Koskenniemi 160.

[6] For the evolution see Joseph HH Weiler, 'The Geology of International Law–Governance, Democracy and Legitimacy' (2004) 64 Heidelberg J Int'l L 547

realm, bringing new forms of law-making into being.[7] In consequence, international law tends to 'exert influence on national political and legal processes and often exerts pressure on nations not in compliance with its norms.'[8] This increasing influence of international law on the domestic sphere, and the transformation of the international legal order itself, has sparked an intense discussion about the suitability of the conventional basis of the legitimacy of international law. In particular, due to the direct impact on individuals of international law norms in areas previously covered by national law, a legitimacy gap has opened up, making the legitimation of international law in those areas a pressing concern.[9]

The preoccupation with the issue of whether international institutions and rules are legitimate dovetails with one of the most longstanding discussions in the discipline about the status and influence of international law: the compliance problem. How is it possible that states follow international law even though there are no centralized enforcement mechanisms? As Thomas Franck puts it, '[i]n the international system, rules usually are not enforced yet they are mostly obeyed.'[10] The roots of this discussion can be traced back to the beginnings of modern international law, and authors such as Jeremy Bentham and Immanuel Kant who posed the question of why states should follow it.[11] Many explanations and counter-explanations followed.[12] One of the most prominent rationalizations of why

[7] Jean L Cohen, 'A Global State of Emergency or the Further Constitutionalization of International Law: A Pluralist Approach' (2008) 15 Constellations 456

[8] Mattias Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis' (2004) 15 EJIL 907, 912

[9] Samantha Besson, 'The Authority of International Law - Lifting the State Veil' (2009) 31 Sydney Law Review 343 346-347, footnote omitted

[10] Thomas M Franck, *The Power of Legitimacy among Nations* (Oxford University Press 1990) 3. This evokes the famous phrase by Louis Henkin that 'almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time,' see Louis Henkin, *How Nations Behave: Law and Foreign Policy* (Seond edn, Columbia University Press 1979) 1

[11] Harold H Koh, 'Why Do Nations Obey International Law?' (1997) 106 Yale J Int'l L 2599, 2607ff

[12] See e.g. Franck; Phillip R Trimble, 'International Law, World Order, and Critical Legal Studies' (1990) 42 Stanford Law Review 811; Chayes Abram and Antonia H Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press 1995); Koh; Benedict Kingsbury, 'Concept of Compliance as a Function of Competing Conceptions of International Law, The' (1997) 19 Michigan Journal of International Law 345; Judith Goldstein and others, 'Introduction: Legalization and World Politics' (2000) 54 IO 385; Martha Finnemore and Stephen J Toope, 'Alternatives to "Legalization": Richer Views of Law and Politics' (2001) 55 IO 743; Friedrich V Kratochwil, 'How Do Norms Matter?' in Michael Byers (ed), *The Role of Law in International Politics: Essays in International Relations and International Law* (Cambridge University Press 2000); Jack L Goldsmith and Eric A Posner, *The Limits of International Law* (Oxford University Press 2005); Robert Howse and Ruti Teitel, 'Beyond Compliance: Rethinking Why International Law Really Matters' (2010) 1 Global Policy 127; Jutta Brunnée and Stephen J Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University Press 2010); Ryan Goodman and Derek Jinks, *Socializing States: Promoting Human Rights through International Law* (Oxford University Press 2013). In a sense, the debate

states comply is based on the idea of legitimacy, which is adduced as a fundamental and necessary element for understanding the status and influence of international law. In this way, legitimacy has become one of the 'master questions' regarding international law and its authority.[13]

I.2. Legitimacy and its variations

But what is legitimacy? Like many other political and social concepts, legitimacy refers to a variety of phenomena and is a concept fraught with difficulties and ambiguities. Yet the literature deploys the word

> as if its meaning were generally understood, and our arguments proceed as if the audience must share this understanding. Legitimacy seems to signify some crucial and reasonably discrete feature of political [and legal] life, something that political actors want, that they ought to be and are eager to seek, and that the rest of us (subjects, citizens, peers) will recognise and respond to.[14]

Nevertheless, when legitimacy is deployed, different 'things' seem to be evoked. Take the case of the Kosovo intervention. Even though it was argued that the bombing was morally legitimate, the SC was deemed to suffer a crisis of legitimacy as it was unable to fulfil its purpose of keeping international peace and security. On other occasions, such as Israel's 1967 military intervention in Egypt, it was debated whether or not such actions could be considered as self-defence and, thus, whether they were or were not legitimate. In the context of the European Union (EU), discussions about democratic deficits or the management of the financial crisis and the subsequent sovereign debt crises are often couched in terms of legitimacy.[15] Legitimacy concerns have also been raised in relation with

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replicates the more general discussion about the problem of order or how it is possible that individuals live with each other, each of them pursuing their own interests and ends, instead of resorting to fighting and conflict. This position is normally attributed to (or discussions at least tend to begin with) Thomas Hobbes and his exposition on the 'state of nature,' but this reading of Hobbes is contestable. Regardless of the possible interpretive inaccuracies, what it is certain is that the problem of order has been treated as crucial within the social sciences throughout the twentieth century. On the problem of order see Dennis Wrong, *Problem of Order* (The Free Press 1994). On the 'misinterpretation' of Hobbes see Barry Barnes, *The Nature of Power* (University of Illinois Press 1988),

[13] 'And what is meant by legitimacy or legitimate authority? That is the master question of politics,' Bernard Crick, *American Science of Politics: Its Origins and Conditions* (Routledge 2006 [1959]) 150

[14] Shane P Mulligan, 'The Uses of Legitimacy in International Relations' (2006) 34 Millennium 349, 351

[15] Andreas Follesdal and Simon Hix, 'Why There Is a Democratic Deficit in the Eu: A Response to Majone and Moravcsik' (2006) 44 Journal of common market studies 533

the International Court of Justice (ICJ) because of the ostensible lack of the use of scientific expertise for solving disputes.[16] Taken together, legitimacy is 'a term that occurs in a number of different, although obviously not completely unrelated, contexts.'[17] Legitimacy not only appears in very diverse places, but the examples above illustrate that the concept is also used in very distinct ways. For instance, legitimacy questions regarding the illegality of the Kosovo intervention are of very different nature compared to those regarding the democratic deficit of the EU.

The complications regarding legitimacy are not restricted to the issue of how we deploy legitimacy, in which context and with what purpose, but legitimacy can also be understood analytically in different ways.[18] First, we can distinguish between legitimacy as a word and legitimacy as a concept. Treating legitimacy as a word is connected to tracing the different ways in which the word is used and to what it refers, which could be further words or some concept.[19] For example, as we have seen above, legitimacy is used in relation to authority, power, right, and so forth. Legitimacy as a concept, on the other hand, is concerned with the idea or the meaning behind the word. Sometimes a concept is identical to the word that describes it, but it may be expressed with different words.[20] An example, taken from John G. Gunnell, would be 'Venus' and the 'evening star' which are two different ways of referring to the same concept, which is an 'empirically distinguishable planet.'[21] Concerning the concept of legitimacy, we have the words 'legitimacy' and the 'right to rule,' where the latter is the most generic way in which the concept tends to be portrayed.[22]

Next, we need to differentiate between legitimacy as a category of practice and legitimacy as a category of analysis. Regarding the former, legitimacy can be found in various discourses and discussions outside of academia, such as a speech by a head of state at the

[16] Juan Guillermo Sandoval Coustasse and Emily Sweeney-Samuelson, 'Adjudicating Conflicts over Resources: The Icj's Treatment of Technical Evidence in the Pulp Mills Case' (2011) 3 Goettingen Journal of International law 447; Caroline E Foster, 'New Clothes for the Emperor? Consultation of Experts by the International Court of Justice' (2014) 5 Journal of International Dispute Settlement 139. The same occurs with the WTO's Appellate Body, see Christopher A Thomas, 'Of Facts and Phantoms: Economics, Epistemic Legitimacy, and Wto Dispute Settlement' (2011) 14 Journal of international economic law 295

[17] Raymond Geuss, *History and Illusion in Politics* (Cambridge University Press 2001) 31

[18] For other distinctions that might not appear in the text see Christopher A Thomas, 'The Uses and Abuses of Legitimacy in International Law' (2014) 34 OJLS 729

[19] Arthur I Applbaum, *Legitimacy in a Bastard Kingdom* (2004) 76

[20] Melvin Richter, *The History of Political and Social Concepts: A Critical Introduction* (Oxford University Press 1995) 9

[21] John G Gunnell, *Political Theory and Social Science: Cutting against the Grain* (Palgrave Macmillan 2011) 134

[22] Applbaum 76; Besson 344

General Assembly (GA). Categories of practice, also known as 'folk' or 'lay' categories, thus refer to the 'categories of everyday social experience, developed and deployed by ordinary social actors.' A category of analysis, by contrast, refers to the 'experience-distant categories used by social analysis.'[23] The distinction aims to differentiate between the positions of those taking part in daily activities from the positions of academic origin. When a politician argues that a certain action is 'legitimate' she uses the term as a tool for making sense of the action. In contrast, when an academic discusses whether a certain action is 'legitimate,' the statement might have a very different meaning from how the category of practice is used. Max Weber is the most prominent example of a scholar using everyday categories and re-appropriating them for analytical purposes, legitimacy being one of those categories. Sometimes this becomes a point of contention as there might be concerns that a certain academic use of the concept has departed too much from the folk one, thereby invalidating the extension.[24]

A third major distinction concerns the differentiation of legitimacy as a sociological (or descriptive) concept from legitimacy as a normative concept. Legitimacy as a normative concept is centred on the specification of moral conditions necessary for a social arrangement to be morally acceptable or justified.[25] In contrast to normative legitimacy, sociological legitimacy tends to be understood in terms of 'the normative belief by an actor that a rule or institution ought to be obeyed.'[26] By focusing solely on what actors perceive as legitimate, normative considerations about the system itself no longer play a role. Thus, one deliberately refrains from making 'claims about the morality of specific arrangements of power.'[27] Although there might be occasions in which normative and sociological notions of legitimacy overlap, this is by no means necessary. A social arrangement might be deemed

[23] Rogers Brubaker and Frederick Cooper, 'Beyond "Identity"' (2000) 29 Theory and Society 1, 4

[24] This is clearly the situation in legal philosophy with the concept of law, see Nicholas W Barber, 'The Significance of the Common Understanding in Legal Theory' (2015) OJLS n/a

[25] Throughout the thesis I will try to use 'social arrangement' as the most general type of social organization. Sometimes I will use 'social order' but both can be regarded as meaning the same thing. My preference for social arrangement lies in the ambiguity of 'order' and its empirical and normative connotations. Social arrangement does not carry that baggage as it does not imply order, stability, or any of the implications of order. I take the idea of social arrangement from Nicholas G Onuf, *World of Our Making: Rules and Rule in Social Theory and International Relations* (Routledge 2012 [1989]). I get the double meaning of order from Andrew Abbott, 'The Idea of Order in Processual Sociology' (2006) 2 Cahiers Parisiens 315

[26] Ian Hurd, 'Legitimacy and Authority in International Politics' (1999) 53 IO 379, 381. I say 'usually' because there are other accounts that do not focus on the beliefs of actors. These will be dealt with in later chapters.

[27] Patrick Thaddeus Jackson, 'Rethinking Weber: Towards a Non-Individualist Sociology of World Politics' (2002) 12 International Review of Sociology 439, 449

legitimate by those that are subjected to it and, nevertheless, could be understood as normatively illegitimate. For instance, even if there is widespread acceptance of the use of torture within a particular social arrangement, that social arrangement could still be considered illegitimate on normative grounds.[28] Conversely, as Samantha Besson writes, 'international law may have legitimate authority whether or not its subjects think it does and whether or not they have consented to its authority.'[29]

The normative understanding of legitimacy stands prior, both historically and logically, to the sociological understanding.[30] Accordingly, discussions about the legitimacy of the international legal order through a descriptive lens did not appear until the rise of legal positivism in the seventeenth century,[31] while earlier discussions focused solely on the question of why states should follow the law of nations. An almost complete separation between the normative and sociological approaches came with Weber, who discarded any normative concerns from his account of legitimacy. Normative legitimacy is also logically prior to sociological legitimacy because the latter typically refers to the different normative worldviews that might co-exist in a society. The underlying idea is that actors interact within a particular social arrangement based in part their normative beliefs. This suggests that the relationship between the two sides is complex and that both understandings 'coexist in an almost inextricable unity.'[32]

I.3. The subject of the dissertation

The treatment of legitimacy in the international law literature has to date been relatively unsystematic. Franck's assertion, 25 years ago, that despite the familiarity of international lawyers with the language of legitimacy, questions regarding legitimacy and the international legal order mostly give rise to 'superficial declarations about a government's, an initiative's, or a rule's legitimacy without serious examination of what is meant,' still rings

[28] Although see Seumas Miller, 'Is Torture Ever Morally Justifiable?' (2005) 19 International Journal of Applied Philosophy 179
[29] Besson 345
[30] Applbaum 80; Koh 2604ff; Mulligan 356-362
[31] Koh 2608
[32] Geuss 112

true nowadays.[33] Certainly, the situation has improved to an extent, as the sheer increase in attention to legitimacy has resulted in more detailed examinations of the concept.[34] That said, due to inherent tendencies of the field – its insistence on normativity – and the deep entrenchment of legitimacy in our legal and political vocabulary, legitimacy is often treated as self-evident.[35] This is not to suggest that the concept of legitimacy has been left uncriticised. David D. Caron, when discussing the relationship between the SC and legitimacy, notes that the concept is loosely used and that it is rather 'nebulous.'[36] In particular, he posits that circumstances under which a particular process is '"illegitimate" are difficult to describe because they reflect subjective conclusions, perhaps based on unarticulated notions about what is fair and just, or perhaps on a conscious utilitarian assessment of what the process means for oneself.'[37] The imprecise status of legitimacy is also raised by James Crawford, who criticizes the surge of 'legitimacy-speak' with its

[33] Franck 16

[34] The literature is quite voluminous, see e.g. Dencho Georgiev, 'Letter' (1989) 83 AJIL 554; Franck; Daniel Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?' (1999) 93 AJIL 596; Paul B Stephan, 'The New International Law: Legitimacy, Accountability, Authority, and Freedom in the New Global Order' (1999) 70 University of Colorado Law Review 1555; Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford University Press 2003); Rüdiger Wolfrum and Volker Röben, *Legitimacy in International Law* (Springer 2008); James D Fry, 'Legitimacy Push: Towards a Gramscian Approach to International Law' (2008) 13 UCLA Journal of International Law and Foreign Affairs 307; Hilary Charlesworth and Jean-Marc Coicaud, *Fault Lines of International Legitimacy* (Cambridge University Press 2009); *Legitimacy, Justice and Public International Law* (Lukas H Meyer ed, Cambridge University Press 2009); Brunnée and Toope; Steven Wheatley, *The Democratic Legitimacy of International Law* (Hart Publishing 2010); Jean d'Aspremont and Eric De Brabandere, 'Complementary Faces of Legitimacy in International Law: The Legitimacy of Origin and the Legitimacy of Exercise, The' (2010) 34 Fordham International Law Journal 190; Thomas, 'The Uses and Abuses of Legitimacy in International Law'; Yves Bonzon, *Public Participation and Legitimacy in the Wto* (Cambridge University Press 2014). As can beseen, my focus is on international law. In international relations there have been further attempts to address the subject of with legitimacy. for some recent accounts see e.g. Christian Reus-Smit, 'International Crises of Legitimacy' (2007) 44 International Politics 157 Ian Clark, *Legitimacy in International Society* (Oxford University Press 2005); Ian Hurd, *After Anarchy: Legitimacy and Power in the United Nations Security Council* (Princeton University Press 2008); Martha Finnemore, 'Legitimacy, Hypocrisy, and the Social Structure of Unipolarity' [2009] 61 World Politics 58; Richard Falk, Mark Juergensmeyer and Vesselin Popovski, *Legality and Legitimacy in Global Affairs* (Oxford University Press 2012). For examples of scholarship where legitimacy is discussed but its content remains unexplored see e.g. Antonio Cassese, 'Ex Iniuria Ius Oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?' (1999) 10 EJIL 23; Christine Gray, 'A Crisis of Legitimacy for the Un Collective Security System?' (2007) 56 International and Comparative Law Quarterly 157

[35] 'International law scholarship has been a vehicle of an internationalist morality,' see Benedict Kingsbury, *The International Legal Order* (2003) 10; see also Robert O Keohane, 'International Relations and International Law: Two Optics' in *Power and Governance in a Partially Globalized World* (Routledge 2002)

[36] David D Caron, 'The Legitimacy of the Collective Authority of the Security Council' (1993) 87 AJIL 552, 556

[37] Ibid

inherent 'fuzziness and indeterminacy.'[38] Last but not least, Koskenniemi has an equally critical opinion of legitimacy. For him, the indeterminacy of legitimacy 'dissimulates a substantive void that blunts legal and political criticism and lets power redescribe itself as authority *on its own terms*.'[39] These are valid criticisms that will be touched upon in the following chapters. However, such criticisms have been a minority position within the field, while the majority has embraced so-called 'legitimacy-speak.'

The purpose of this dissertation is to examine the concept of legitimacy critically, both from the conceptual side and from the explanatory side. Regarding the former, I start from the observation that many accounts of legitimacy, especially those that provide a systematic analysis of the concept, aim to establish what legitimacy is and that these attempts end in very different outcomes. Franck, for instance, posits that states perceive international norms as legitimate if, and only if, they have the following traits: determinacy, symbolic validation, coherence, and adherence.[40] For Allen Buchanan, on the other hand, an action or institution can be considered legitimate if, and only if, it achieves a certain degree of justice. Very often however, the assumptions on the criteria that supposedly define legitimacy are not stated explicitly but treated as self-evident. For example, when it is argued that some institution has a legitimacy problem because there is a lack of 'accountability' and 'representation,' there is an implicit assumption that legitimacy is about 'accountability' and 'representation.' I first show that the criteria ascribed to legitimacy are extremely varied and often difficult to reconcile. To make sense of this variety, I then focus in more detail on the conceptual features of legitimacy. Relying on Ross' analysis of legal concepts in his article *Tû-Tû,* I explain that legitimacy, as most legal concepts, mainly serves as a device that connects certain sets of situations to certain sets of consequences. Since the functionality of such concepts relies on a common understanding of the underlying criteria, I argue that legitimacy serves this purpose very poorly. I further contend that the deep disagreements regarding the substance of legitimacy can be traced back to the desire of using legitimacy as an analytical concept when it is more appropriately treated as an appraisive one. Given the

[38] James Crawford, 'The Problems of Legitimacy-Speak' (2004) 98 Proceedings of the Annual Meeting (American Society of International Law) 271, 271

[39] Martti Koskenniemi, 'Miserable Comforters: International Relations as New Natural Law' (2009) 15 EJIR 395, 367

[40] Thomas M Franck, 'The Emerging Right to Democratic Governance' (1992) 86 AJIL 46

theoretical properties of appraisive concepts, I argue that it is rather unlikely that the ongoing disagreements over the concept will be overcome.

After laying out the conceptual features of legitimacy, I address its explanatory aspect. Discussions about legitimacy are typically associated with questions about the stability and order of social arrangements. Social life is rife with asymmetrical relationships 'where one party to the relationship benefits from it more than, and at the expense of, the other.'[41] Social arrangements can thus be viewed as based on relationships of domination and power that are often built on opposite interests. Those that dominate are interested in keeping the status quo, while those being dominated may want the contrary.[42] What can keep such a relationship stable? Normally three factors tend to be raised: coercion, self-interest or material interest, and legitimacy.[43] The key argument in the debate is that both coercion and self-interest are insufficient in sustaining any relationship for a long period of time without incurring heavy costs. In consequence, it is posited that for a social arrangement to survive it has to maintain the subjective acceptance of actors based on a normative grounding.[44] This argument is based on the underlying assumption that human beings are motivated by normative considerations. In particular, it presumes that we have a sort of moral compass and that we react if we consider some situation to be against our own normative commitments.[45] According to this idea, 'we will … more easily follow rules and accept roles that can be justified to us in normative terms, while political and social orders that cannot be justified will have difficulty securing acceptance.'[46] In consequence, a belief in the social arrangement to be normatively valid allows for 'a less 'costly' means of sustaining authority compared to either coercive or interest-based authority.'[47]

[41] Xavier Marquez, *The Irrelevance of Legitimacy* (2012) 6
[42] Ibid 6
[43] Max Weber, *Economy and Society: An Outline of Interpretive Sociology* (Guenther Roth and Claus Wittich edn, University of California Press 1978); Rodney S Barker, *Political Legitimacy and the State* (Clarendon Press Oxford 1990); Franck, *The Power of Legitimacy among Nations*; Hurd, 'Legitimacy and Authority in International Politics'
[44] Weber 124-125
[45] Mark Johnson, *Morality for Humans: Ethical Understanding from the Perspective of Cognitive Science* (University of Chicago Press 2014)
[46] Marquez 7
[47] Craig Matheson, 'Weber and the Classification of Forms of Legitimacy' (1987) 38 BJS 199, 200

I contest the assertion that legitimacy - or the lack of it - explains the 'order, stability, and effectiveness' of social orders on two grounds.[48] First, I argue that the stability of social arrangements can be explained without the need to rely on actors' belief in its legitimacy. In particular, by presenting a series of mechanisms of social and psychological character, i.e. adaptive preferences, collective action problems, and free riding, I maintain that normative beliefs may play little role in how social arrangements reproduce and sustain themselves. Secondly, I argue that the idea that actors' compliance with international legal norms is indicative of their attitude towards those norms – that it is possible to discern the 'real' motives of actors – is problematic and impracticable. In the literature, it is typically assumed that actors obey a norm because they believe that it is normatively adequate. For example, Jutta Brunnée and Stephen Toope, in their 'interactional' account of international law, claim that actors have an internal sense of obligation towards international law whenever it has come about through the appropriate normative requirements. Normative accounts of legitimacy, which in principle are not focused on individuals, embrace this assumption. This can be seen in Mattias Kumm's international-constitutional account of legitimacy when he posits the question '*To what extent should citizens regard themselves as morally constrained by international law in the collective exercise of constitutional government?*'[49] The idea that the obedience to certain norms should be regarded as an 'external manifestation of subjective and deeper lying elements in individuals'[50] implicitly relies on an assumption which Barry Barnes calls 'normative determinism.'[51] 'Normative determinism' entails that individuals act according to a set of beliefs, norms, and values, which they have somehow internalized. I argue that such an understanding of norms and values may not be adequate. More specifically, in light of psychological research which suggests that individuals' commitment to principled actions is highly contextual and points to the limited cognitive abilities of individuals, I contend that the idea of true internalization is difficult to sustain. I further emphasize that the relationship between the internalization of norms and the corresponding behaviour is more complex than typically acknowledged. As Mark Laffey and Jutta Weldes remark, '[t]he ascription to individuals of 'internal' states that explain 'external' behavior also produces considerable technical difficulties for analysis inasmuch as

[48] David Beetham, *The Legitimation of Power* (Macmillan 1991) 33
[49] Kumm 908-909
[50] C Wright Mills, 'Situated Actions and Vocabularies of Motive' (1940) 5 American sociological review 904, 913
[51] Barnes 26

it becomes necessary to construct accounts of how 'external' phenomena are translated into, produced by or interact with 'internal' phenomena and vice versa.'[52] Given the strong reliance on the assumption of the possibility of the internalization of public norms in the literature on legitimacy and international law, I argue that the question of how the transition between the 'internal' and the 'external' operates deserves a more critical scrutiny.

I.4. From legitimacy to legitimation

Despite these criticisms, I want to emphasise that I do not deny the importance of legitimacy as such. It surely plays an important role in social, political, and legal life. It would thus be mistaken to not pay attention to how legitimacy intersects with social life. However, my account aims at deflating the expectations one should have regarding legitimacy. I believe that there has been an inflation of the use of legitimacy in international law and that its actual impact is overstated. Nonetheless, there is space for an account of legitimacy that makes sense of the ongoing developments in international law and is sensitive to the considerations brought forward here. Drawing on a heterogeneous mix of literature, I take a first step in that direction by putting forth my own understanding of legitimacy as means of bounding action.[53] Under this approach, analysis is not centred on ascertaining whether or not a certain social arrangement is legitimate, but rather on describing and analysing the means through which actors attempt to expand or restrict the permissible boundaries of action. This approach to legitimacy breaks away from the 'individual' and emphasises the 'social.' Moreover, the main focus lies on legitimation rather than legitimacy, moving from a static perspective to a dynamic one.

According to this approach, the process of legitimation, and the activities it involves, should be viewed as a struggle, an ongoing series of claims and counter-claims. Following Michel Foucault's conception of discourse, this struggle can be regarded as being part of 'strategic games of action and reaction, of question and response, of domination and evasion, as well

[52] Mark Laffey and Jutta Weldes, 'Beyond Belief: Ideas and Symbolic Technologies in the Study of International Relations' (1997) 3 EJIR 193, 216

[53] I take this understanding of legitimacy from Rodney Barker, *Legitimating Identities: The Self-Presentations of Rulers and Subjects* (Cambridge University Press 2001); Patrick Thaddeus Jackson, *Civilizing the Enemy: German Reconstruction and the Invention of the West* (University of Michigan Press 2006)

as of battle.'[54] In order to pursue their objectives, actors draw on a variety of cultural resources. These resources have been conceived in a variety of ways: as topoi,[55] symbolic technologies[56] or living traditions,[57] among others. Following Jackson I conceptualize them as 'rhetorical commonplaces.'[58] The notion of rhetorical commonplaces refers to the cultural resources existent in concrete spatio-temporal circumstances. They constitute the assets from which actors rationalize and attempt to affect some particular course of events. Rhetorical commonplaces comprise norms, ideas, systems of representations, values, etc. In international law, for instance, rhetorical commonplaces may include norms such as the value of peace or of self-determination. As Ian Johnstone remarks, within law,

> certain types of argument and styles of reasoning are acceptable and accepted; others are not. There is a limit to which any language, including the language of the law, can plausibly be stretched. The limits exist because those who use legal language are typically in a relationship of some duration, from which common meanings, values, and expectations have emerged.[59]

Rhetorical commonplaces need not be considered as fully determined or ready to be deployed for action. On the contrary, such resources are contradictory, varied, vague, and only loosely integrated, often unevenly distributed around society. As a result, rhetorical commonplaces do not determine which course of action is pursued. Instead, for each particular course of action general, already existent notions become specified for particular purposes.[60]

To put the notion in more concrete terms, we can consider the actions of the Bush administration prior to the 2003 Iraq invasion. Although the United States (US), with the aid of the United Kingdom (UK) and Spain, among other countries, eventually invaded Iraq without a resolution from the SC, in the months prior to the invasion the US engaged in a plethora of debates in order to justify and present their case. In particular, Bush and others

[54] Arnold I Davidson, 'Structures and Strategies of Discourse: Remarks Towards a History of Foucault's Philosophy of Language' in Arnold I Davidson (ed), *Foucault and His Interlocutors* (University of Chicago Press 1997) 5

[55] Friedrich V Kratochwil, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge University Press 1989)

[56] Laffey and Weldes

[57] John Shotter, *Conversational Realities: Constructing Life through Language* (Sage 1993)

[58] Jackson, *Civilizing the Enemy: German Reconstruction and the Invention of the West* 27ff.

[59] Ian Johnstone, *The Power of Deliberation: International Law, Politics and Organizations* (Oxford University Press 2011) 25, footnotes omitted.

[60] Jackson, *Civilizing the Enemy: German Reconstruction and the Invention of the West* 28

from his administration put forward a series of arguments about the desirability of deposing Sadam Hussein. On the legal dimension, for example, the Bush administration argued that the recourse to force was justified through various interpretations of past resolutions of the SC. The Bush administration thus deployed various resources, both legal and political, in order to proceed with its desired course of action. That the justification failed should not distract us from the fact that the administration engaged general resources, such as the threat to international security and peace, and modified them to the particular context.

This account of legitimation is inherently social because it focuses on the patterns of justificatory claims put forth by different actors in public settings under a particular sequence of events. More importantly, by abandoning 'internal' motives as part of the analysis, there is no need in ascertaining whether those that 'accepted' a particular action 'believed' in it or not. Likewise, I do not rely on the idea of internalization of norms. Following authors such as Ludwig Wittgenstein, William O.V. Quine, or Weber, I thus take a social view of norms and consider them as public entities that do not reside in anyone but that are publicly negotiated and produced. It should be emphasized that my approach sidesteps the question of whether a particular social arrangement is legitimate or illegitimate. In my view, such discussions may lead to several unproductive dead ends, as will be discussed in Chapter V.

The account of legitimation presented here will most likely sound familiar to international lawyers, as the idea of legitimation as a bounding action can be found implicitly in the literature. As Oscar Schachter, in his analysis on the use of force in international law, sustains, '[i]nternational law does not, and should not, *legitimize* the use of force across national lines except for self-defence … and enforcement measures ordered by the security council.'[61] Legitimacy is thus deployed in order to argue against the expansion of a particular boundary, that of the use of force. It is precisely this type of reasoning which appears in the context of the Kosovo situation. The discussions regarding a potential humanitarian intervention were centred on the question of what were the appropriate boundaries of action.[62] Furthermore, the account of rhetorical commonplaces resembles the conception of norms and legal doctrines in parts of the international legal scholarship. In particular, the

[61] Oscar Schachter, *International Law in Theory and Practice* (Martinus Nijhoff Publishers 1991) 128, emphasis added.
[62] Cassese

idea of norms being open-ended, contradictory, or indeterminate is all too familiar to international lawyers. Especially since the arrival of the *New Stream*, the position that international law is indeterminate has been accepted in parts of the community. Nevertheless, this accepted image of international law seems often to be abandoned when legitimacy concerns enter the picture. The reasons behind this disconnect might be based on the normative tendencies of the field or the moral connotations that legitimacy entails.[63]

I.5. Outline

The dissertation is structured as follows. Chapter II is centred on fleshing out the background against which discussions of legitimacy have flourished. The chapter describes the ongoing transformations of the international legal order in light of processes of globalization. It presents the well-established reasons as to why, as a consequence of those transformations, the basis for the legitimacy of international law must be reconsidered. More specifically, it explains that the accrual of power and authority by an increasing constellation of international organizations and the increasing importance of private actors in the management of transnational relations make consent, the traditional basis of international legal legitimacy, insufficient. In the past, the consent of states was argued to be enough render international law legitimate, in part due to a horizontal perception of the legal order, whereas nowadays consent has lost its erstwhile importance. International Organizations (IOs) have developed a series of rights and obligations which not only lack the direct consent of states but that also infringe upon processes of domestic law. Apart from the need for a new basis of legitimacy, the increasing power of private organizations in the international legal order has given rise to calls for making those institutions more accountable in their use of power.

Chapter III discusses some of the most important accounts of legitimacy within international law. It focuses on the analyses of Franck, Brunnée and Toope, Kumm, and Buchanan. Although the four accounts do not cover all possible variations of understandings of legitimacy in the literature, they span a large part and they represent the few instances in which the issue of legitimacy has been addressed systematically. Given that the majority of

[63] Mulligan 366

the literature tends to be rather fragmented when dealing with legitimacy, these accounts not only provide the opportunity of engaging with in a more systematic fashion, but also highlight where the problems with legitimacy lie. The first two accounts, those of Franck and Brunnée and Toope, are hybrids between sociological and normative accounts. Their objective is to find explanatory elements demonstrating why international law is being obeyed, which, at the same time, might be seen to be normatively desirable. The remaining two accounts are purely normative. Their purpose is to offer a guideline for when we *ought* to obey international law and to develop principles regarding how international law *ought* to be.

Chapter IV elaborates the main criticisms that have been briefly outlined above. The first part of the chapter concentrates on the notion of legitimacy. Its main purpose is to identify and clarify the reasons why legitimacy is invoked and what its invocation is designed to achieve. The second part focuses on the conceptual characteristics of legitimacy. It illustrates the variedness of the concept and identifies the main points of contention among the different understandings of legitimacy. I examine in more detail how legitimacy operates as a concept and explain what undermines its analytical purchase. The third part of the chapter is concerned with the explanatory dimension of legitimacy. It is centred on legitimacy in relation to social arrangements. Traditionally when social arrangements are discussed it refers the relationship between rulers (the object) and the ruled (the subject). That sad, ss we will see, what can be considered the 'subject' and the 'object' of legitimacy in international law is rather complex. I further analyse the role of normative beliefs in sustaining a social arrangement. In particular, I show that stability can be accounted for by a variety of mechanisms in which legitimacy is either an effect, rather than a cause, or in which legitimacy plays no role. Beyond contesting the role of normative beliefs in explaining the stability of a social arrangement, I also contest the underlying assumption of how norms are internalized, thereby challenging the usual perception in the literature regarding beliefs and motives.

Chapter V presents my alternative approach to legitimacy. As explained above, this entails moving away from legitimacy and focusing, rather, on legitimation. Such a turn towards a more dynamic understanding of the role of justification is related to an alternative conception of social life, one that views social life in terms of processes. This conception

stands in contrast to the underlying view in the majority of accounts within international law, which can be dubbed 'substantialism.' According to a 'substantialist' view of social life, entities are self-subsistent; they 'come "preformed"' and constitute the basis from which one can consider 'the dynamic flows in which they subsequently involve themselves.'[64] In contrast to substantialism, a process-oriented approach does not treat entities as having some inherent properties or elements but views the processes themselves as the ontological primitives. I connect the process-based account of social life to legitimation and argue why this account may allow us to better explain the role of legitimacy for international law.

Chapter VI concludes the dissertation by briefly recapitulating the main points and reflects on what the account presented here adds to our understanding of legitimacy in international law.

[64] Mustafa Emirbayer, 'Manifesto for a Relational Sociology ' (1997) 103 American journal of sociology 281

II - Globalization and International Law

II.1. Introduction

As discussed in the Introduction, in the past the study of legitimacy and international law were treated as separate topics and only later was their relationship discussed, even then often unsystematically and not in great detail – with the exception of Franck's *The Power of Legitimacy among Nations*. The main focus in those early accounts was centred on the task of unravelling the 'mystery of legal obligation' and on the explanation of why international law is obeyed.[65] The recent and thriving interest in the relationship between international law and legitimacy does not entirely depart from that approach but has taken new turns due to the changing circumstances of international law in the context of globalization.[66] It is the purpose of this chapter to offer an overview of the evolution of international law in the context of globalization and how these changes are related to legitimacy.

The processes transforming the international legal order are varied and multifaceted. As a result of its sheer complexity, diverse accounts have been given in order to make sense of those changes. My point of entrance in explaining and describing the transformation will be through the general lens of globalization. Even though the notion of globalization, as we shall see below, covers multiple aspects and processes, globalization serves as a focal point from which one can identify and interpret the different processes transforming international law.[67]

The chapter proceeds in the following manner. The first part provides a broad account of what globalization is and how it has been approached. We shall see that there are deep disagreements as to how to conceive the worldwide transformations that have taken place.

[65] Martti Koskenniemi, 'The Mystery of Legal Obligation' (2011) 3 International Theory 319

[66] The obvious point is that if legitimacy consists of the fact that an actor follows a certain norm, institutions or social arrangement, because it enjoys normative standing, the question remains unaffected. What has changed, and what I explore here, are those transformed contexts.

[67] As Michael Mann notes, it is not possible to differentiate globalization from other social processes, see Michael Mann, *The Sources of Social Power: Volume 4, Globalizations, 1945-2011* (Cambridge University Press 2013) 3

In the second part, we move from globalization as a general topic to its particular role for law. I briefly discuss how law is being altered by globalization and how, at the same time, law plays an active role in furthering globalization. I then describe how international law has changed and portray the rise of a novel phenomenon, which has been discussed under the label of transnational law. The last section links and examines the ongoing evolution of international law in relation to legitimacy. Although I will give a more detailed account of the various attempts to explain legitimacy as a sociological and normative concept in the next chapter, I will focus here on the various claims and preoccupations typically raised in relation to legitimacy.

II.2. The multidimensional character of globalization

Globalization, following Anthony Giddens famous formulation, can 'be defined as the intensification of worldwide social relations which link distant localities in such a way that local happenings are shaped by events occurring many miles away and vice versa.'[68] Despite the seemingly straightforward definition on which many would agree, globalization is an elusive and complex concept.[69] As Manfred Steger posits, 'the social processes that make up globalization have been analysed and explained by various commentators in different, often contradictory ways.'[70] While some accounts draw a picture in which we inhabit a global borderless world, other accounts offer a more sceptical assessment of globalization.[71] Within those that agree on the existence and importance of globalization, there are severe divergences in the assessment of its extension or force.[72]

The difficulties surrounding the assessment of globalization do not only concern its empirical dimension; there are also significant epistemological concerns. Discussions about globalization are typically far from neutral, as there is an important aspect of knowledge and

[68] Anthony Giddens, *The Consequences of Modernity* (Polity 1990) 64

[69] William I Robinson, 'Theories of Globalization' in George Ritzer (ed), *The Blackwell Companion to Globalization* (John Wiley and Sons 2008) 126; Luke Martell, *The Sociology of Globalization* (Polity 2010) Ch. 1; Leslie Sklair, *Globalization: Capitalism and Its Alternatives* (Third edn, Oxford University Press 2002) 35

[70] Manfred B Steger, *Globalization: A Very Short Introduction* (Second edn, Oxford University Press 2013) 11

[71] David Held and others, *Global Transformations: Politics, Economics and Culture* (Stanford University Press 1999); Paul Hirst and Grahame Thompson, *Globalization in Question: The Internatioonal Economy and the Possibilities of Governance* (Polity 2000)

[72] For a very good overview of all relevant positions see Manfred B Steger, *Globalisms: The Great Ideological Struggle of the Twenty-First Century* (Rowman & Littlefield Publishers 2008) Ch. 2

power behind most analyses. As William I. Robinson remarks, discussions of globalization are 'closely related to the problems they seek to discuss and what kind of social action people will engage in.'[73] Thus,

> [i]t is therefore necessary carefully to reflect on the priorities and power relations that any definition reflects – and also helps to (re)produce. Different definitions of globalization may promote different values and interests.[74]

Despite these concerns, globalization as a concept seems indispensable for understanding the transformations taking place worldwide - unlike legitimacy, as we shall see.[75] As Jan A. Scholte argues, '[i]t is impossible to avoid the issue [- globalization -], but difficult to specify what it involves.'[76] Perhaps the best way to put it is that our vocabulary would be more impoverished without it.[77] After all, even those that reject globalization do accept two basic tenets that can be found in any globalization account: 'the rejection of the nationally constituted society as the appropriate object of discourse, or unit of social and cultural analysis', and 'a commitment to conceptualizing "the world as a whole."'[78]

As Giddens' definition hints at, and many others have pointed out, globalization is understood as a multidimensional phenomenon affecting various societies on a large scale.[79] Globalization refers to multiple and interrelated levels and subfields of analysis – society, economics, law, politics, and culture.[80] In consequence, globalization cannot be reduced to a 'single master process.'[81] The idea of globalization also 'suggests a sort of dynamism best captured by the notion of 'development' or 'unfolding' along discernible patterns.'[82] These patterns (or processes) do not necessarily have to be coherent; they

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[73] Robinson 126
[74] Jan A Scholte, *Globalization: A Critical Introduction* (Second edn, Palgrave Macmillan 2005) 53
[75] Alan Scott, *The Limits of Globalization: Cases and Arguments* (Routledge 1997)
[76] Scholte 1
[77] Neil Walker says the same for global law, see Neil Walker, *Intimations of Global Law* (Cambridge University Press 2014)
[78] Anthony D King, 'Preface to Revised Edition' in Anthony D King (ed), *Culture, Globalization and the World System: Contemporary Conditions for the Representation of Identity* (Revised edn, University of Minnesota Press 1997) viii. This is the case with Mann, who's analysis starts with a denial of the existence of closed societies, see Mann
[79] Robinson 127; George Ritzer, *Globalization: The Essentials* (John Wiley & Sons 2011) 1-54; Arjun Appadurai, *Modernity Al Large: Cultural Dimensions of Globalization* (Univeristy of Minnesota Press 1996)
[80] James H Mittelman, *The Globalization Syndrome: Transformation and Resistance* (Princeton University Press 2000) 7
[81] Robert J Holton, *Globalization and the Nation State* (Second edn, Palgrave Macmillan 2011) 16
[82] Steger, *Globalization: A Very Short Introduction* 9

might overlap, merge, and they can work in opposite directions.[83] Scholte identifies four processes inherent to globalization: internationalization, liberalization, universalization, and respatialization.[84] Let us briefly address each of them in turn.

Internationalization refers to increasing interdependence between states. One conventional way of observing this interdependence is in economic terms, in particular the worldwide extension of markets and chains of production due to technological changes. As a consequence, trade flows between countries have risen considerably, leading to a constant exchange of goods and services worldwide.

> Markets have extended their reach around the world, in the process creating new linkages among national economies. Huge transnational corporations, powerful international economic institutions, and large regional trading systems have emerged as the major building blocks of the twenty-first century's global economic order.[85]

Processes of internationalization are also related to discussions about the nature of the state and the transformations of international relations more generally. The conception of the state as an ideal sovereign-territorial entity has changed. As John Agnew remarks, the modern discourse concerning statehood 'is intimately bound up with claims to sovereignty over territory.'[86] The ideal and practice of state sovereignty – meaning centralized political and legal power within a particular and defined territory - has become loosened. We are witnessing the formation of layers of governance in all shapes and forms, cutting across boundaries, regionally or globally. The evidence for this development can be seen in the rise of manifold international organizations and regimes.[87] Likewise, the state has lost part of its supremacy. Instead, it operates alongside a large assembly of actors that are participating in and producing the process of globalization.[88]

A counterpart to internationalization and the development of a global economy is the notion of liberalization. While technological innovations have been significant for the transformation of world economy, the political dimension behind the creation and

[83] J MacGregor Wise, *Cultural Globalization: A User's Guide* (John Wiley & Sons 2010) 3
[84] Scholte 16
[85] Steger, *Globalization: A Very Short Introduction* 38
[86] John Agnew, *Globalization and Sovereignty* (Rowman & Littlefield Publishers 2009) 47
[87] David Held and Anthony McGrew, *The Global Transformations Reader: An Introduction to the Globalization Debate* (Second edn, Polity 2003) 11-13
[88] Despite the preeminence of the state, this has obscured that multiple types of actors have always interacted with, and in the shadow of, the state.

sustainment of the global economy should not be forgotten. The concept of liberalization emphasizes the processes of opening up states in order to create and foster a borderless economy. Although discussions of liberalization can be traced back to the nineteenth century, the trend from the Second World War onwards, with the Bretton Woods system and the insistence on promoting a worldwide liberalization of the economy, serves as a crucial time-frame for the furthering of liberalization. Unsurprisingly, the US has had a determinant role in the liberalization of world economy with the creation of diverse international institutions, among other actions.[89] Thus, we can find the General Agreement on Tariffs and Trade (GATT) and its successor, the World Trade Organization (WTO), which have played a crucial role in fostering the liberalization of the world economy by reducing and eliminating different types of economic barriers such as tariffs or subsidies. At a regional level, the development of the EU is an important example. The establishment of the common market, the liberalization of capital, labour, and service, as well as the creation and recognition of qualifications represent one of the greatest attempts to open up economies across several countries.

Universalization refers to the spreading of 'objects' and 'experiences' on a global level; it refers to the process of synthesising cultures, whose final outcome would be a global culture.[90] According to this notion, '[g]lobalization … is inextricably linked to the idea of humanity as a whole, and not confined to any national, ethnic, religious or cultural fragment of it.'[91] It is posited that as the awareness of the fact that we inhabit the same space grows, a global consciousness emerges.[92] For J. MacGregor Wise, this represents the distinctiveness of globalization from earlier periods. He writes,

> [w]hat makes globalization new is a sense of the world as a whole; that is, that not only is one aware of other people and places, but there is a sense of simultaneity and interconnection, that events and decisions made in far-off places can have consequences for your everyday life, and that your everyday life can have consequences for many others a world away.[93]

[89] On the role of the US see John G Ruggie, 'International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order' 36 IO 379
[90] Scholte 16
[91] Barry K Gills, ''Empire'versus 'Cosmopolis': The Clash of Globalizations' in Barry K Gills (ed), *The Global Politics of Globalization: 'Empire' Versus 'Cosmopolis'* (Routledge 2007) 6
[92] Roland Robertson, *Globalization: Social Theory and Global Culture* (Sage Publications 1992) 8
[93] Wise 29

The technological changes that took place in the twentieth century 'have opened up a massive series of communication channels that cross national borders, increasing the range and type of communications to and from all the world's regions.' In turn, this has allowed for the creation of 'a far greater intensity of images and practices, moving with far greater extensity and at a far greater velocity than in earlier periods.'[94] For some, universalization is tightly linked to the creation of a homogeneous culture in which the same symbolic elements are shared by different cultures. Given the dominance of Western states when it comes to pursuing and furthering globalization, this is sometimes perceived to be problematic. In particular, the development is at times regarded as cultural imperialism rather than a fair synthesis of cultures.[95] Some authors have pushed against this perception of globalization. Pieterse posits that instead of homogenization we observe a rise of hybridity, a mix of the different cultures, and an ongoing balancing between particular and universal cultural developments.[96] Hence, it is possible to find local cultural innovations reappropriating elements of Western culture. Not only that, it is argued that processes of globalization may have facilitated the maintaining of identity and culture for some groups. While before it might have been difficult for a minority group in a country to uphold ties with their community, technological developments may now permit them to do so. In consequence, communities can cut across the bounded territory of the state and should be perceived as transnational objects with overlapping identities and spatialities. In principle, this goes for any type of community regardless of its origin, e.g. religion, race, class, etc. These different communities then interact in a variety of ways and, through their practices, not only shape globalization but develop the transnational social space. As a result, 'the practices become routine to social life and may involve transient as well as more structured and permanent interactions and practices that connect people and institutions from different countries across the globe.'[97]

[94] Held and McGrew 235

[95] Wise 34ff; George Ritzer, *The Mcdonaldization of Society* (SAGE Publications 2014); John Tomlinson, *Cultural Imperialism: A Critical Introduction* (Second edn, Continuum 2001). What they have in common in my view is being critical of the sort of homogeneity that globalization is bringing forth, not the fact of converges. Susan Silbey also has a similar take. She admits that there are local innovations that resist global forces. However, the exchange is unequal; Susan S Silbey, '"Let Them Eat Cake": Globalization, Postmodern Colonialism, and the Possibilities of Justice' (1997) 31 Law and Society Review 207, 223

[96] See Jan Nederveen Pieterse, 'Globalization as Hybridization' in Mike Featherstone, Scott Lash and Roland Robertson (eds), *Global Modernities* (Sage Publications 1995)

[97] Robinson 137

The emphasis on the ability of communities to maintain their identities in the face of globalization and its Westernizing tendencies should not be interpreted as a denial of the importance of power. As Doreen Massey has emphasized, culture is embedded in social relations and these are constructed within the context of asymmetries of power. To illustrate her point, she posits that a Guatemalan child wearing a US t-shirt is not the same as a US child wearing a Guatemalan t-shirt:

> When, say, young people in Guatemala sport clothing marked clearly as "from the USA" (or – ironically – with an "American" logo and trademark emblazoned upon it but in fact quite likely made in Guatemala, a T-shirt quite likely sewn up by the mother of the Guatemalan kids themselves) they are tapping into, displaying their knowledge of, their claimed connection with, that dominant culture to the north. The social relations (both cultural and economic) embedded in this flow of cultural influence (and thus in the particular moment of the wearing of this T-shirt) are complex but they are clearly to do with the subordination of the Guatemalan culture and economy to the greater power of the United States of America.[98]

This process of universalization is sometimes discussed under the heading of modernity and modernization.[99] Modernity, as Giddens asserts, 'refers to modes of social life or organisation which emerged in Europe from about the seventeenth century onwards and which subsequently became more or less worldwide in their influence.'[100] Those modes of social life refer to capitalism, rationality, individualism, and so forth. For Boaventura de Sousa Santos, this is an instance of "globalized localism," which refers to the process through which a 'given local phenomenon is successfully globalised'.[101] An example of this phenomenon is the attempts to export the Western rule of law worldwide.[102] In sum, universalization and its variants refer to a complex process that helps us better understand how certain institutional, social, and cultural structures are being replicated, assumed, or adopted worldwide.

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[98] Doreen Massey, 'The Spatial Construction of Youth Cultures' in Tracey Skelton and Gill Valentine (eds), *Cool Places: Geographies of Youth Cultures* (Routledge 1998) 125

[99] Wise

[100] Giddens 1

[101] Boaventura de Sousa Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (Routledge 1995) 263

[102] See Stephen Humphreys, *Theatre of the Rule of Law: Transnational Legal Intervention in Theory and Practice* (Cambridge University Press 2010)

Finally, respatialization focuses on the reconfiguration of the social geography towards increasing 'transplanetary' interconnectness of people.[103] This aspect of globalization, considered by Giddens a key element, emphasizes the technological changes that make possible the transformation of social relations due to alterations in our perception of space.[104] Bryan Turner stresses a similar aspect. For him, globalization involves 'the compression of time and space, the increased interconnectivity of human groups, the increased volume of the exchange of commodities, people and ideas, and finally the emergence of various forms of global consciousness.'[105] Popular metaphors like 'global village' encapsulate how technology has impacted the structuring of societal affairs worldwide. In this vein, globalization 'involves almost everyone, everything, and every place, in innumerable ways.'[106] The time-space compression manifests itself in the following aspects: local activities can have global reach; relationships among and between groups are intensified; processes and interactions are sped up; and, as a result of the previous features, the impact of events is magnified.[107] Michael Mann puts it in dramatic terms and posits that these developments work as a 'boomerang effect whereby actions launched by human beings hit up against the limits of the earth and then return to hit them hard and change them.'[108]

The four processes of globalization, while far from exhaustive, illustrate the richness and complexity that globalization entails. Clearly, the different processes do not operate in isolation but are interrelated and interact in multifaceted and complicated manners. Differentiating them analytically nevertheless allows us to get a better grasp on the different dimensions of the complex and far reaching changes currently taking place.

It remains to emphasize that globalization, despite the profound transformations it entails, does not have to be equated or assimilated to a teleology whereby we become 'a single world of human society in which all the elements are tied together in one interdependent

[103] Scholte 16
[104] See Manuel Castells, 'The Network Society: From Knowledge to Policy' in Manuel Castells and Gustavo Cardoso (eds), *The Network Society: From Knowledge to Policy* (John Hopkins Center for Transatlantic Relations 2006)
[105] Bryan S Turner, 'Theories of Globalization: Issues and Origins' in Bryan S Turner (ed), *The Routledge International Handbook of Globalization Studies* (Routledge 2011) 5
[106] Ritzer, *Globalization: The Essentials* 3; Martell 2
[107] Held and others
[108] Mann 3

whole.'[109] Accordingly, globalization cannot be regarded as one coherent process with some clear objective. Instead it encompasses manifold processes pointing in multiple directions with diverse and possibly conflicting ends. As David Held and Anthony McGrew posit,

> globalization is not inscribed with a preordained logic which presumes a singular historical trajectory or end condition, that is, the emergence of a single world society or global civilization. In fact, teleological or determinist thinking is roundly rejected. Globalization, it is argued, is driven by a confluence of forces and embodies dynamic tensions.[110]

In sum, globalization 'has been a very long, uneven and complicated process'[111] with elements of simultaneous fragmentation and coordination.[112] That is, we encounter cycles of integration countered by cycles of disintegration, constantly modifying and revising the global societal landscape.[113]

We can now turn to the criticisms of the concept of globalization and its implications. There are several arguments put forward which aim at downplaying the relevance of globalization. Some of them are of a historical character. They typically focus on the economic dimension of globalization and postulate that the phenomena normally associated with globalization also existed in past periods. Such criticism suggests that, even though there might be some novel elements that differentiate the current era of globalization from prior ones, the developments are far from unprecedented.[114] More specifically, it is claimed that, at least in economic terms, there is no fundamental difference between the ongoing developments and the late nineteenth century. Indeed, proportional to the world economy, flows of immigration and investment were roughly the same as today.[115] On a similar note, there are disagreements about the temporal confinements of globalization. There are accounts that view globalization as a development of recent decades, while others regard the technological achievements of the nineteenth century as the starting point. There are also authors, such as Roland Robertson, for whom the 'germination phase' of globalization falls between the early fifteenth and mid-eighteenth century, while they interpret the middle of

[109] Holton 2
[110] Held and McGrew 7
[111] Robertson 10
[112] Giddens 175
[113] Ian Clark, *Globalization and Fragmentation: International Relations in the Twentieth Century* (Oxford University Press 1997); David J Bederman, *Globalization and International Law* (Palgrave Macmillan 2008)
[114] Bederman x
[115] Hirst and Thompson

the nineteenth century and the following years as the 'take-off' period of globalization. Hence, they connect globalization in terms of time to the emergence of modernity and capitalism.[116] Finally, there are authors that see globalization as a development emerging since the dawn of history.[117]

Undoubtedly, there is a certain truth in arguments downplaying the radical novelty of globalization. There are not only striking similarities between past and present periods of globalization, but it is also noticeable that globalization has not produced novel theories of society. They have simply been expanded in their geographical scope.[118] Nevertheless, the fact that it is possible to draw parallels to the past does not imply that we are witnessing a mere repetition of the past.[119] There can be both continuities and discontinuities. And indeed, as Saskia Sassen argues, it is possible to identify features of current processes of globalization, which make it a sufficiently new phenomenon. Robinson takes a similar stand. He acknowledges that the idea of a world economy is not unprecedented in history, but emphasizes that the modes of production, although linked through the international market, were developed within each nation-state. What distinguishes the current development of the world economy from the past is the fact that the production process has also become global. Rather than having national circuits of production, we now find globally integrated production chains. As he puts it,

> [g]lobalization … is unifying the world into a single mode of production and a single global system and bringing about the organic integration of different countries and regions into a global economy. The increasing dissolution of space barriers and the subordination of the logic of geography to that of production … is without historic precedence.[120]

To sum up, despite some caveats against the perception of globalization as a radically new phenomenon, there is widespread agreement on the fundamental '*change in the spatial*

[116] Robertson 58-59; Luke Martell similarly argues that the foundations of globalization can be traced back to the modern era, see Martell 66

[117] Robinson 127; Steger, *Globalization: A Very Short Introduction* 19ff; Holton Ch 2

[118] Mann 3

[119] Saskia Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton University Press 2006); Scholte 59ff; Robert O Keohane and Joseph S Nye Jr, 'Globalization: What's New? What's Not?(and So What?)' [2000] Foreign policy 104; Richard E Baldwin and Philippe Martin, 'Two Waves of Globalisation: Superficial Similarities, Fundamental Differences' in Horst Siebert (ed), *Globalization and Labor* (Mohr Siebeck 1999)

[120] William I Robinson, 'Social Theory and Globalization: The Rise of a Transnational State' (2001) 30 Theory and Society 157, 159

organization of social, economic, political and cultural life' that the current process of globalization entails.[121]

II.3. Globalization and international law

Up until now law has remained absent in our discussion of globalisation, a reflection of the fact that those analysing globalisation come from different disciplines. Nevertheless, law performs a highly relevant role in the processes described above. First, law 'reflects and conveys [the social forces], embodying and institutionalizing values, norms and prescriptions for social organization and behaviour.'[122] That is, the content and working of law, both at the national and international level, is profoundly shaped by the social developments of globalization.[123] Furthermore, law not only reflects the different social processes taking place globally, but also produces and constitutes them. As Santos posits 'the transnationalization of the legal field' is 'a constitutive element of globalization.'[124]

Similar to the broader accounts of globalization presented above, discussions about law and globalization also tend to emphasize the complex dynamics of different processes of globalization. Likewise, we encounter divergent and sometimes contested views on what the changes taking place are, how to conceptualize them, and to what extent they are novel. For David Bederman, for instance, there is nothing original about the role of law in globalization. Taking a historical view, he posits that law has been a constant presence in the regulation of 'political aggregations.' The classic example in Western legal history is *ius gentium*, which was created by the Romans in order to govern the relations between the Roman Empire and its neighbours.[125] But again, the fact that we encounter similarities with the past does not preclude the existence of significant features of law specific to current developments. An important novelty is that 'legal and juridical concepts, institutions, and ideologies are used with increased density, in terms of both of their expanded scope and

[121] Markus Kornprobst and others, 'Introduction: Mirrors, Magicians and Mutinies of Globalization' in Markus Kornprobst and others (eds), *Metaphors of Globalization: Mirrors, Magicians and Mutinies of Globalization* (Palgrave Macmillan 2008) 3
[122] Gregory Shaffer, 'Transnational Legal Process and State Change' (2012) 37 Law & Social Inquiry 229, 238
[123] Terence C Halliday and Pavel Osinsky, 'Globalization of Law' (2006) 32 Annu Rev Soc 447, 455
[124] Santos 268
[125] Bederman 6

their deep penetration into local political/legal/social orders.'[126] Neil Walker raises a similar point in his discussion about global law, which he defines as '*a commitment to the universal or otherwise global-in-general warrant of some laws or some dimensions of law.*'[127] Although he admits that such discussions are not unprecedented, he argues that the novelty lies in

> the extent and intensity of the contemporary movement towards global law, whether implicitly understood or explicitly styled as such, and the convergence of that movement from so many different quarters and perspective.[128]

There are some disagreements on what global law means.[129] For Pierrick Le Goff, for instance, global law comprises international law but also includes regulatory frameworks like *lex mercatoria*, *lex constructionis* or *lex sportiva*.[130] For authors like Rafael Domingo, on the other hand, global law is a normative concept that moves beyond international law and envisages the global regulation of individuals rather than states.[131]

Besides definitional issues, discussions about globalization and law evolve around a variety of phenomena such as the internationalization of national law or the tendency of national law to cut across states. A prime example is the US antitrust law whose reach is not limited to the US jurisdiction but can also be felt internationally. Take, for example, the ruling in the Alcoa case, which found Aluminum Co. of America (Alcoa) guilty of committing conspiracy within the US even though Alcoa was engaged in an international cartel with Canadian and European companies that did not operate in the US. Through this judgment the US antitrust law affected the markets in Canada and Europe. Likewise, treatments of globalization and law attempt to further our understanding about the influence of particular models of law on the legal framework of other countries. An instantiation is the ongoing discussion over the question of whether European law has been 'Americanized' or not.[132] Another important aspect in the debate concerns the idea of global governance. The notion refers to 'a

[126] A Claire Cutler, *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy* (Cambridge University Press 2003) 18
[127] Walker 18
[128] Ibid 19
[129] Ibid 1
[130] Pierrick Le Goff, 'Global Law: A Legal Phenomenon Emerging from the Process of Globalization' (2007) 14 Indiana Journal of Global Legal Studies 119, 122ff
[131] Rafael Domingo, *The New Global Law* (Cambridge university press 2010)
[132] Robert A Kagan, 'Globalization and Legal Change: The "Americanization" of European Law?' (2007) 1 Regulation & Governance 99

thickened and extended regulatory fabric whose relevant spheres of interest, action, institutionalization and normativity' are global, as the name suggests.[133] James N. Rosenau proposes an even more expansive definition, according to which global governance is a 'system of rule at all levels of human activity … in which the pursuit of goals has transnational repercussions.'[134] One can also find more modest definitions that simply equate global governance with the institutions and norms that have global reach.

Last but not least, the process of globalization has challenged conventional accounts of the production of law. The state can no longer be seen as the sole source of legal normativity. Instead, it is supplemented by an ever-increasing number of other sources of normativity, both international and transnational.[135] As a result, we observe the emergence of a normative space in which public and private initiatives can flourish. As Paul Schiff Berman suggested, we live in multiple overlapping normative communities, whose interactions and connections cannot be subsumed under conventional accounts of law.[136]

II.3.a. The Evolution of International Law

Before coming back to globalization and its relation to international law, it is necessary to present a brief overview of the normative evolution of international law in the last century. For some readers, this excursus might seem slightly unnecessary - after all, the development has been covered and analysed in great detail in the literature - however, it will become clear that the rise of the prominence of legitimacy in the literature is closely connected to the changes that the international legal order has gone through. A presentation of the continuities and discontinuities that have occurred within international law thus allow for a better understanding of the subsequent discussion of legitimacy.

We can broadly divide the evolution of international law into three phases. The first phase, emerging slowly from the seventeenth century onwards, represents conventional international law. This type of international law is what Wolfgang Friedmann termed the

[133] Walker 13
[134] James N Rosenau, 'Governance in the Twenty-First Century' (1995) 1 Global governance 13, 13
[135] See e.g. Kaarlo Tuori, 'Transnational Law - on Legal Hybrids and Perspectivism' in Miguel Maduro, Kaarlo Tuori and Suvi Sankari (eds), *Transnational Law: Rethinking European Law and Legal Thinking* (Cambridge University Press 2014)
[136] Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (Cambridge University Press 2012)

'law of coexistence' in his emblematic *The Changing Structure of International Law*. Under this heading, international law is seen as a composite of rules, norms, and principles governing exclusively interstate relations.[137] Joseph Weiler terms this understanding of international law 'transactional international law.' For him, transactional international law is 'represented best by the bilateral transactional treaty. It is premised on an understanding of a world order composed of equally sovereign states pursuing their respective national interest through an enlightened use of law to guarantee bargains struck.'[138] It has been widely argued that such an understanding of international law is deeply imbued in liberalism and essentially analogizes international law to private law. This corresponds to the position of Thomas Holland, who in 1989 posited that 'the Law of Nations is but private law 'writ large.' It is an application to political communities of those legal ideas which were originally applied to relations of individuals.'[139] It is, then, little surprising that some basic concepts (still) underpinning international law reflect those basic principles of liberalism and private law. Take for instance the infamous 1927 *Lotus* case, in which the Permanent Court of International Justice (PCIJ) established that

> [i]nternational law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.

In this paragraph, we can identify some key principles underlying classical international law. These principles comprise sovereign equality and consent. While the idea of sovereign equality does not require much explanation,[140] the principle of consent flows naturally from it: if no state is superior to or dependent on any other, then, in order to agree to an obligation, states need to consent. Another key element is the principle of *pacta sunt servanda*, which is not 'just the indispensable and tautological axiom of obligation, but a signifier of the world of honour in which the equally sovereign understood themselves to be in.'[141] Needless to say, the historical and even theoretical record is more complicated than

[137] Wolfgang Friedmann, *The Changing Structure of International Law* (Columbia University Press 1964)
[138] Weiler 553
[139] Thomas E Holland, *Studies in International Law* (Clarendon Press 1898) 152
[140] See discussion in Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge University Press 2004) 26-29
[141] Weiler 555

that, but it represents a good approximation of what, for a long time, was the predominant view of international law.

A significant shift in the conception of international law already began at the end of the nineteenth century and took hold from the mid-twentieth century onwards. Following David Kennedy, it can be summarized as *the move to institutions*.[142] International law began to expand its reach by incorporating new subjects and areas. The most important aspect of this shift has been the rise of international organizations as actors in the international legal order. The emergence of international organizations went along with a new emphasis on cooperation and community interests. For Weiler, this turn to institutions represents a constitutional and legislative shift through which common assets became prevalent. Those common assets can be material, such as the deep bed of the high sea, or ideational, such as human rights. Accordingly, states can no longer claim exclusive sovereignty on those assets; instead they have to be managed collectively.[143] This turn towards more cooperation is connected to further discussions about the possibility of an international society coming into being.

Lastly, the spreading of international institutions has brought with it the rise of regulatory international law.[144] This takes us back to the idea of global governance. The emergence of global governance captures the evolution of governmental functions in settings that have no institutions of government. More specifically, we observe the existence of 'an order that lacks a centralized authority with the capacity to enforce decisions on a global scale.'[145] The innovative character of this shift is reflected in the considerable transfer of power 'regarding individual duties and their enforcement from states to the international fora and transnational networks.'[146] In the international law domain, this development entails a wider and more detailed range of obligations. At the same time, these transformations have challenged the classical divide between the national and international law realm. According to this divide, national and international law has 'spheres of action, structures of authority

[142] David Kennedy, 'The Move to Institutions' (1986) 8 Cardozo Law Review 841
[143] Weiler 556
[144] Jacob K Cogan, 'The Regulatory Turn in International Law' (2011) 52 Harvard International Law Journal 321
[145] James N Rosenau, 'Governance, Order and Change in World Politics' in James N Rosenau and Ernst-Otto Czempiel (eds), *Governance without Government: Order and Change in World Politics* (Cambridge Univ Press 1992) 7
[146] Cogan 362

and forms of normativity that are distinct and different.'[147] The change is observable in the fact that international legal normativity often goes straight to the individual, bypassing the state. An instantiation of this tendency is the International Criminal Court (ICC) and the direct attribution of criminal responsibility to individuals. The influence of international law can be felt directly when an international norm replaces a domestic one and, to a lesser extent, when it does not replace the domestic norm but severely limits its autonomy. It can also be seen in incentives in order to induce normative standardization and by the emergence of a thicker framework of procedural techniques of regulation.[148]

It should be kept in mind that the three phases outlined here are highly stylized. The actual practices of international law are much messier, making a comprehensive yet analytically neat account impossible. Thus, the conceptions of international law outlined above should be understood as part of an ongoing interplay. Even during the heyday of 'classical' international law one can see the seeds of future evolution.[149] As Jan Klabbers notes, as early as 1910, with the rise of the first international organizations, it was posited that international unions could directly affect individuals and companies.[150] The evolution of international law should consequently not be understood in linear terms, with one phase succeeding the other, but in a more fluid manner. Weiler proposes looking at international law through the lens of geology as a useful way of capturing these dynamics. He posits that the analogy with

> geology allows us to speak not so much about transformations but of layering, of change which is part of continuity, of new strata which do not replace earlier ones, but simply layer themselves alongside. Geology recognizes eruptions, but it also allows a focus on the regular and the quotidian. It enables us to concentrate on physiognomy rather than pathology.[151]

Bearing in mind that every account brings with itself a particular perspective and a particular presentation of the narrative, we can now move on to a detailed discussion of the changes that international law has undergone in recent decades.

The most remarkable aspect of the current state of international law in comparison with the beginning of the twentieth century is the institutional density of the international legal

[147] Walker 12
[148] Weiler 559
[149] Ibid 551.
[150] Jan Klabbers, 'The Transformation of International Organizations Law' (2015) 26 EJIL 9
[151] Weiler 551

order. The spread and power of international organizations is at an unprecedented level. Although it is possible to identify international institutions going back to the end of the nineteenth century, e.g. the Universal Postal Union (UPU), it is only after the end of the Second World War that we observe their increasing prominence and diffusion. The UN is quite exemplary in this regard, but also beyond the UN and its connected specialized agencies there has been an explosion of organizations of various types that operate at the international level.[152] These organizations differ greatly in their influence and reach. On the one hand, we encounter powerful institutions such as the UN, the International Monetary Fund (IMF), or the EU while, on the other hand, there is a large number of smaller organizations such as the Copper Union or the World Meteorological Organization (WMO), whose focus lies on well-defined and narrowly circumscribed issues. The rise of international organizations has gone hand in hand with the expansion of the range of responsibilities international law has claimed. While traditionally international law was focused on issues of diplomacy and international peace and security, nowadays it is hard to find an area on which international law has not normatively touched.

The thickening of international law has also taken place through the emergence and expansion of international courts and tribunals.[153] The Project on International Courts and Tribunals (PICT) in 2004 identified up to 125 judiciary bodies. In comparison, before the Second World War, there was only a single permanent judiciary, the PCIJ, and a few arbitral bodies. The expansion of the international courts system is connected to the rise of international organizations: the ICJ, the European Court of Justice (ECJ), and the Appellate Body all came into being alongside a particular international organization. At the same time, there exist some self-standing international courts and tribunals, such as the ICC, which are not associated to any specific international organization.

The ICC, and earlier international criminal courts such as the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the Special Court for Sierra Leone (SCSL), represent what some authors have called the

[152] See, e.g., Henry G Schermers and Niels M Blokker, *International Institutional Law: Unity within Diversity* (Fifth edn, Martinus Nijhoff Publishers 2011) 22

[153] Karen Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton University Press 2014)

humanization of international law.[154] The use of the word humanization emphasizes the increasing importance of individuals within international law and the rise of human rights as a fundamental building block of the international legal order. Individuals are treated as both objects and subjects of international law. They have a legal personality and a firm standing within the international legal order but they also have legal obligation not mediated through states. Another innovation was that international courts 'did not prosecute acts criminalized by states; by virtue of their statuses, they prosecuted acts criminalized by international law itself, and those crimes were more extensive and more detailed than ever before.'[155]

The expansion of subjects of international law also entailed the extension to transnational corporations (TNCs). While historically TNCs have also played an important role (take for example the Dutch East Indies Company) international law initially glossed over their status. This can be best exemplified with the institution of diplomatic protection whereby states took the claims of their corporations 'as if' the corporations belonged to them.[156] This institution was historically important because TNCs' activities were not considered to fall into the realm of international law. However, from the 1960s onwards TNCs have been partially incorporated in the international legal order. For example, the International Centre for the Settlement of Disputes (ICSD) gave corporations the right to bring claims against states in the international arena. This trend has continued with the Bilateral Investment Treaties, which allow TNCs to have recourse and access to international arbitral bodies for investment disputes with states.

The emergence of these institutions and actors has deeply affected the substance and form of international law. As stated above, it is difficult to find an area that is left untouched by international law. An outcome of this normative expansion is the intrusion of international law into national affairs, which can at times be quite substantial. One extreme instance of this type of intrusion is the administering of territories by IOs, as in the case of Kosovo. While historically there have been cases of territories being governed by another state (e.g. the mandate system during the League of Nations) these mandates can now be taken directly by IOs rather than states. During the Kosovo conflict, the UN and the EU

[154] E.g., Theodor Meron, *The Humanization of International Law* (Martinus Nijhoff 2006); Ruti G Teitel, *Humanity's Law* (Oxford University Press 2011)
[155] Cogan 347
[156] On the 'as if' nature of diplomatic protection see Annemarieke Vermeer-Künzli, 'As If: The Legal Fiction in Diplomatic Protection' (2007) 18 EJIL 37

administered the territory and organized the administration through United Nations Interim Administration Mission in Kosovo (UNMIK). Another instance in which international organizations took over such important role is East Timor after its independence from Indonesia. In both cases, the authority was vested in international organizations rather than in particular states.

The structural changes affecting international law have also affected its 'sources.' To begin with, treaties, besides their considerable expansion, are now of a different nature. One of the most important aspects in the evolution of treaties is the rise of multilateral treaties that regulate collective matters such as environmental or security issues. There has also been a shift in how provisions are worded. As Jacob K. Cogan notices, during much of the twentieth century, the provisions of treaties were quite broad. In particular, there used to be a deferral to states in pursuing (or not) the objectives of treaties. Nowadays there is typically less deferment and mediation. Instead, the obligations established by contemporary treaties

> are much more detailed – the individual duties are more elaborately stated, their elements are more specific, the forms of liability … are broader, the sanctions to be imposed by states are more precise and harsher, and the obligation of states to elaborate and apply the law clearer.[157]

As a result of this hardening and amplification of obligations, 'the discretion traditionally allowed to states by international law in the elaboration and application of international directives has narrowed substantially in many respects from what had been the norm.'[158]

Connected to the changing nature of conventional sources of international law, we also encounter so-called 'soft law.' Although the name itself is somewhat paradoxical,[159] it is used in distinction to the usual sources of international law, as presented in article 38 of the ICJ statute. The latter is considered 'hard law,' which comprises 'legally binding obligations … that delegate authority for interpreting and implementing the law.'[160] The range of instruments that are considered to be soft law is quite broad.[161] Under this heading, we find

[157] Cogan 351
[158] Ibid
[159] Hartmut Hillgenberg, 'A Fresh Look at Soft Law' (1999) 10 EJIL 499, 500
[160] Kenneth W Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance' (2000) 54 IO 421, 421.
[161] Christine M Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38 International and Comparative Law Quarterly 850, 850

codes of conduct, standards, principles, guidelines, recommendations, etc. Each of those can be general and abstract, like a set of regulating principles, or quite concrete.[162] The most distinguishable feature of soft law in comparison to conventional law, as the name suggests, is that it is not binding. There are normative commitments but these are not explicitly approved or treated as conventional law.[163] Several arguments have been put forth in order to explain the rise of soft law, the most widespread of which is related to economic-based reasoning. Soft law is deemed to be 'cheaper and easier to achieve … [and] easier to breach with impunity.'[164] Hard law on the contrary, while it 'reduces transaction costs and strengthens the credibility of commitments', is very costly to negotiate[165] due to the difficulties of reaching an agreement. Soft law thus serves as an alternative for states in certain political circumstances. As Sir Joseph Gold has posited, '[s]oft law can overcome deadlocks in the relations of states that result from economic or political differences among them when efforts at firmer solutions have been unavailing.'[166]

An area which, due to its contentious status, has seen a proliferation of soft law is international environmental law. The Convention on Biological Diversity (CBD), for example, mostly entails nonbinding agreements. The CBD was adopted by states in order to protect and improve the biological diversity of the Earth. The Conference of the Parties (COP), which is the main body composed of the states that have ratified the treaty, is in charge of reviewing the process and implementing the objectives behind the CBD. However, the COP does not have the authority to produce legally binding resolutions.[167] Instead, the COP typically produces a series of guidelines, for example the recent code of conduct regarding the protection of biodiversity in relation to the protection and furthering of indigenous

[162] Ibid 852

[163] There are other soft-law sources that have origins in conventional law but, because of their legal status, they do not have the 'alleged' force of hard law. Thus, General Assembly resolutions have been a source of contention over their status. Their resolutions are not binding, even though the authority to issue resolutions is based on a treaty. Even treaties themselves might not be 'hard' because, even though they are formally created as the VCLT dictates, there are no rights and obligations laid down in the treaty. See Richard R Baxter, 'International Law in "Her Infinite Variety"' (1980) 29 International and Comparative Law Quarterly 549

[164] Cutler 23

[165] Ibid

[166] Joseph Gold, 'Strengthening the Soft International Law of Exchange Arrangements' (1983) 77 AJIL 443, 443. A somewhat related point in favour of soft law has been raised by Fastenrath, who views soft law as necessary for hard law insofar as it provides the shared linguistic background from which divergent issues of interpretation can be overcome, see Ulrich Fastenrath, 'Relative Normativity in International Law' (1993) 4 EJIL 305

[167] Convention on Biological Diversity (5 June 1992), 1760 UNTS 79; 31 ILM 818 (1992), Article 23 (4) c) – f).

people.[168] In sum, soft law has become a novel type of regulation which, due to its distinct status, gives rise to entirely new forms of relations between states and other international actors.[169]

Soft law represents what scholars have regarded as the deformalization of international law. With the increasing verticalization (or hierarchization) of international law we also find the opposite tendencies.[170] While classical international law rested on the idea of horizontal law, whereby all norms were treated at the same normative level, now there is considerable differentiation among international law norms, some of them having priority over others.[171] An instantiation of such differentiation is article 103 of the UN Charter, which states explicitly that the obligations laid down in the Charter have precedence over other types of obligations. This precept departs from traditional rules regarding conflicts between norms, which are based on temporality or on an attempt to reconcile them. Another instance of the verticalization of international law, which has had an even more profound effect on the field of international law than article 103, is the appearance of *Jus Cogens* norms. The idea of peremptory norms represents a radical rupture with the classical conception because it entails the existence of general international law norms that cannot be derogated and that are binding for all actors.

II.3.b. In the Shadow of International Law: Transnational Law

While much has changed within international law, it would be misguided to limit our attention to its boundaries. We already noted that the effects of globalization on law are

[168] See Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessments regarding Developments Proposed to Take Place on, or which are likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities, included in COP Decision VII/16, para. F, Annex, UN Doc. UNEP/CBD/COP/7/21.

[169] Oana A Ştefan, 'European Competition Soft Law in European Courts: A Matter of Hard Principles?' (2008) 14 European Law Journal 753

[170] On deformalization see e.g. Jean d'Aspremont, 'The Politics of Deformalization in International Law' (2011) 3 Goettingen Journal of International Law 503

[171] There is also the critical issue of principles constituting the international legal order and which do exist without the acceptance of states without the risk of entering in a continuous regress circle. This has been an issue highly analysed by scholars such as Koskenniemi. While the criticism about the limits of consensus as an explanation of the existence of international law has analytical and historical force, I accept the characterization of classical international law for narrative purposes. See Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument (Reissue with a New Epilogue)* (Cambridge University Press 2006). For a criticism of the rise of differentiated normativity see Prosper Weil, 'Towards Relative Normativity in International Law' (1983) 77 AJIL 413

multifaceted and not limited to any specific field. As Santos has vividly argued, we live in conditions of interlegality. In his own words,

> we live in a time of porous legality or legal porosity, of multiple networks of legal orders forcing us to constant transitions and trespassing. Our legal life is constituted by an intersection of different legal orders, that is by *interlegality.*[172]

The underlying point, and one worth repeating, is that legal life is not only administered through clearly identified domains, such as the conventional divide between national and international law, but rather in terms of a 'densely interconnected continuity.'[173] What we observe are multiple processes that may be irregular, discontinuous, or even contradictory, but which involve 'a plurality of regulatory orders, legal forms, and agents or subjects of the law.'[174] As Berman asserts, we live in multiple normative communities where law 'is constantly constructed through the contest of these various norm-generating communities.'[175] A by now archetypical example of these dynamics is the *Yahoo* case, where a French court, the Tribunal de Grande Instance de Paris, ordered the US based company to bar French citizens from the auction of Nazi memorabilia and Holocaust denial material because it violated French law. Yahoo replied that, due to the fact that Yahoo was a US company dealing with material uploaded in the US, it was protected by the First Amendment of the US Constitution and the tribunal had no jurisdiction.[176] The Kiobel saga is another good example of how different jurisdictions interplay with each other.[177]

In order to capture these dynamics that do not fit the classical model of the national/international divide, it has been argued that we are witnessing the construction of a legal space that is neither local nor global. It is not local because there is no demarcated geographical space the particular community falls into; it is not global because the reach does not go beyond the particular community. Instead, what we observe is 'the emergence of forces and institutions not founded on the state system though they are constrained by

[172] Boaventura de Sousa Santos, 'Law: A Map of Misreading. Toward a Postmodern Conception of Law' (1987) 14 Journal of Law and Society 279, 297-300
[173] Walker 13; Cutler 24
[174] Cutler 20
[175] Paul S Berman, 'Global Legal Pluralism' (2006) 80 Southern California Law Review 1155, 1158
[176] Tribunal de Grande Instance De Paris, May 22, 2000, Ordonnance de refere, UEJF et Licra c/ Yahoo! Inc. et Yahoo France. (Available at: http://www.juriscom.net/txt/jurisfr/cti/tgiparis20000522.htm).
[177] For an insightful account see Philip Liste, 'Transnational Human Rights Litigation and Territorialized Knowledge: Kiobel and the 'Politics of Space'' (2014) 5 Transnational Legal Theory 1

and simultaneously transcend it in specific ways.'[178] In sum, we are operating in a realm of transnational law.[179] The concept was coined by Philip Jessup a little more than half a century ago. He noticed that the view of the normative world through the lens of international law was insufficient, incomplete, and that 'individuals, corporations, states, organizations of states, or other groups' had a role neglected by statist approaches.[180] He aimed to capture this diversity with the idea of transnational law. He defined it as 'all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into' into our conventional normative framework.[181] The last part of the quote is key as it captures those elements that go beyond the traditional typologies. The suggestiveness of the prefix 'trans-' is picked up by Craig Scott, who posits that '[t]rans-' brings with itself 'a serious polyvocality built into it [which] opens rather fecund possibilities for the kinds of legal relationships or structures that count as being trans-national.'[182] At the same time, one needs to be attentive to the limitations of Jessup's definition. For instance, his understanding of transnational law seems to suggest that only occurrences that physically take place in more than one jurisdiction belong to the transnational sphere. The idea is that transnational law is concerned with those 'legal phenomena … that affect or have the power to affect behaviors beyond a single state border.'[183] This ignores the fact that there are issues deemed transnational, even though they do not occur in more than one jurisdiction but nevertheless have been constructed as transnational.[184] Relatedly, it seems intuitive that the idea of transnational law should cover events or actions that take place within one jurisdiction but where the relevant actors have roots in and connections to other jurisdictions.[185] This is something that evades Jessup's original definition. Despite such limitations, Jessup's definition constitutes a vital starting point of debate and was prophetic of the sweeping changes that would take place in the following decades.

[178] Sklair 35
[179] Craig Scott, ''Transnational Law' as Proto-Concept: Three Conceptions' (2009) 10 German Law Journal 877
[180] Philip C Jessup, *Transnational Law* (Yale University Press 1956) 3
[181] Ibid 136
[182] Scott suggests, *inter alia*, law across states, law beyond states, law through states, see Scott 866
[183] Carrie Menkel-Meadow, 'Why and How to Study Transnational Law' (2011) 1 UC Irvine Law Review 97, 104
[184] Scott 864-865
[185] Ibid 865

In sum, transnational law, first and foremost, has to be understood as an analytical concept that describes the enmeshment of the different normative settings regulating and ordaining a multiplicity of areas or issues. The distinctiveness of transnational law is that conventional normative boundaries are being erased and re-constructed. Typical classifications, such as public and private law or hard and soft law, are becoming more difficult to sustain.[186] In consequence, the notion of transnational law can be regarded as an umbrella concept trying to capture a multifaceted and complex framework of legal relationships. In this regard, Santos identifies seven types of transnational legal relations: transnationalized state law, the law of regional integration, *lex mercatoria*, the law of people on the move, transnationalized infrastate law, cosmopolitan law, and *jus humanitas,* or the common heritage of kind.[187] This typology is not exhaustive and there exist alternative classifications. Nevertheless, it serves to illustrate the sheer diversity of phenomena that fall into the realm of transnational law. Likewise, as becomes clear from Santos' typology, both the normative sources and the range of subjects acting in this legal space are highly varied.[188]

This diversity of transnational law is reflected both in the public and in the private sphere. Despite some earlier accounts which posited that the state is receding or losing influence in light of the increasing importance of non-state actors,[189] it is widely acknowledged that the state has played a decisive role in furthering the rise of transnational law.[190] The view of the state as a homogeneous unit, a stylized idea aided by international law's normative structure, has been shattered. Instead, it is acknowledged that states, in order to address a variety of challenges, have created and nurtured a dense network of transnational relations, each of which dealing with different issues. The state, in other words, has become disaggregated. The most prominent account of this development has been provided by Anne-Marie Slaughter, especially in her insightful *A New World Order*.[191] She observes that

[186] Peer Zumbansen, 'Defining the Space of Transnational Law: Legal Theory, Global Governance, and Legal Pluralism' (2012) 21 Transnational Law & Contemporary Problems 305

[187] Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* 265

[188] Menkel-Meadow 110

[189] Susan Strange, *The Retreat of the State: The Diffusion of Power in the World Economy* (Cambridge university press 1996)

[190] Kal Raustiala, 'States, Ngos, and International Environmental Institutions' 41 International Studies Quarterly 719

[191] Anne-Marie Slaughter, *A New World Order* (Princeton University Press 2004). Needless to say, there is an impressive array of literature on the matter. See, e.g., ; Kal Raustiala, 'The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law' (2002) 43 Virginia Journal of International Law 1; Pierre-Hugues Verdier, 'Transnational Regulatory Networks and Their Limits' (2009) 34

the different elements of the state, such as judges, civil servants, parliamentarians, ministers and so forth, are embedded in several transnational governmental networks (TGNs) in which they negotiate and regulate various issues. The G-20 is an instantiation of such transnational governmental networks. The G-20 is composed of the finance ministers and central bank governors from 19 countries and the EU, dedicated to coordinating and organizing the world economy.[192] Another example of an influential transnational governmental network is the Basel Committee on Banking Supervision (BCBS). Established in 1974, the BCBS is composed of bureaucrats from regulatory agencies and central banks. It does not have any formal transnational regulatory authority but its role in banking regulation has been crucial for the governance of the global financial system.[193] Slaughter argues that TGNs have three main functions: shared information and best practices, coordination and harmonization of policy, and the facilitation of solutions to the enforcement of transnational problems.

Beyond the public sphere, a plethora of other actors have sprung up and taken a clear and decisive role in the governance of the world. Normally treated under the label of non-state actors, the term obfuscates the immense diversity of actors operating transnationally or internationally. We encounter TNCs, Non-Governmental Organizations (NGOs), private individuals, law firms, financial firms, banks, private bodies, public-private bodies, labour unions and so forth, participating, overlapping, and clashing in a variety of networks and bodies.[194] As an example, consider the International Coral Reef Initiative (ICRI), which is dedicated to the protection of the marine ecosystem. Established in 1994, ICRI represents an enterprise loosely composed of governments, NGOs, international development banks, the private sector, international organizations and scientific associations. It does not have a clear formal structure. Instead, it is composed of a variety of informal bodies such as

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Yale J Int'l L 113; Claire Kelly and Sungjoon Cho, 'Promises and Perils of New Global Governance: A Case of the G20' 12 Chicago Journal of International Law 491. Both Raustiala and Choo and Kelly's articles notice that despite the recent trend of transnational governmental networks, they are not a new phenomenon in historical terms.

[192] For a more detailed discussion see Kelly and Cho

[193] Kern Alexander, Rahul Dhumale and John Eatwell, *Global Governance of Financial Systems: The International Regulation of Systemic Risk* (Oxford University Press 2006)

[194] This is not to imply that these actors do not have any influence on the realm of international law. As has been widely noted and acknowledged, non-state actors have had an enormous influence on the development and impact of international law and in how certain treaties have come into being. The distinction I make here is analytical and for the purposes of clarity. See as a good overview Andrea Bianchi (ed) *Non-State Actors and International Law* (Ashgate 2009)

working groups, ad hoc committees or discussion groups. As Dimitrov states, 'the ICRI is neither an international governance structure nor a policy-making body … this loose institution is an informal network of interested parties, an open forum for like-minded political actors to discuss coral reef issues, share information, promote, research, identify priories and facilitate policy action.'[195] The ICRI thus represents one example among many of the novel forms of transnational actors, each of which is unique in its structure, scope and objectives.

The rise of non-state actors is also related to the rise of private forms of transnational regulation. Take for instance the Forest Stewardship Council (FSC), which is heralded as 'the most important example of increasingly successful certification systems that are transforming the major industries around the world.'[196] The organization is private and its composition is highly heterogeneous: NGOs, corporations specialized in forestry, scientific institutions, and individuals. The purpose of the FSC is the creation of a trustworthy system that allows for the identification of well-managed forests, serving as a reliable source of sustainable timber products. In order to achieve its objectives the FSC 'administers a self-elaborated third-party certification system on wood and timber products that serves to verify whether products originate from sustainable forestry,' without the need for public regulatory elements.[197]

The existence of private organizations like the FSC is indicative of their increasing importance for normatively ordering transnational issues.[198] As Philipp Pattberg highlights,

> [t]he emerging private institutions are no longer primarily concerned with influencing the international policy cycle, but increasingly begin to agree upon, implement, and monitor different forms of regulation, including general codes of conduct, management standards, and certified product labels. As a result, the impact of private actors on world politics has changed as well. They

[195] Radoslav S Dimitrov, 'International Coral Reef Initiative' in Thomas Hale and David Held (eds), *Handbook of Transnational Governance* (Polity 2011) 185

[196] Michael E Conroy, *Branded: How the Certification Revolution Is Transforming Global Corporations* (New Society Publishers 2007) 95

[197] Philipp Pattberg, 'Forest Stewardship Council' in Thomas Hale and David Held (eds), *Handbook of Transnational Governance* (Polity 2011) 266

[198] Fabrizio Cafaggi, 'New Foundations of Transnational Private Regulation' (2011) 38 Journal of law and society 20, 21

> have gone from being an intervening variable of the international system to establishing rules that exist mainly outside of it.[199]

As this paragraph hints at, alongside the rise of the influence of private actors, there has been a substantive expansion of legal normativity beyond the state. The paradigmatic case is *Lex Mercatoria*, whose origins can be traced back to the Middle Ages. It was developed by merchants in order to create 'a neutral, stable, and predictable legal framework to structure their commercial relations and to resolve disputes in a neutral forum.'[200] There have been various controversies around the status of *lex mercatoria,* especially regarding the question of whether, in its current form, it is independent from the state. Nevertheless, it is widely accepted that there has been a renaissance of *lex mercatoria,* during which transnational commercial rules have been developed without state interference.[201] The veritable explosion of normativity from private sources in the transnational arena often takes the form of 'voluntary statements of principles, model laws, and optional codes.'[202] The status of those instruments has been hotly debated, where the controversies often resemble those evolving around soft law, as discussed above.

Alongside the 'pure' private type of normative ordering, we also encounter mixtures of public and private normative instruments, for instance in the form of the so-called regulatory contract. This type of contract appears most prominently in the context of production chains and their regulation. Here, private contracts between producers and distributers, which are subjected to public laws, incorporate soft law instruments, such as codes of conduct, which all contracting partners need to take into account. Regulatory contracts thus exemplify how a private relationship, formalized by a bilateral contract, can be both governed by public law and, at the same time, include private soft law elements.[203]

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[199] Philipp Pattberg, 'What Role for Private Rule-Making in Global Environmental Governance? Analysing the Forest Stewardship Council (Fsc)' (2005) 5 International Environmental Agreements: Politics, Law and Economics 175, 176

[200] See Stefan W Schill, 'Lex Mercatoria', in: *Max Planck Encyclopedia of Public International Law* (OUP, 2011), available at: http://opil.ouplaw.com/home/EPIL (last accessed 29 April 2015), para 6

[201] Rebecca Schmidt, 'Public-Private Cooperation in Transnational Regulation' (PhD, European University Institute 2015) 23; L Yves Fortier, 'The New, New Lex Mercatoria, or, Back to the Future' (2001) 17 Arbitration International 121

[202] Cutler 30

[203] Fabrizio Cafaggi, 'Regulatory Functions of Transnational Commercial Contracts: New Architectures, The' (2013) 36 Fordham International Law Journal 1557

II.4. What has all this to do with legitimacy?

The transformations presented here have not only changed our descriptive account of international law but have also raised deep normative issues. For Claire A. Cutler, the renaissance of private authority in recent decades and the concomitant changes in how social relations are ordered normatively have created a dissociation between theory and praxis. The assumption of the Westphalian paradigm of the sovereign state as the most important source of authority is no longer applicable in light of the changed realities.[204] Anne Peters, for example, posits that national constitutions are being de-nationalized and that there is a transfer of authority from the national to the international realm.[205] This view hints at the widespread and recurrent concern about 'the inadequacy of international law in changing conditions,' and regarding the basis of its legitimacy.[206]

The normative concerns raised in relation to the transformations of international law can be better understood by returning to the three phases of international law, outlined in the beginning of the chapter. We saw that classical international law is based on the idea of consent. Consent has also been regarded as the main cornerstone of the legitimacy of the normative structure of international law. Because states are sovereign, nothing can be imposed on them against their will.[207] As Weiler remarks, the idea of consent is

> based on the legal premise, even if at times fiction, that the collectivity has neither the power nor, certainly, the authority to impose its will on individual subjects other than through their specific or systemic consent, express or implied. Put differently, it is based on the premise, an extreme form of which claims that there is no collectivity with normative power, and, in less extreme form claims that even if there is a collectivity, there is an inherent power of opting out.[208]

The authority of international law is thus derived from the approval of states and, likewise, the legitimacy of an international rule is based on the consent of the states to which it

[204] A Claire Cutler, 'Critical Reflections on the Westphalian Assumptions of International Law and Organization: A Crisis of Legitimacy' (2001) 27 Review of International Studies 133
[205] Anne Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures' (2006) 19 LJIL 579
[206] Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford University Press 2007) 50
[207] On the relationship between sovereignty and consent see Terry Nardin, *Law, Morality, and the Relations of States* (Princeton University Press 1983) 210-220
[208] Weiler 548

applies.[209] Similarly, the legitimacy of an international organization is grounded on the approval for its creation by states, which typically entails that states, through different organs and procedures, remain in control of the organization.[210]

In light of the normative and institutional expansion of international law, state consent as the basis of legitimacy is regarded increasingly critically. The consent of the state as the criterion for legitimacy seemed appropriate when treaties, either bilateral or multilateral, were considerably simpler and their execution depended entirely on states. The considerable expansion of international law's regulatory reach and the dissolution of the national/international divide created a new reality. This is well captured by Kingsbury et al when putting forth their Global Administrative Law (GAL) program. As they argue,

> the rise of regulatory programs at the global level and their infusion into domestic counterparts means that the decisions of domestic administrators are increasingly constrained by substantive and procedural norms established at the global level; the formal need for domestic implementation thus no longer provides for meaningful independence of the domestic from the international realm. At the same time, the global administrative bodies making those decisions in some cases enjoy too much de facto independence and discretion to be regarded as mere agents of states.[211]

This evolution of international law represents a gradual weakening of state consent, which is noticeable in many areas, such as decision-making procedures of IOs, certain forms of treaty-making, or third-party effects of treaties.[212] As a consequence, it has been argued that the 'chain of legitimacy from the national to the international level established at least in part by the general consent of states … is attenuated.'[213] Likewise, the daily operations of

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[209] As has been clearly established, this idea of consent derives from liberal theory. See Fernando R Teson, 'International Obligation and the Theory of Hypothetical Consent' (1990) 15 Yale J Int'l L 84, 90; Anthony Carty, 'Critical International Law: Recent Trends in the Theory of International Law' (1991) 2 EJIL 66, 66; Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument (Reissue with a New Epilogue)*.

[210] There is a further distinction to be made in relation with consent and IOs. On one hand, we find consent to the treaty setting up the IO. On the other hand, there is the particular consent to particular acts of the IO or to particular modifications of the treaty. See Bodansky 604; Jürgen Friedrich, *International Environmental "Soft Law": The Functions and Limits of Nonbinding Instruments in International Environmental Governance and the Law* (Springer-Verlag 2013) 382-383

[211] Benedict Kingsbury, Nico Krisch and Richard B Stewart, 'The Emergence of Global Administrative Law' (2005) 68 Law and contemporary problems 15, 26

[212] Christian Tomuschat, 'Obligations Arising for States without or against Their Will' (1993) 241 Recueil Des Cours 195, 241-352; Bruno Simma, 'From Bilateralism to Community Interest in International Law' 250 Recueil Des Cours 217, 322-375; Malgosia Fitzmaurice, 'Consent to Be Bound-Anything New under the Sun?' (2005) 74 Nordic Journal of International Law 483; Friedrich 388-389; Laurence R Helfer, 'Nonconsensual International Lawmaking' [2008] 1 University of Illinois law review 71

[213] Friedrich 386

IOs and certain treaty bodies, which act increasingly autonomously, tend to fall outside of the traditional conception of consent. It has been widely acknowledged that IOs do not only act as agents for their member states, but also act according to their own objectives and interests, which might depart considerably from those of the states.[214] Part of this discretion stems from the fact that 'a number of significant institutional activities are not designed, elaborated and decided upon at the highest political levels, but at lower political levels or by civil servants of the [IOs'] secretariat.'[215] Richard Stewart also emphasizes how these new international bodies and institutions slip away from the states' radar. As he puts it,

> [g]lobal regulatory bodies typically exercise significant discretionary decision-making powers. Such discretion is inherent in the creation—whether at the domestic, supranational, or global level—of a special-purpose entity with responsibility for regulating a given sector of activity. In such circumstances, it is not feasible or desirable for the principal establishing the administrative body to lay down detailed instructions for the agent's decisions in advance. The principal's ability to monitor and evaluate the agent's performance and to take necessary corrective action ex post is inherently limited because these tasks require detailed, continuously updated knowledge and experience that the principal does not have. As a result, the agent enjoys a greater or lesser degree of free reign or "slack," including discretion to adopt policies contrary to the goals and interests of the principal.[216]

The weakening of the principle of state consent is even more striking when we move to transnational law. As outlined previously, here we find 'global administrative bodies include formal intergovernmental regulatory bodies operating with reference to an international intergovernmental regime, hybrid public-private regulatory bodies, and some private regulatory bodies exercising transnational governance functions of particular public significance.'[217] The way these bodies operate is quite diverse and, most importantly, often independent from particular states' direct or indirect consent.

> These administrative authorities issue regulatory rules, standards, and decisions. Many of them adjudicate or make other law-based determinations of particular matters. They also gather and disseminate information; engage in consultations and deliberations; promote, monitor, and, in some

[214] See Michael Barnett and Martha Finnemore, *Rules for the World: International Organizations in Global Politics* (Cornell University Press 2004); José E Alvarez, *International Organizations as Law-Makers* (Oxford University Press 2005); Richard Collins and Nigel D White, *International Organizations and the Idea of Autonomy: Institutional Independence in the International Legal Order* (Routledge 2011)
[215] Friedrich 391
[216] Richard B Stewart, 'Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness' (2014) 108 AJIL 211, 219
[217] Kingsbury, Krisch and Stewart 17

> cases, supervise implementation of their regulatory norms; and take other steps to promote their adoption.[218]

In sum, the idea of consent as the legitimizing basis is no longer congruent with the realities of the international and transnational legal landscape. The actions that can be pursued within the international legal order, especially through IOs, make the idea of a legal framework based on mutual agreements obsolete. As a consequence, it has been posited that it can no longer be argued that 'there are no real democracy or legitimacy deficits in global administrative governance because global regulatory bodies answer to states, and the governments of those states answer to their voters and courts.'[219] Instead, the bread and butter of international law is nowadays less and less the 'stuff of effective democratic control by state Institutions.'[220]

A separate issue that arises in the context of the original idea of consent is that it conflates the government with the state. When a government consented to a particular norm, the underlying assumption was that the state as a whole was bound to it. However, with the increasing reach of international law,

> most international normativity is as contested socially as domestic normativity. The result of international law continuing to conflate government with State is troubling: You take obedience claim of international law and couple it with the conflation of government and State which international law posits and you get nothing more than a monstrous empowerment of the executive branch at the expense of other political estates or an empowerment of those internal special interest who have a better capture of the executive branch.[221]

With the decline of the importance of consent, this problem actually becomes exacerbated. When dealing with new institutions like hybrid public-private partnerships and purely private bodies, the issue of accountability and transparency arises. These institutions often operate in the shadow of the law or in the gaps between areas of law. For instance, *lex mercatoria,* despite being one of the main constituents of the 'juridical conditions of modern capitalism,' until recently has been virtually invisible from an international legal

[218] Stewart 217
[219] Kingsbury, Krisch and Stewart 26
[220] Weiler 560
[221] Ibid 558. For a similar point see Eyal Benvenisti and George W Downs, 'The Empire's New Clothes: Political Economy and the Fragmentation of International Law' (2007) 60 Stanford Law Review 595

point of view.[222] As a consequence of this development, authority has become increasingly privatized and has moved further and further away from the public domain. As Philip Cerny insightfully notes in relation to the changing tendencies of globalization and the rise of new regulatory bodies,

> [g]lobalization leads to a growing disjunction between the democratic, constitutional, and social aspirations of people … and increasingly problematic potential for collective action through state political processes… Indeed, the study of international regimes is expanding beyond intergovernmental institutions or public entities *per se* toward "private regimes" as critical regulatory machines. New nodes of private quasi-public economic power are crystallizing that, in their own partial domains, are in effect more sovereign than the state.[223]

In light of these new conditions, the need to revisit questions of legitimacy has become impossible to ignore. In the debate about these transformations, consent no longer plays any significant role or it becomes relegated. Instead, it is necessary to devise new normative solutions that can account for the fundamental transformation of international law and aim at making the emerging bodies and institutions more accountable and more democratic.[224]

II.5. Conclusion

The purpose of this chapter has been to present an overview of the transformations the international legal order has undergone in recent decades. The importance of presenting such an overview is related to the current rise of discourses concerning legitimacy in the international law literature. This chapter began with a discussion of globalization, providing the background for making intelligible the changes that international law has undergone. The chapter described how international law has evolved from a system or rules and norms centred on the relationship between states to a normatively dense legal framework, covering areas that were previously alien to international law. Likewise, there has been an emergence of legal and social processes that do not fit into the classical national/international distinction which have been subsumed under the label of transnational law. We have highlighted the rise of new sources of normativity and the

[222] Cutler, 'Critical Reflections on the Westphalian Assumptions of International Law and Organization: A Crisis of Legitimacy' 77
[223] Philip G Cerny, 'Globalization and the Changing Logic of Collective Action' (1995) 49 IO 595, 618
[224] See e.g. Charlesworth and Coicaud; Wolfrum and Röben

emergence of new types of authorities that often overcome the public-private divide. In light of these transformations, we saw that conventional means of assessing legitimacy in international law, in particular assessing levels of state consent, are no longer adequate. In consequence, it has been argued in the literature that international law needs to provide new means for making international law normatively acceptable.

III – International Law and Legitimacy: Accounts

III.1. Introduction

The previous chapter was centred on the description of the changes that have motivated the rise of discourses about legitimacy in the international law literature. It was argued that the transformations of the international legal order driven by the various processes of globalization have profoundly modified traditional structures of authority. For many, this situation strongly suggests that a new basis of legitimacy is needed for international law. The present chapter provides a description and analysis of such accounts of legitimacy in the international law literature.

As noted above, legitimacy is a contested and intricate concept, which in turn refers to other complex concepts such as authority, power and democracy. As a result, there exist multiple accounts of legitimacy following different approaches and focusing on different aspects. Those accounts tend to be fragmented, as many of them refer to legitimacy as a very broad category while their focus is on other, more particular, issues. For example, discussions about accountability of international organizations emphasise the importance of the issue and typically link it to legitimacy; however, they rarely touch on conceptual issues of legitimacy. Other accounts delve into the concept but mostly give general overviews.[225] Beyond those fragmented approaches to legitimacy, there have been attempts in the literature to provide a more thorough and well-developed account of legitimacy. I will focus on these attempts as they explicitly put forth the assumptions and arguments underpinning their conception of legitimacy.

More specifically, I will discuss four systematic accounts, two of which are sociological with some normative considerations, while the other two are purely normative. Beginning with

[225] See Daniel Bodansky, 'The Concept of Legitimacy in International Law' in Rüdiger Wolfrum and Volker Röben (eds), *Legitimacy in International Law* (Springer 2008); Thomas, 'The Uses and Abuses of Legitimacy in International Law'

the former, I will first focus on Franck's account of legitimacy, which is the most prominent in international law. Undoubtedly, Franck's importance is in large part due to reasons of timing, as it was the first full-fledged contemporary account dealing with legitimacy, and due to Franck's position in the field, him being at the center of mainstream international law. Franck's analysis of legitimacy was presented in a series of several articles, summarized in the 1990 book *The Power of Legitimacy Among Nations*. Subsequent writings, such as *Fairness in International Law*, did not substantially alter his account, which is why I focus on the original book with some occasional reference to other articles. The second account I will discuss is Brunnée and Toope's more recent work *Legitimacy and Legality in International Law*. Drawing on constructivism and on the legal theory of Leon Fuller, they put forth a highly stimulating account of legitimacy. Although there is some overlap with Franck's analysis, Brunnée and Toope's account discusses in more detail some of the issues Franck left untreated or glossed over.

Both accounts are sociological but have some normative connotations; they straddle the line between the descriptive and the normative. In particular, they not only provide an explanatory justification of the role of legitimacy but, from their analysis, they also want to suggest how international law should be. Franck explicitly argues that his study of legitimacy in international law allows him to describe 'reality' and to explain why some international rules have the pull towards compliance while others do not. He posits that studying those norms that tend to be followed might help to produce more compliance in international law more generally.[226] Brunnée and Toope take a similar stance. They aim to show that compliance with particular rules is the result of certain normative considerations present in the practices of international law. By emphasizing those normative practices, their account aspires to 'provide … concrete guidance for practice that would strengthen international law,' which includes the outlining of 'a framework to assist international lawyers and policymakers in identifying the most promising avenues for normative and institutional development.'[227]

Moving to the purely normative accounts, I first focus on international constitutionalism. Although international constitutionalism is multifaceted, the majority of those scholars

[226] Franck, *The Power of Legitimacy among Nations*
[227] Brunnée and Toope 5

following a constitutionalist approach tend to be liberal-cosmopolitanists. Accordingly, there is some convergence among their accounts of what a legitimate order of international law would be. I will focus here on Kumm's account. Although the international constitutional literature frequently emphasizes the importance of legitimacy, Kumm's analysis of legitimacy is one of the rare occasions in which legitimacy is discussed in detail and systematically. Lastly, I will present Buchanan's account of legitimacy, which is purely philosophical. Buchanan makes one of the first attempts to approach international law and issues of morality from an analytic philosophical viewpoint.

Before presenting the four accounts, a comment is in order. As will be noticed, there seems to be a divergence between what the accounts analyse and the matters discussed in the earlier chapter. In the preceding chapter, I posited that the rise of legitimacy within international law is closely related to the changes that the international legal order has undergone. Nevertheless, some of the accounts presented here do not touch on these transformations or focus solely on the compliance with international legal norms more generally. For example, Franck's account, appearing in 1990, was written before discussions about the transformation of international law became prominent. One reason for this disconnect is that Franck's, and the other three accounts, aspire to provide a general theory of legitimacy within international law. Although, the accounts are conscious of the differences between the domestic and the international arena, they are of sufficient generality such that they can do so without entering into those differences. Nevertheless, it is possible to connect the recent changes in international law to those accounts. Furthermore, as a result of the rising interest in legitimacy, they have become focal points from which further discussions about legitimacy and international law have emerged. Thus, even though parts of the theories presented here are not directly related to the transformations the international legal order is undergoing, they play an important role in structuring the debates in the literature concerning legitimacy and the development of international law.

It will also be noticed that the four accounts presented here have a liberal flavour. This should not be surprising. Although the etymology of legitimacy can be traced all the way back to the Roman Empire, questions of legitimacy gained significance with the Enlightenment. More precisely, while ideas about the justification of authority have thrived

throughout history, the secularization of the Western world made legitimacy central, as Rodney Barker suggests.[228] As a result of the 'desacralization' of the world and the concomitant recognition that people create their own institutions, an automatic justification through divine command was no longer available. Accordingly,

> [t]he question of why people should obey the modern state is different from the question of why, in earlier, times, they might have been obliged to obey the law or the king, and an order which is both explained and justified by divine law is replaced by one which, in so far as it is man made, is less easy either to explain or to justify.[229]

Under these conditions, the social contract tradition – predominantly liberal – sparked interest in producing an account and justification of political power in which the consent of the rational man had a fundamental role. In light of this, it follows naturally that scholars of a liberal bent have shown a larger preoccupation with themes of consent and legitimacy than others.[230]

III.2. Franck's The Power of Legitimacy Among Nations

Franck's book *The Power of Legitimacy Among Nations* represents the culmination of a series of articles addressing the role of legitimacy within international law. The book synthetized and more systematically put forth Franck's view on the matter. Franck's interest in understanding legitimacy within the international legal order is based on the classical

[228] Barker 6; while not following an identical line of argumentation, Mulligan offers a somewhat similar argument though he does not emphasize as much as Barker the desacralization point, see Mulligan 356-362

[229] Barker 7

[230] This is not to suggest that other traditions have not paid attention to the issue. We have already mentioned Koskenniemi but Susan Marks has also touched, however briefly, on the matter, see Susan Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* (Oxford University Press 2003). Outside of international law the examination of legitimacy has come from many different angles. As John Griffiths has remarked in relation with sociology of law, '[m]any writers about law, beginning from startlingly different viewpoints, have supposed that law is important because of its "legitimacy,"' see John Griffiths, 'Is Law Important?' (1979) 54 New York University Law Review 339, 362. While still under the spell of the juridical model of sovereignty, their approach to legitimacy has differed. For scholars outside of the liberal tradition, legitimation becomes the crucial concept. They are interested in obedience and stability but they do look at this through the lenses of false consciousness and the role of elites and of law in reproducing social hierarchies and inequalities, see Austin Sarat, 'Authority, Anxiety, and Procedural Justice: Moving from Scientific Detachment to Critical Engagement' (1993) 27 Law & Society Review 647. Thus, there is the interest in consent and how actors come to believe in a certain social arrangement, but in an opposite way from that of the liberal tradition which begins with rational individuals giving their free and rational consent to a certain social arrangement. Besides that difference, one which is indubitably an important one, similar assumptions arise in relation with legitimacy.

questions of obligation and compliance and on the impact of international law on international relations: how is it possible that states follow international law when there is no central sovereign enforcing it? This has been a central question in the field since the rise of John Austin's conception of law.[231] The influence of Austin's conception and its implications for the standing of international law as a proper field of law has haunted international lawyers for a long period. Franck constructs his account of legitimacy against that background. He wants to demonstrate that there is an 'international rule system' different from mere international politics, which is sustained without the presence of a central sovereign.[232] His central hypothesis is that states '*habitually*' follow international rules because they perceive them to be legitimate.

Franck begins his account by presenting the various views on legitimacy within social and political theory. He divides the different views into three camps. The first camp treats legitimacy as a process. According to this view, a rule or law is legitimate whenever it has come into being through the appropriate formal procedure – legitimacy as legal validity.[233] Franck includes Weber under this heading. For the second camp, legitimacy encompasses both procedural and substantive elements. According to this perception of legitimacy, it not only matters 'how a ruler and a rule where chosen, but also … whether the rules made, and commands given, were considered in the light of all relevant data, both objective and attitudinal.'[234] Franck identifies Jürgen Habermas as the most representative scholar of this school of thought. The third camp focuses on normative outcomes – legitimacy as substantive justice. Here, Franck points, although not exclusively, to neo-Marxist philosophers. This group posits that, for a system to validate itself, it needs to 'be defensible

[231] Law as sovereign command.

[232] Franck distinguishes 'law' from 'rule.' The former, is based on the Austinian conception of law, while the latter is reserved for those norms that are not backed by the command of a sovereign. For him, however, both types of norms are law. As he puts it, '[i]n endorsing the definition distinction between a commitment enforceable at law and one which is not, it is not necessary also to embrace the Austinian concept of a coercive command as defining both the necessary *and sufficient* components of law,' see Franck, *The Power of Legitimacy among Nations* 35, 33-34. He also undertakes some disquisitions on Hart's account in order to differentiate municipal law from international law, which is treated as an international rule system. However, as Jose Alvarez remarks, Franck both misrepresents Hart's views and puts himself in a fragile position by attempting to argue that international law norms are not norms but rules, see Jose E Alvarez, 'Quest for Legitimacy: An Examination of the Power of Legitimacy among Nations by Thomas M. Franck' (1991) 24 New York University Journal of International Law & Policy 199

[233] Franck, *The Power of Legitimacy among Nations* 17

[234] Ibid

in terms of the equality, fairness, justice, and freedom which are realized by those commands.'[235]

Franck acknowledges that legitimacy is a broad concept, in particular that the use of legitimacy refers to 'many integral factors, which are related but different and which must be investigated by reference to different social data.'[236] He proposes the following definition of legitimacy:

> *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.*[237]

Franck subsequently identifies and describes four 'objective' properties attached to rules: determinacy, symbolic validation, coherence and adherence. He posits that 'to the extent a rule, or rule process, exhibits these four properties it will exert a strong pull on states to comply.' Conversely, it follows that '[t]o the extent that these properties are not present, the institution will be easier to ignore and the rule easier to avoid by a state tempted to pursue its short-term self-interest.'[238]

Before going into the details of those properties, Franck qualifies his account. Specifically, he admits that the proposed properties are not in themselves sufficient for providing a full account of why nations obey international rules. 'How rules are made,' Franck writes, 'interpreted, and applied is part of a dynamic expansive, and complex set of social phenomena.'[239] He equally adds that legitimacy is not and on/off property of rules. As he puts it, 'legitimacy is not merely a matter of assembling readily available ingredients and mixing them in the right proportions.'[240] Not only that, he argues that there is a high variability in levels of legitimacy between different rules and that the degree to which an international rule produces compliance depends on how much those properties appear in the particular rule.[241] Franck also posits that the idea of measuring the legitimacy of rules

[235] Ibid 18, footnote omitted
[236] Ibid
[237] The most he says is that those multiple criteria falling under legitimacy and which apply to national communities can be also adapted for the international community, ibid 19, 24
[238] Ibid 49
[239] Ibid
[240] Ibid 25
[241] Ibid 41-49

and institutions 'can only be sustained if there is a community which agrees upon and applies that standard.'[242] Accordingly, for Franck, the existence of a community is indispensable for the definition and the evaluation of legitimacy.[243] While it may not be the case that every rule of the international system is legitimate, Franck argues that the existence of a community allows for the possibility of issuing legitimate commands and for the enforcement of obligations on the different members of the community.[244] Let us now explain Franck's fourfold typology.

For Franck, determinacy refers to the extent to which the meaning of international rules are clearly identifiable.[245] There are two ways in which an international rule can achieve determinacy and, in consequence, a greater degree of legitimacy. First, determinacy requires textual clarity, meaning that the norm, linguistically speaking, clearly states the conduct that is or is not allowed. As a consequence, there should be no ambiguities over what is expected from actors and the norm should be easy to follow. Partially arguing against Wittgenstein's famous dictum that 'no course of action could be determined by a rule because every course of action can be made out to accord with the rule,'[246] Franck asserts that there are degrees of determinacy.[247] As an example of rules that are highly determinate and for which a high degree of rule-confirming behaviour, and consequently of legitimacy, can be identified, Franck mentions the jurisdiction of vessels on the high seas, territorial waters and ports, as established in the UN Convention on the Law of the Seas (UNCLOS).[248] Secondly, determinacy, according to Franck, can be achieved through a process of clarification. The idea is that a rule, despite being textually unclear or vague, can become determinate through a process of interpretation, undertaken by an authority or on a case-by-case basis.[249] For Franck, whether or not the clarifying process works will depend on whether the members of the international system perceive the process as legitimate. Hence, its success will depend on '*who*' is interpreting the rules, the '*pedigree*' of the

[242] Ibid 204
[243] Ibid
[244] Ibid
[245] Ibid 52
[246] Ludwig Wittgenstein, *Philosophical Investigations* (P.M.S. Hacker and J. Schulte eds, G.E.M. Anscombe, P.M.S. Hacker and J. Schulte trs, Fourth edn, Wiley 2010) para. 201
[247] Franck, *The Power of Legitimacy among Nations* 56. One could argue that Franck might have missed the point of Wittgenstein's remarks. For an analysis of the importance of Wittgenstein for law generally speaking see Dennis Patterson, *Law and Truth* (Oxford University Press 1999)
[248] Franck, *The Power of Legitimacy among Nations* 60
[249] Ibid 61

authority, and the '*coherence*' of the principles applied in the interpretation of the rule.[250] Franck further argues that rules, generally speaking, tend to move towards determinacy. As an example, he discusses the prohibition of the use of force in article 2(4) of the UN Charter. Franck argues that while before the introduction of the article the legality of war was based on whether it was regarded 'just' or 'unjust,' article 2(4) represents a step towards determination in the regulation of war because with the article the use of force as a first action is never acceptable.[251] In sum, through textual clarity or case-by-case clarification, a norm can gain determinacy and thus become more legitimate. Franck warns that determinacy is not a binary notion but can only be satisfied to varying degrees. In consequence, the level of legitimacy ascribed to the rule will vary accordingly.[252]

The second dimension of Franck's fourfold typology is symbolic validation. This aspect of legitimacy refers to the cultural and anthropological dimensions of law. Franck asserts that the ability to 'exert a pull to voluntary compliance' is based on the ability to communicate, not so much through content but in terms of authenticity: this can be 'the voluntary acknowledged authenticity of a rule or a rule-maker, or, sometimes the authenticity (validity) bestowed on a symbolic communication's recipient.'[253] In other words, the will to follow an authority might be based on a belief that in turn might be based on some tradition or other factors. Symbolic validation then takes place when a 'signal is used as cue to elicit compliance with a command.'[254] Franck illustrates his point with the example of singing the national anthem. Through its singing and through its visual realization, the national anthem reinforces the relationship between the state and its citizens as well as their rights and duties. Franck clarifies his notion of symbolic validation with a detailed discussion of ritual and pedigree. Ritual is treated as a particular form of symbolic validation. It entails 'ceremonies, often mystical, which provide unenunciated reasons for compliance with the commands of persons and institutions.'[255] For Franck, a ritual

> serves to communicate and ratify the beliefs and values of the system. It reinforces the rules and authority structure of a community by embracing and involving an in-group and by excluding an out-

[250] Ibid
[251] Ibid 62
[252] Ibid 56
[253] Ibid 91
[254] Ibid 92
[255] Ibid

> group which cannot (or will not) share in, or understand, the symbolic communications code … It is thus a way of confirming common bonds and legitimizing not only a particular action or rule, but the system itself, its entire set of norms and the distribution of roles and authority.[256]

Franck further discusses pedigree as another mode of symbolic validation. This notion relies on the idea of a 'deep rootedness' between the rule and the institution making the rule. In more precise terms, pedigree emphasizes 'the venerable historic and social origins and continuity of rule standards, and rule-making or rule-applying institutions … It links rights and duties reciprocally in a notion of venerable, authenticated status deserving special deference.'[257] To boost the symbolic strength of the pedigree, symbols of high cultural-anthropological significance are used.[258] Symbolic validation thus induces compliance through ritual or pedigree, or a combination of them. Franck acknowledges that symbolic validation is only powerful under particular circumstances and cannot be created arbitrarily. In particular, he posits that

> cues used to validate symbolically are potent to the extent they are perceived as true by those to whom they are addressed. When cues cease to refer symbolically to what is perceived as historic, social, political or metaphysical reality they fail to validate and, instead, squander their "magic." In the grey area, when the cues refer to an ambiguous reality, they may sometimes be effective not only in validating, but also in reinforcing, that reality. But where reality is clear, institutions charged with conferring symbolic validation quite properly resist pressure to abuse-and thereby diminish-their power to bestow legitimacy by resort to false cues.[259]

The third element of Franck's typology is coherence. Furthering the point of why symbolic cues might fail, he names incoherent use as one possible reason. As an example of incoherence, he refers to the acceptance of the Ukraine as a member state of the UN before the collapse of the Soviet Union, when Ukraine still failed to fulfil the requirements for eligibility. According to Franck, coherence allows for the legitimation of a

> *rule, principle, or implementing institution because it provides a reasonable connection between a rule, or the application of a rule, to 1) its own principled purpose, 2) principles previously employed to solve similar problems, and 3) a lattice of principles in use to resolve different problems*.[260]

[256] Ibid 93, footnote omitted
[257] Ibid 94
[258] Ibid
[259] Ibid 134
[260] Ibid 147-148

In other words, if a rule it is not applied coherently, that is, if it cannot be validated by 'the test of coherent generalization,' its legitimacy will be undermined.[261] Franck further differentiates coherence from consistency. In particular, he argues that inconsistencies do not have to be incoherent as long as there is a '*rational*' basis for the distinction, that is, there is 'an intrinsic, usually logical, relationship not only between a rule, its various parts, and its purpose, but also between the particular rule, its underlying principle, and the principles underpinning other rules of society.'[262]

Lastly, Franck discusses adherence as the fourth element of his account of legitimacy. The introduction of adherence is connected to the idea of international law being a proper system, meaning that there exist primary rules, secondary rules, and even the ultimate rule of recognition.[263] This is contrary to Hart's claim, which asserts that international law resembles a primitive tribe with only primary rules.[264] Franck argues that international law is a proper system due to the existence of dynamics of reciprocity, which in turn prompts the voluntary compliance with rules of states belonging to a particular community. More concretely, states follow international rules because that is the 'price to pay' for belonging and being accepted as part of the community of states.[265] This corresponds to the ultimate rule of recognition, from which the formal sources of international obligations and the secondary rules spring.[266] Coming to the relation between international law as a system and adherence, Franck emphasises the 'vertical nexus between a primary rule of obligation … and a hierarchy of secondary rules identifying the sources of rules' and the establishment of 'normative standards that define how rules are to be made, interpreted, and applied.'[267] He posits that rules will be followed more if they are the product of the 'right process'.[268] In particular, he asserts that if the rules created by the international rule system can be justified by the secondary rules of the system, their normative pull will be greater. As an example, articles 31-33 of the Vienna Convention on the Law of Treaties (VCLT), which regulate the interpretation of international legal norms, can validate a primary rule if it has

[261] Ibid 152, 138
[262] Ibid 153
[263] Ibid 183-187
[264] Herbert L A Hart, *The Concept of Law* (Second edn, Oxford University Press 1997) 77-96
[265] Franck, *The Power of Legitimacy among Nations* 196-199
[266] Ibid 190-194
[267] Ibid 184
[268] Ibid 184-190

been interpreted according to those articles. In turn, secondary rules can also be validated by further general rules, such as *pacta sunt servanda,* which is part of the rule of recognition.[269] This already hints at the fact that, for Franck, the legitimacy of the ultimate rule of recognition cannot be justified by other rules 'but only by the conduct of nations manifesting in their belief in the ultimate rules' validity *as the irreducible prerequisites for an international concept of right process*.'[270]

Finally, Franck emphasises the distinction between legitimacy and justice. In particular, he argues that legitimacy should not be 'muddled' with justice, its 'symbiotic cousin.' For Franck, legitimacy refers to perception, whereas justice is oriented towards outcomes. In his own words, 'legitimacy of a rule or principle does not necessarily ensure its justice, and conversely, the justice of a rule need not correlate with its degree of legitimacy.' Nevertheless, the use of the word 'symbiotic' is intended to convey the idea that 'the principles of justice need infra-structural support from principles of legitimacy.'[271]

III.3. Brunnée and Toope's interactional theory of international law

In the spirit of Franck, Brunnée and Toope propose their interactional theory of international law. They put forward a rich, multifaceted and complex account, bridging both international relations and international law. Their position is built in opposition to realist and materialist accounts, which treat international law either as epiphenomenal or in purely instrumental terms. For Brunnée and Toope, international law has a clear and independent influence on how actors behave and deeply affects the way international relations take place.[272] In their own words, 'international law can be an important force in socializing actors and shaping their interests and choice.'[273]

In order to sustain their claim, they begin the account with an explanation of how international law as an 'intersubjective structure' emerges. To do this, they take a step back and first focus on the question of how actors develop socially and create structures.

[269] Ibid 202
[270] Ibid 194
[271] Thomas M Franck and Steven W Hawkins, 'Justice in the International System' 10 Michigan Journal of International Law 127, 161
[272] Contrary to Franck, Brunnée and Toope talks about actors and they are not focused only on the state.
[273] Brunnée and Toope 12

Brunnée and Toope view 'interaction' as key in understanding human conduct. They posit that actors' identities are formed through interaction which, in turn, affects how interests are shaped. In particular, they assume that 'the ends of social interaction are not predetermined, but can be discovered and learned.'[274] Furthermore,

> through interaction and communication, actors generate shared knowledge and shared understandings that become the background for subsequent interactions. In the process, social norms may emerge that help shape how actors see themselves, their world and, most importantly for us, their interests.[275]

Likewise, through social interactions, actors create durable intersubjective structures, which can be norms, identities, culture or knowledge, and which always remain modifiable. In consequence, one can regard actors and structures as mutually constituted and social in nature.[276]

Through intersubjective structures, shared understandings come into being and these shared understandings are essential for the emergence of international law. In particular, Brunnée and Toope posit that shared understandings evolve within so-called 'communities of practices.'[277] The basic idea behind this notion is that, through participation in certain communities, actors generate and produce particular collective understandings. These collective understandings are continuously negotiated through the internal practices of the community. The relationship between members can be either consensual or conflictive and, accordingly, practices can be either of positive or negative nature. Regardless of the precise form relationships and practices take, what is relevant is that the members belonging to a community are interlinked through them.[278] Brunnée and Toope do not provide an example for what a shared understanding is but one could, for instance, regard the principle of territorial integrity in international law as a shared understanding of the international community.

After establishing their general constructivist framework, Brunnée and Toope move on to Lon L. Fuller's theory of law and its relationship with international law. Fuller is one of the most recognized legal theorist of the last century, especially in the Anglo-American

[274] Ibid 13
[275] Ibid, footnote omitted.
[276] Ibid 14
[277] They take the nomenclature from Emmanuel Adler who took it from Jean Lave and Etienne Wenger.
[278] Brunnée and Toope 62-64

academic world. He is known for advancing the thesis that law has a distinctive, though weak, morality – the so-called 'inner morality of law.'[279] More precisely, Fuller posits that law has certain inherent moral qualities that distinguish it from other types of normative codes. Besides this differentiation, for Fuller, and by extension for Brunnée and Toope, once those qualities inherent in law are met, it will stimulate a sense of 'fidelity' to the law by those acting under its rule.[280] Fuller identifies eight criteria constituting the inner morality of law: legal norms must be of general character; they have to be publicly propagated; laws cannot be retroactive but must be prospective; laws must be clear on what is expected from citizens; laws cannot be contradictory; laws must be realistic; they cannot demand the exceptional or the impossible; laws must be constant so as to allow for stable expectations; and, finally, there has to be congruence between the legal norms and the actions of the officials acting under the law. These criteria, according to Fuller, allow for the possibility of organizing social life between individuals and, at the same time, limit the possibilities of abuse of authority by providing some standards that constrain the arbitrary exercise of power.[281]

Although Fuller is upfront about presenting his account of law as moral, he rejects that it requires substantive agreement on the ends of law. Instead, he insists that his account of law is procedural. Thus, it is not 'concerned with the substantive aims of legal rules, but with the ways in which a system of rules for governing human conduct must be constructed and administered if it is to be efficacious and at the same time remain what it purports to be.'[282] As Brunnée and Toope comment, Fuller's version of law can be regarded as 'weak' because the commitments needed are of limited range. What is crucial is that these minimal requirements allow for two of the most important elements of Fuller's account – human autonomy and communication or interaction.[283]

In more detail, Fuller is committed to the idea of the autonomy of citizens. For him, autonomy is social, as it depends on and has to be evaluated with respect to social relations. Law serves to manage those social relations and thereby allows individuals to keep their autonomy. Law can thus to be regarded as a purposive activity, furthering the autonomy of

[279] Lon L Fuller, *The Morality of Law* (Revised edn, Yale University Press 1977)
[280] Lon L Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' (1958) 71 Harvard law review 630
[281] Brunnée and Toope 29-30
[282] Fuller, *The Morality of Law* 96-97
[283] Brunnée and Toope 20

the individual. In particular, it is essential for guiding human action and for organizing life with relatively stable expectations. In relation to communication and interaction, Fuller sustains that the main purpose of human life is not survival but to maintain communication 'with our fellows.'[284] In allegiance to the Aristotelian tradition of rhetoric, Fuller believes, as Brunnée and Toope note, that one of the purposes of law is the facilitation of communication so that human coordination and flourishing can be achieved. This tradition assumes that 'rhetorical activity' serves as a 'means of discerning and evaluating the ends available to a given community.'[285]

As Brunnée and Toope remark, Fuller's account was mostly directed toward municipal law. He hardly discusses his theory in relation to international law and, in the few occasions that he does, Fuller raises doubt that his account can be extended to international law.[286] Brunnée and Toope argue that Fuller was mistaken and that even though there are differences between municipal and international law, it is possible to extend his account. In particular, they posit that Fuller's perception of law as a set of non-hierarchical practices structuring human interactions resonate with similar ideas of international legal theorists who primarily understand international law as a horizontal legal order.

There are five facets of Fuller's account that can further an understanding of international law. The first feature is the above-mentioned assumption of the horizontal nature of law. The idea is that 'law does not depend upon enforcement for its existence, much less on the use of physical force, though power and force are relevant in understanding human interaction in law.'[287] According to Brunnée and Toope, this idea can be extended to international law, as it allows for an explanation of a 'sense of obligation' to international law when international rules are not backed by a sanction. This is not to say that enforcement is unnecessary. Brunnée and Toope are aware of the fact that if law has no effect there is no chance of 'fidelity'. This leads them to argue that there must be a

[284] Fuller, *The Morality of Law* 185
[285] Francis J Mootz III, 'Natural Law and the Cultivation of Legal Rhetoric' in Willem J Witteveen and Wibren van der Burg (eds), *Rediscovering Fuller: Essays on Implicit Law and Institutional Design* (Amsterdam University Press 1999) 444
[286] For a brief overview of Fuller's interest in international law see Karen Knop, 'The Hart-Fuller Debate's Silence on Human Rights' in Peter Cane (ed), *The Hart-Fuller Debate: In the Twenty-First Century* (Hart Publishing 2010)
[287] Brunnée and Toope 34

congruence 'amongst the action of a majority of international actors.' Otherwise fidelity will be non-existent.[288]

The second aspect of Fuller's theory is reciprocity and obligation. Arguing against rational approaches to international legal obligation whereby international law is followed due to simple material interests, for Brunnée and Toope, fidelity to the law is deeply connected with the reciprocal fulfilment of duties. That is, lawmakers need to follow the requirements laid down by Fuller so citizens can take decisions and plan their actions with the rules in minds. Conversely, if lawmakers do not act accordingly, citizens will not abide to the laws. There will be no reciprocity. Concerning international law, the notion of reciprocity is related to the idea that failures of international law are failures of how the law has been created. Brunnée and Toope, offer the hypothetical example of a treaty that has been formed with great disparity among the different signatories, either because of an imbalance of power, lack of negotiations or lack of sense of mutual duty. As a result, Brunnée and Toope argue, the agreement would have the form of a treaty but could not be considered an actual treaty. Accordingly, the treaty would not be followed due to the lack of adherence to the conditions of legality. More generally, they state that '[o]nly when the conditions of legality are met, and embraced by a community of practice, can we imagine agents feeling obliged to shape their behaviour in the light of the promulgated rules.'[289]

The third element that Brunnée and Toope highlight, and which they relate to the question of how to manage diversity at the global realm, is the importance of Fuller's thin conception of the rule of law. They argue that Fuller's interactional account of law, entailing the slow build-up of shared understandings and the lack of a need to agree on particular substantive outcomes, allows for the sustainment of a proto-community, despite the possibility of a wide variety of actors that do no share understandings or do not yet belong to a community of practice. Clearly this is an important feature for Brunnée and Toope in order to sustain their reliance on Fuller's account as, due to the extreme diversity of views among actors in the international arena, a community of practice is not yet identifiable. Fuller's framework envisages a way to form such a community, through interactions and internal practices.[290]

[288] Ibid 35
[289] Ibid 37-42
[290] Ibid 42-45

Fourthly, for Brunnée and Toope, Fuller's account suggests the need to move away from formalistic accounts of international law. They view the abandonment of formalism as necessary in order to provide a more accurate explanation of legal obligations and to differentiate legal rules from other type of norm. Here Brunnée and Toope explicitly depart from Fuller, who was not interested in discriminating between different types of normative codes. Although Brunnée and Toope do not outright reject formal criteria for identifying law, they consider such criteria insufficient for generating a sense of fidelity. For them, a legal norm appears through the 'practice of legality', which in turn reflects some shared understanding coming out of the criteria of legality and is congruent with practice. According to this idea, soft law, rooted in shared understandings, can be considered law and might actually have more obligatory force than formal norms.

Lastly, Brunnée and Toope discuss the criteria developed by Fuller in relation to legitimacy and to the long-lasting discussions on compliance within international law. Related to their criticisms of formalist accounts, Brunnée and Toope sustain that the consent of states can at most be viewed as a 'necessary but not sufficient condition for international legal legitimacy.'[291] Likewise, they posit that any norm in the international legal order can only be deemed legitimate if it has come from their interactional account of law. In particular they put heavy emphasis on the idea that 'legal norms be grounded in underlying social norms and, in turn, that social practice is congruent with extant legal norms.'[292] For legal legitimacy to be satisfied, a necessary requirement is thus not only social legitimacy, as in shared understandings, but also Fuller's criteria of law. Brunnée and Toope highlight that compliance in relation to legitimacy should be understood in terms of fidelity and obligation. States thus follow international law because it is part of their identity; they have fidelity to the international legal system and its norms, as long as those norms have come from Fuller's criteria. Finally, Brunnée and Toope qualify their account by admitting that following it does not inevitably produce compliance. What they want to argue against are theories that rely on interests and power alone.[293]

[291] Ibid 52
[292] Ibid 53
[293] Ibid 92

III.4. International constitutionalism through the lens of Kumm's framework

The constitutionalization of international law has become 'one of the "hot topics" of international legal research.'[294] While constitutional language has not been alien to international law, it is only recently that it has become prominent within international legal literature.[295] The importance of the international constitutionalists' project rests on the ability to make sense, both analytically and normatively, of the ongoing transformation of international law. Constitutionalism entails more than a mere working order; it is concerned with establishing a normative framework, regulating how power is exercised among political institutions, controlling those institutions, and laying down a series of fundamental rights for the protection of citizens.[296] In sum, constitutionalism aims at addressing, limiting, and regulating political power.[297] Here I will focus on Kumm's writings as he specifically addresses the issue of legitimacy.

Kumm starts his account with the observation that discussions concerning the legitimacy of international law are connected to questions of obedience. Concurring with Joseph Raz, he posits that one is morally obliged to obey international law if and only if international law is legitimate. In order to provide normative guidance about when one ought to obey international law or not, Kumm presents a constitutional framework outlining the normative considerations relevant for legitimacy in constitutional terms. He is explicit about his framework being directed towards citizens of liberal constitutional democracies. The framework entails four distinctive principles, each of them representing a particular normative concern. These principles comprise international legality, subsidiarity, adequate participation and accountability.

With respect to the principle of legality, Kumm posits that international law should, in principle, be obeyed and respected by those addressed by it. There is a presumption of

[294] Susan C Breau, 'The Constitutionalization of the International Legal Order' (2008) 21 LJIL 545, 556

[295] Bardo Fassbender, 'United Nations Charter as Constitution of the International Community, The' (1998) 36 Columbia Journal of Transnational Law 529 538-550

[296] Thomas Cottier and Maya Hertig, 'The Prospects of 21st Century Constitutionalism' (2003) 7 MPYUN Law 261, 280

[297] Wouter Werner, 'The Never-Ending Closure: Constitutionalism and International Law' in Nicholas Tsagourias (ed), *Transnational Constitutionalism: International and European Perspectives* (Cambridge University Press 2007) 331

international law as legitimate, as it represents the law of the international community. More specifically, according to Kumm, international law deserves the presumption of legitimacy because it embodies the establishment of a fair framework of cooperation in an arena with deep disagreements about the way cooperation should be undertaken. For Kumm, there are certain advantages to having an international legal order. He views the international legal system as '*an asset to the international community as a whole*,'[298] which enables and fosters

> the establishment of welfare-enhancing cooperative endeavours between various actors. Law can help reduce transaction costs for setting up trans-border cooperative schemes. It is a tool that helps build trust between international actors and thus facilitates engagement in mutually beneficial cooperative endeavours, thereby enhancing global welfare. Law then can be a tool that helps foster the development of transnational communities, internationalize externalities, prevent prisoner-dilemma-based misallocation of resources, realize efficiency gains, etc….[299]

Furthermore, Kumm posits that we also owe allegiance to international law because it helps to check and balance the powers comprising the constitutional system of liberal-democracies. He argues that international law allows for the limitation of the executive branch's capacity to 'claim foreign affairs prerogatives.' By that token, it limits the possibility of destabilizing the balance of democracy at the domestic level. Moreover, Kumm postulates that the fact that there is an international rule of law system allows for predictability and thereby '*enhances the freedom of individual actors*.' Lastly, for Kumm the presence of international legality limits the possibilities for abuse of power. In particular, he argues that the international rule of law may protect weaker states from greater powers.

The principle of subsidiarity, for Kumm, means the demarcation of the proper jurisdictional space between the national and international realm instead of relying on the principle of sovereignty. The concept originally appeared in the context of the development of the EU as a mean of demarcating the realm of competences among the different levels of governance. The principle is structural and entails that any 'infringements of the autonomy of the local level by means of pre-emptive norms enacted on the higher level [need] to be justified by good reasons.' Subsidiarity serves as a jurisdictional boundary whereby it is not only necessary that substantive reasons are brought forward to justify why certain institutions

[298] Kumm 918
[299] Ibid

can govern certain issues but there has to be further justification of what 'would be lost if the assessment of the relevant policy concerns was left to the lower levels.'[300] Kumm posits that the subsidiarity principle needs to be reinforced with a two-step analysis. The first step is to find out when and where collective-action issues arise. In the second step, reasons for a higher-level authority need to be counterweighted with the particular local concerns regarding the matter of interest. Kumm thus sees the need to apply a sort of 'cost-benefit' analysis or 'proportionality' test. He posits the following reasons for relying on the principle of subsidiarity. According to him, the principle allows for 'sensibility towards locally variant preferences, possibilities for meaningful participation and the protection and enhancement of local identities.'[301] This point is especially important at the international level, Kumm argues, where instruments for holding authorities accountable are not yet sufficiently developed. Finally, Kumm maintains that there will be occasions in which the principle of subsidiarity will strengthen rather than weaken international law. This will occur precisely when there are good reasons for deciding an issue at the international level.

The last two principles are adequate participation and accountability, which can be subsumed under the name procedural legitimacy. Kumm begins with the observation that discussions about legitimacy of international law tend to make the point that national law has greater legitimacy than international law because national law has a repository of institutions that make it more accountable. However, Kumm posits that representative democracies – with the parliament as representation of the governed - no longer actually operate like this. The first reason for this is that, due to the rise of the administrative state, many decisions and actions are taken by non-representative organisms. Kumm further emphasises the rise of constitutional courts within liberal democracies. Constitutional courts are counter-majoritarian institutions designed to strike down or uphold laws and norms in light of the constitution. Also the expansion of the executive, for Kumm, represents the rise of the importance of non-representative institutions within liberal democracies. Given these developments, Kumm argues that one needs to take a pragmatic and more realistic approach towards the national parliament and acknowledge that, under certain circumstances, it is preferable to rely on non-parliamentary procedures. In turn, he posits that the argument against international law based on its lack of 'electorally accountable

[300] Ibid 921
[301] Ibid 921-922

institutions' is not sufficient for discarding international law when procedural grounds are levelled. Nevertheless, Kumm argues that international law needs to comply with certain procedural principles. Whether the international legal order can be considered legitimate or not thus depends on whether 'procedures are sufficiently transparent and participatory and whether accountability mechanisms exist to ensure that decision-makers are in fact responsive to constituents' concerns.

Lastly, Kumm incorporates the issue of outcomes into his framework. In particular, he posits that issues of justice can affect the legitimacy and standing of authorities. Nevertheless, Kumm sustains that matters of outcome play a limited role for assessing the legitimacy of a certain law, as, for him, they should be determined authoritatively on the basis of the legal decision-making procedures. Accordingly, it is not the 'task of addressees of norms to re-evaluate decisions already established and legally binding on them.'[302] Nevertheless, he accepts that there are occasions in which one can discard a certain law because it is highly unjust. Kumm posits that the law has to 'cross a high threshold of injustice or bear a costly inefficiency for being ignored by a national community on exactly the grounds that they are deeply unjust or extremely costly and inefficient.'[303] In other words, there has to be an underlying principle of substantive reasonableness that determines the depth and scope of plausible disagreement within the international community.

III.5. Buchanan's philosophical account of legitimacy

International law has become an object of increasing interest in the field of analytic political and legal philosophy. As Besson and John Tasioulas argue, contemporary legal philosophy has devoted little space to international law.[304] A similar point can be made about political philosophy. This trend, however, has reversed in recent decades, during which there has been a growing interest in the conceptual and normative issues surrounding international

[302] Ibid 927
[303] Ibid
[304] Samantha Besson and John Tasioulas, 'Introduction' in Samantha Besson and John Tasioulas (eds), *Philosophy of International Law* (Oxford University Press 2010) 2; Also Buchanan 17-22

law from a philosophical point of view.[305] I will focus here on Buchanan's analysis of legitimacy, as it can be seen as the most comprehensive account regarding legitimacy.

Similar to Franck, Buchanan developed his account of legitimacy throughout a series of several articles and essays. The definite statement of his view on legitimacy appears in his *Justice, Legitimacy, and Self-Determination*.[306] Although I will focus on discussing Buchanan's analysis of legitimacy, it has to be noted that the book offers a larger attempt to develop a systematic moral account of international law. Buchanan does not deal with the topics of justice, legitimacy and self-determination separately; rather they are presented in a holistic manner. For him, 'to determine whether a particular rule … ought to be included in international law will depend in part upon what is being assumed about the other principles that will coexist with, how they fit together, and what the effects of their joint implementation is likely to be.'[307] This contrasts with those that focus solely on legitimacy, ignoring the other principles.[308]

For Buchanan, there is a fundamental connection between justice and legitimacy. He posits that the main purpose of international law must be justice, which is to be understood as protecting basic human rights.[309] He therefore rejects the argument that the proper objective of international law is peace among states.[310] Buchanan notes that in order to achieve justice, political power must be exercised. For him, the relevant question is thus under which conditions the exercise of political power is morally justified. He posits that an 'entity' is morally justified, that is, it is legitimate, only if it meets some minimal standard of

[305] See, among others, Buchanan; Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press 2010); Patrick Capps, *Human Dignity and the Foundations of International Law* (Hart 2009); Fernando R Tesón, *A Philosophy of International Law* (Westview 1998); Danilo Zolo, 'A Cosmopolitan Philosophy of International Law? A Realist Approach' (1999) 12 Ratio Juris 429. In principle, there are not great differences between the constitutional approach outline above and the philosophical approach that will be here presented. Moreover, the way Besson, Tasioulas or others present the matter of what is a philosophical approach seems to refer more to certain disciplinary basis than in actual substantive differences. Both constitutional and philosophical approaches are focused in dealing with normative and conceptual issues and both are preoccupied with discussing the morality of international law. If anything the difference is more in degree and the sources of inspiration. As we just saw, Kumm's framework is inspired by a series of institutional principles that have developed within constitutionalism. Philosophical approaches, as we shall see, tend to be more abstract in general, as they are trying to provide some account based on general principles from which some conclusions are derived from.

[306] He has continued discussing the issue in later articles and collections of essays but the account remains structurally the same.

[307] Buchanan 28

[308] Ibid

[309] Ibid 73ff

[310] Ibid 6

justice.[311] Despite the fact that in Buchanan's account justice is part of legitimacy, Buchanan asserts that he does not conflate the two concepts. For him, the difference is that justice refers to the outcome, while legitimacy is concerned with how political power is exercised.[312] In consequence, those entities 'wielding political power can be legitimate even if they do not achieve an ideal democratic governance or are less than morally optimal in some other respect.'[313] Differently put, '[a] wielder of political power that does a credible job of achieving justice is morally justified in wielding that power, if it provides a reasonable approximation of justice through processes that are themselves reasonably just.'[314]

Buchanan distinguishes between a minimal and a full conception of political legitimacy. The former refers to instances in which there is no possibility of creating the resources for democratic authorization. In such cases, Buchanan sees the exercise of political power as justified if minimal standards of human rights protection are offered through processes and policies that are minimally just.[315] Nevertheless, he insists that legitimacy in such situations remains insufficient. Buchanan posits that full political legitimacy entails the existence of democratic authorization. For him, democratic authorization is necessary because it allows for the formation of a 'genuine political community' instead of a mere 'rational association for mutual protection.' He views the former as superior because all persons are treated with equal regard.[316]

Concerning international law, Buchanan adapts his account of political legitimacy in order to answer the following questions: '(1) Under what conditions is it justifiable for agents to exercise political power through international legal institutions? And (2) what reasons do private individuals and representatives of states or other organizations have to comply with international law and support the international legal system?'[317] As a response, Buchanan argues that the international legal system ought to be democratic. Crucially, he rejects consent of states as a determinant for the legitimacy of the system. Likewise, his argument for democratizing international law does not entail moving towards a system of state

[311] Ibid 234
[312] Ibid 247, 302
[313] Ibid 236
[314] Ibid 247
[315] Ibid 259
[316] Ibid 259-260
[317] Ibid 290

majoritarianism. Instead, for him, the key factor for moving towards a more democratic international legal system is to achieve some minimal conditions of accountability and respect for human rights.

More precisely, Buchanan views the idea that the consent of states in conditions of equality is, or ought to be, a necessary condition for legitimizing the international legal order is a mistake. Instead, he regards the credible commitment to achieve justice, through protecting basic human rights, as the necessary condition. For Buchanan, the argument for consent as a basis of legitimacy is not sustainable because states tend to commit violations of human rights. He also argues that the idea of consent 'is too morally anemic to confer legitimacy'[318] and that it misses an element of volition. Accordingly, consent to a treaty under conditions of duress should not be viewed as a factor for legitimacy. Furthermore, Buchanan emphasises that consent is not a central feature of how the international legal system works. The obvious example is customary law, where a norm becomes incorporated in international law through practice and opinion juris.

After having discarded the importance of consent for providing legitimacy to the international legal system, Buchanan moves on to discuss the argument for democratizing it and, as a result, legitimizing it. He posits that democratizing the system can mean three things: (1) augmenting the scope of state majoritarianism; (2) making states more democratic; and (3) making international institutions more representative and accountable. Buchanan supports (2) and (3), while he opposes (1) because the objective for him is achieving justice in the international legal system rather than the equality of states. Moreover, the increase of majoritarianism would increase the importance of states and would give greater weight to small states in comparison to big states.

Regarding (3), Buchanan argues that if we consider persons as equal, making international institutions more representative requires fostering a sort of global individual democratic governance, so persons could participate equally in the relevant aspects of global governance. This would, according to Buchanan, truly alleviate the legitimacy deficit, as the global technocratic elite would become more accountable. Buchanan favours democratization because it is 'generally the most reliable instrument for ensuring that basic human rights are protected and it inherently expresses equal regard for all who are subject

[318] Ibid 303

to the system of governance.'[319] Buchanan is aware of the actual conditions of the international legal system and acknowledges that it is far from achieving any kind of genuine democratic global governance. This should not stop us from pursuing it, Buchanan insists.[320]

Regarding (2), Buchanan discusses the conditions upon which a state would become legitimate, dubbed recognitional legitimacy. Following Buchanan's account, an entity is recognized as legitimate if it follows certain principles and, as a result, 'confers status of being a primary member in good standing of the international system.'[321] Buchanan provides criteria that are to be considered the 'necessary and sufficient conditions for an entity to be recognized as a member in good standing of the state system.'[322] He posits that being recognized as a legitimate state provides unique advantages within the system, one of which is the implicit support 'for an entity's efforts to preserve its territorial integrity in the face of various threats.'[323] For Buchanan, recognition thus has clear moral implications:

> [E]ntities recognized as legitimate states are legally entitled to support for their territorial integrity and to non-interference in their internal affairs, and ought to be allowed to participate … in the basic processes of international law …. [i]f the international community recognizes an entity as a legitimate state it thereby augments that entity's power to control those within the jurisdiction it claims. And if that entity treats those within its control unjustly, the international community is guilty of complicity in its wrongdoing.[324]

The criteria for recognition that Buchanan proposes build on the criteria developed in the Montevideo convention. They comprise (1) a minimal internal justice requirement, (2) a non-usurpation requirement, and (3) a minimal external justice requirement. Buchanan posits that the conditions are deliberately minimal so as to provide some basic guidance for the recognition of states in future encounters. Beginning with (1), Buchanan argues that states should require new states to achieve minimal conditions of justice so as to 'avoid a situation in which members of the state system would be accomplices in injustice.'[325] The second condition, non-usurpation, additionally requires that in order for a new state to be 'awarded the status of statehood it must not come about through the violent or otherwise

[319] Ibid 323
[320] Ibid 324, 326
[321] Ibid 263
[322] Ibid 264
[323] Ibid 265
[324] Ibid 266, 270
[325] Ibid 271

unlawful overthrow of a recognitionally legitimate state.'[326] This criterion is added to avoid situations in which groups would get the benefits of being recognized after having unjustly overthrown a legitimate state. Likewise, it allegedly encourages 'recourse to constitutional or other rule-governed, consensual processes for creating new political entities out of old ones that are legitimate while at the same time encouraging just behavior on the part of existing states by providing protection from violent overthrow so long as they satisfy the justice-based criteria.'[327] Finally, the third criterion requires that new states do not engage in actions of aggressive war.[328]

Taken together all these elementes, through an account of political legitimacy based on minimum requirements of justice, Buchanan presents a particular view of legitimacy that departs from the typical elements found in international legal accounts. In particular, Buchanan departs from the idea of consent as a criterion of legitimacy and instead proposes a system of recognition that requires states to fulfil certain demands. Likewise, according to his account, the international legal order needs to fulfil certain minimal conditions in order to legitimize the system as a whole.

III.6. Conclusion

As stated in the introduction, the four accounts discussed here represent different approaches to legitimacy within international law. They exemplify how legitimacy is viewed in the literature and have several features that other accounts also touch upon. Franck's analysis of legitimacy represents the most classical approach to the matter, focusing mostly on procedural elements. Brunnée and Toope move one step further by not only focusing on the legal requirements for international law to be legitimate but also underpinning their analysis by a sociologically rich account of social life. The accounts of Kumm and Buchanan represent different normative approaches to the problem. Kumm, drawing on a series of constitutional principles, proposes a framework from which citizens can determine whether or not to obey international law, while Buchanan presents the 'purest' example of normative theorizing, establishing a framework of how international law ought to be.

[326] Ibid 275
[327] Ibid
[328] Ibid 271-272

IV - Legitimacy and its problems

IV.1. Introduction

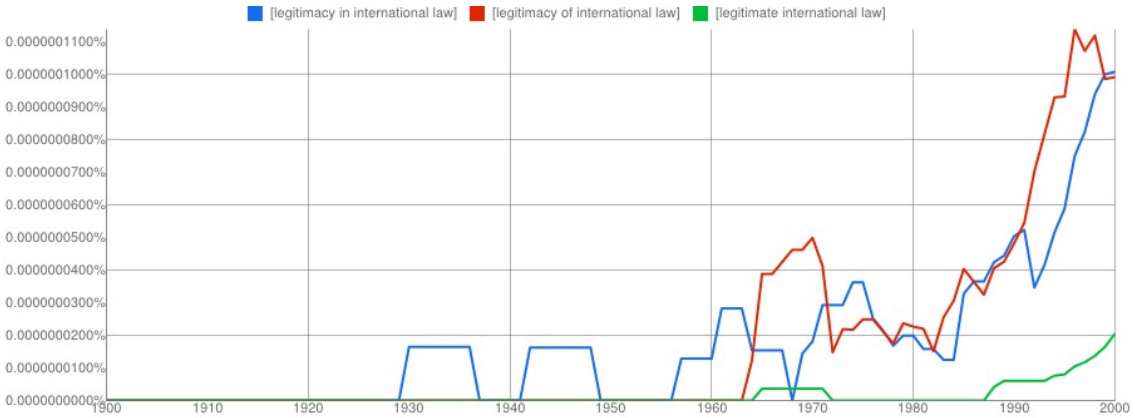
The previous chapter mapped out the various accounts of legitimacy within international law. As discussed in the introduction, the most remarkable feature of legitimacy's current standing in international law is its recent exponential rise and importance. Comparing the evolution of the word in international law to its more general appearance in social sciences and cognate disciplines is quite instructive, as a parallelism can be recognised. Legitimacy begins to be used more prominently in legal and political theory as a property of social orders from the 1940s onwards. Prior to those years, the word was used but not with the ubiquity that it has reached nowadays.[329] So even though legitimacy appears regularly in texts from the mid-seventeenth century onwards, philosophers such as John Locke, Kant or Marx did not feel the need to rely on legitimacy when writing about politics.[330] This is not to say that those authors did not have a conception of legitimacy; their political writings were aimed at detailing the normative conditions under which authority would be justified.[331] Nevertheless, throughout the 20th century legitimacy would become an essential feature of how to think about social order, illustrated in the graph below.

[329] The word 'legitimacy' can be found as far as 1691. Marquez 4.

[330] Martti Koskenniemi, 'The Power of Legitimacy among Nations, by Thomas M. Franck' (1992) 86 The American Journal of International Law 175.

[331] As Shane Mulligan succinctly comments, authors like Locke or Hume were contesting a particular understanding of legitimacy. 'Legitimacy was very much in play in the politics of the time, but it was not the legitimacy we know today,' see Mulligan 360.

A similar pattern appears if we focus on international law, though the development takes place within a shorter period of time. The following figure, which was presented in the introduction, provides an interesting snapshot of the evolution of the usage of legitimacy in international law.[332]



Source: Google Ngram Viewer

We observe a sharp growth of the usage of legitimacy in international law, similar to the evolution in the social sciences. While in the first chart the interest in legitimacy remains somewhat steady until its rise, the development within international law is steeper. Up to the 1960s, the use of the term legitimacy is rare. Notable exceptions are the thirties and forties, the years of the rise of fascism in Europe, the Second World War, and its aftermath.

[332] It should be noted that this graph does not control for the increase in international law literature. I expect the percentage change of the usage of legitimacy in international law to be less extreme but nevertheless sizable.

However, from the 1960s onwards, there is a steady rise in the concept's appearance in relation to international law, with a skyrocketing increase since the end of the Cold War.

Several factors that may explain this development can be put forward. These factors were already examined in the introduction and in Chapter II but it is worth recalling them briefly. First, there is the question of why we are interested in legitimacy in general and, second, there is the question of what are the underlying structural changes that draw our attention to legitimacy specifically. Before coming to first question about the general role of legitimacy in international law, let us take one step back. Looking at its etymological origins, we find that questions of legitimacy are centred on the justification of a decision in relation to some sort of norm. However, as Geuss emphasizes, when legitimacy is brought up it is not because we want to know whether a certain decision was formally 'correct,' 'but to determine whether that enactment has normative standing for me, and, if so, in what way.'[333] While ideas about what makes an authority justified and therefore ought to be obeyed abound throughout history, the centrality of legitimacy has to do with the secularization of the world, as Barker suggests.[334] As a result of the 'desacralization' of the world and the concomitant recognition that people make their own institutions, an automatic justification of authority through divine command no longer presents itself. Accordingly,

> [t]he question of why people should obey the modern state is different from the question of why, in earlier, times, they might have been obliged to obey the law or the king, and an order which is both explained and justified by divine law is replaced by one which, in so far as it is man made, is less easy either to explain or to justify.[335]

This account, however, needs to be slightly modified if we move our focus towards international law. Traditionally, ideas about legitimacy within the field have been linked to anxieties regarding the status of international law and its effectiveness and influence. In particular, legitimacy has been discussed in connection to the extent to which there is 'a moral duty to obey international law.'[336] For example, Franck's classic study connects legitimacy of international law with the degree to which states follow international

[333] Geuss 35
[334] Barker 6; while not following an identical line of argumentation, Mulligan offers a somewhat similar argument though he does not emphasize as much as Barker the desacralization point, see Mulligan 356-362
[335] Barker 7
[336] Kumm 908, footnote omitted.

norms.[337] With the end of the Cold War, discussions about legitimacy within the international law literature have shifted towards Barker's more general notion of legitimacy as a concept for justifying authority. These discussions are centred on the normative justifiability of international institutions such as the IMF, the UN, etc. and their impact on individual polities.

This takes us from the general questions legitimacy raises for international law to the particularities that have propelled the further interest in the concept within the literature. As has been noted in earlier chapters, there have been structural changes transforming our political and legal world which have led to increasing concerns and heated debates regarding the legitimacy of the international legal order. From a consensual normative order, centred on interstate relations, international law has evolved into a complex, dense normative order encompassing a wide variety of subject-areas. While some elements of the consensual order still exist, they are being supplemented and, in some instances, displaced by novel forms of authority. We find a stratified international law composed of diverse layers, each of them with its own particular characteristics, one on top of another.[338] Furthermore, authority has shifted from the state towards the international realm, bringing into being new forms of law-making and authority.[339] As a consequence, international law has an important 'influence on national political and legal processes and often exerts pressure on nations not in compliance with its norms.'[340] This increasing influence and impact of international law on the domestic sphere has provoked an intense discussion about on what grounds it is legitimate. It is believed that the traditional basis of legitimacy – consent – no longer suffices for dealing with these new forms of political power.

Despite the increasing attention legitimacy has received, some voices have raised scepticism as to its utility. The principal criticisms raised against the concept are its inherent ambiguity and, as a result of its 'fuzziness,' the highly inconsistent use of the concept.[341] These criticisms echo similar ones in adjacent disciplines such as sociology and political science. In those disciplines, it is widely accepted that there exists '[n]o single and universally

[337] Franck, *The Power of Legitimacy among Nations*
[338] For the evolution see Weiler
[339] Cohen
[340] Kumm 912
[341] Koskenniemi, 'Miserable Comforters: International Relations as New Natural Law'; Crawford

acceptable definition of legitimacy.'[342] Instead, what we find are diverse accounts of legitimacy, each of those providing different combinations of different elements comprising legitimacy.[343] Together they give rise to disputes about what it really means to be legitimate:

> What we mean when we refer to the (il)legality of the invasion of Iraq is not what we mean when we deny the desirability or the sovereign rights of the regime thus toppled, nor is it the same as when we question the integrity of the justifications made by the invading states – let alone the issues of procedural propriety surrounding the (s)election of one particular head of state.[344]

Despite legitimacy's ambiguity, criticisms against the concept in the international law literature have remained rare. Legitimacy as a category of practice and as a category of analysis is so firmly established that the concept tends to be taken for granted. Thus, in the majority of work on legitimacy and international law, the apparent attraction of the concept is upheld. Some of this work uses the legitimacy without entering the conceptual details, others are conscious about legitimacy's internal problems but do not see them as insurmountable obstacles to its applicability. In particular, while the fuzziness of the concept is often acknowledged, the literature typically postulates one particular definition of legitimacy that, depending on the context, is viewed as superior to the alternatives.[345] In this chapter, I will argue that the ambiguities plaguing legitimacy can be traced back to the structural nature of the concept and that, as a result, it is unlikely that the disputes regarding the criteria of legitimacy will be settled. I will contend that this undermines the usefulness of the concept as an analytical lens through which we can analyse societal life. Instead, legitimacy tends to muddle and confound the issues of interest.

The chapter proceeds as follows. The following section presents in detail the notion of legitimacy. In earlier chapters, I hinted at some conceptual aspects, while here I offer a more thorough and detailed account of what legitimacy is supposed to convey. The section describes the reasons why legitimacy is invoked, identifying the goals that it is supposed to achieve. The discussion will also present a framework within which the concept can be rendered intelligible. The next section provides an analytical account of the conceptual

[342] Christopher K Ansell, 'Legitimacy: Political' in *International Encyclopedia of the Social & Behavioral Sciences* (Elsevier 2001) 8704
[343] Matheson, for instance, identifies up to eight categories! see Matheson
[344] Mulligan 351-352; see also Ernest Gellner, *Legitimation of Belief* (Cambridge University Press 1979) 25
[345] See e.g. Thomas, 'The Uses and Abuses of Legitimacy in International Law'

properties of legitimacy. I will illustrate the broadness of the concept and identify the major points of contestation. I will then enter deeper into the conceptual features of legitimacy. Relying on Ross' analysis of legal concepts in his article *Tû-tû,* I will explain that legitimacy, as most legal concepts, serves as a device to connect a certain set of situations to a certain set of consequences. Due to the deep disagreements regarding the criteria of legitimacy and in contrast to the legal concepts to which Ross refers, I will sustain that legitimacy serves this function very poorly. I will then argue that those disagreements can be traced back to the desire to use legitimacy as an analytical concept when it is more appropriately treated as an appraisive one. In consequence, the ongoing disagreements regarding the conceptual features of legitimacy, in my view, are unlikely to be overcome, calling into question the analytical usefulness of the concept.

Next, we move from the substantive to the explanatory aspects of the concept. This part focuses on the analysis of the 'subject' and 'object' of legitimacy. The 'subject' of legitimacy refers to an actor, an institution or an action that validates another actor, institution or action – the 'object' of legitimacy. As we will see, we encounter critical ambiguities not only regarding the concept of legitimacy itself but also regarding its 'subjects' and 'objects.' Finally, I will come back to the initial question of why legitimacy is invoked. Legitimacy is often used as an explanation as to why a social order either persists or changes. I will discuss alternative mechanisms that can explain the stability and order of a particular regime without the need to rely on legitimacy as an explanation. Furthermore, I will challenge the underlying idea of actions and beliefs typically exhibited by the literature. In particular, I will argue that the notion of beliefs as internalized values that underlies most accounts analysing legitimacy is rather questionable. Taken together, these criticisms shed some doubt on several descriptive arguments regarding legitimacy and international law.

IV.2. Legitimacy and order

As stated in the beginning of this chapter, the treatment of legitimacy in international legal scholarship, with notable exceptions, can be regarded as somewhat superficial. To be more precise, there is an ample literature appealing to the concept and analysing the myriad of ways in which legitimacy operates. However, a closer reading of the literature reveals that

legitimacy as a concept is rarely discussed and often treated as self-evident. Put differently, there are many arguments *about* legitimacy but not *over* legitimacy.[346] This lack of explanations of legitimacy within international law is suggestive of how entrenched the concept is in our legal and political mindset. Precisely because of its embedded status, it is necessary to obtain a deeper understanding of the concept of legitimacy and its role in our comprehension of the social world.[347]

The most natural place to start with is Weber's account of legitimacy. Even though Weber's appearance in the international law literature is rare, there are two important reasons for using his writings as a starting point. The first and most essential reason is that his account of legitimacy has profoundly shaped the debate in the social sciences. As Joseph Bensman emphasizes, of all the contributions that Weber made in his career, legitimacy is the concept most widely accepted.[348] Accordingly, subsequent discussions on the matter have been in great part structured, explicitly or implicitly, by Weber's account.[349] Even alternative accounts that have sprung up in order to salvage, modify or substitute the original approach are driven by similar intuitions and assumptions to those found in Weber.[350]

The second reason is related to the nature of normative accounts, which are predominant within international law. Normative accounts are sometimes argued to be independent of the sociological environments to which they could be applied. Because the focus is on the *ought* and not on the *is*, it is suggested that the fact that things are a certain way does not preclude one from positing ideal conditions. Since in any normative account there is an implicit understanding of how the world works, the argument only goes so far. In Alasdair

[346] It could be objected here that I am partially misrepresenting the literature and that there do exist detailed examinations of legitimacy because of the contentious issue of international law regarding its 'ontological' status. This takes us to the usual discussions about whether international law is really 'law' or not and how to explain why states obey international law. This all true, but this literature accepts tout court what legitimacy is supposed to accomplish; what they are arguing is for the incorporation of legitimacy within international law. Hence, the argument is simply domain-restricted. As a result, such authors argue that if something like legitimacy exists within states, ceteris paribus this can also exists within international law. Then, the diverse arguments goes onto show precisely the importance of legitimacy, but there is little explanation of why legitimacy is important. This is taken for granted.

[347] For some authors to know what legitimacy amounts to is the master question of politics, see Crick

[348] Joseph Bensman, 'Max Weber's Concept of Legitimacy: An Evaluation' in Arthur J. Vidich and Ronald M. Glassman (eds), *Conflict and Control: Challenge to Legitimacy of Modern Governments* (Sage Publications 1979) 17

[349] R. Stryber, 'Legitimacy' in N. J. Smelser and B. Baltes (eds), *International Encyclopedia of the Social and Behavioral Sciences* (2001) 8700

[350] See also Alan Hyde, 'The Concept of Legitimation in the Sociology of Law' [1983] Wis L Rev 379, 381, fn1

MacIntyre's words, '[a] moral philosophy … characteristically presupposes a sociology.'[351] Any philosophical account which intends to offer

> explicitly or implicitly at least a partial conceptual analysis of the relationship of an agent to his or her reasons, motives, intentions and actions, and in so doing generally presupposes some claim that these concepts are embodied or at least can be in the real social world.[352]

In that vein, Weber's writings, which are sociological, provide the backbone of normative theories concerning legitimacy.[353] Put differently, our descriptive account of legitimacy, deeply influenced by Weber's works, affects the way we assess legitimacy as a normative concept. This is not to say that the normative is entirely subject to the non-normative, but if legitimacy is not sustainable as a non-normative concept, then the normative ideal will be built on shaky foundations and will suffer as a result.

Weber's discussion of legitimacy arose as a result of his interest in understanding how social arrangements change, break down, or persist.[354] A social arrangement is based on relationships of domination and power. Social life is rife with asymmetrical relationships 'where one party to the relationship benefits from it more than, and at the expense of the other.'[355] Dictatorships are the most evident instantiation of domination. Democracies, on the other hand, do not have the clear relationship of domination existent in dictatorships, but there still is a high disparity of power between those governing and those that are being governed. Also the international sphere is rife with asymmetrical relationships of domination and power. Although formally speaking states are considered to be equal, it is clear that in reality states differ greatly and co-exist in different and overlapping sets of hierarchies.[356]

The existence of a relationship of domination and power implies that the relationship is built on opposing interests. Those that dominate are interested in keeping the status quo, while

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[351] Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* (Third edn, University of Notre Dame Press 2007) 23; For a similar point, though less explicitly, see Koh

[352] MacIntyre 23

[353] The most interesting aspect is that Weber himself was sceptical regarding the importance of legitimacy, see Stephen Turner, 'Depoliticizing Power' (1989) 19 Social Studies of Science 533, 551, fn22; Jan Pakulski, 'Legitimacy and Mass Compliance: Reflections on Max Weber and Soviet-Type Societies' (1986) 16 BJPS 35, 38

[354] Michael Hechter, 'Introduction: Legitimacy in the Modern World' (2009) 53 American Behavioral Scientist 279.

[355] Marquez 6

[356] Simpson

those being dominated may want the contrary.[357] What can keep such a relationship stable? According to Weber, while it is possible to maintain a relationship through coercion, material interest, or habit for a period of time, this can hardly be sustained in the long run without the dominant party incurring a substantial cost.[358] That is to say, the '[s]tability of [a] relationship may be based on custom, affectual ties, ideal motives or purely material calculations of advantage. But all these factors do not constitute … a sufficient reliable basis for systematic domination.'[359] In Weber's own words,

> An order which is adhered to from motives of pure expediency is generally much less stable than one upheld on a purely customary basis through the fact that the corresponding behaviour has become habitual. The latter is much the most common type of subjective attitude. But even this type of order is in turn much less stable than an order which enjoys the prestige of being considered binding, or, as it may be expressed, of 'legitimacy.'[360]

Hence, for a social arrangement to survive it requires the subjective acceptance of actors based on a normative grounding.[361] The main assumption that drives the argument for legitimacy is that human beings are motivated by normative considerations. The underlying idea is that we have a sort of moral compass and that we react if we consider some situation to be against our own normative commitments.[362] The perceived importance of legitimacy, 'understood as the normative validity of an order,'[363] is that it allows for 'a less 'costly' form of sustaining authority compared to either coercive or interest-based authority.[364] This is simply because 'we will … more easily follow rules and accept roles that can be justified to us in normative terms, while political and social orders that cannot be so justified will have difficulty securing acceptance.'[365] Thus, a legitimate social arrangement is based on the existence of public and shared beliefs about what constitutes a valid course of action.

[357] Marquez 6
[358] Ibid 5
[359] Pakulski 36.
[360] Max Weber, *Max Weber on Law in Economy and Society* (Max Rheinstein and Edward Albert Shils trs, Harvard University Press 1954) 125
[361] Weber, *Economy and Society: An Outline of Interpretive Sociology 124-125*
[362] Johnson
[363] Pakulski 35
[364] Matheson 200
[365] Marquez 7

To be more precise, the concept of legitimacy captures the idea that there is a 'sense of duty, obligation, or 'oughtness' towards rules, principles or commands.'[366] For that to take place there has to be what Xavier Marquez calls an *institutionalized persuasion*. On one side, those that dominate a social order 'take advantage' of certain public shared norms in order to justify their position and actions. On the other side, those dominated need to find the justifications convincing and take them as their own, thereby making them committed to the relationship. Thus, an explanation of persistence or non-persistence of a relationship based on legitimacy

> involves showing that the subordinates consider a particular authority norm valid *because* the authorities in question make a credible claim to meet the standards of publicly relevant evaluative norms, for example by deploying appropriate discursive justifications for their actions or acting in ways that are interpretable as falling within shared normative standards.[367]

For Weber, legitimacy may be based on traditional, charismatic, or legal-rational grounds. According to the idea of legitimacy on traditional grounds, the legitimacy of a social order rests 'on an established belief in the sanctity of immemorial traditions and the legitimacy of the status of those exercising authority under them.'[368] Legitimacy on charismatic grounds refers to the notion that the legitimacy of an authority may be based on the 'devotion to the exceptional sanctity, heroism or exemplary character of an individual person, and of the normative patterns or order revealed or ordained by him.'[369] Finally, an order is legitimate on legal-rational grounds if it is based 'on a belief in the legality of enacted rules and the right of those elevated to authority under such rules to issue commands.'[370]

As Marquez notices, with each of the three notions of legitimacy, the basis of submission differ. In particular, each type of legitimacy entails a particular understanding of why one obeys the social arrangement. First, a legitimate social arrangement based on traditional grounds is obeyed because that is how things are. Second, an order whose legitimacy is based on charismatic grounds is followed due the extraordinariness of the leader. Finally,

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[366] Martin E Spencer, 'Weber on Legitimate Norms and Authority' (1970) 21 BJS 123, 126
[367] Marquez 7, footnote omitted
[368] Max Weber, *The Theory of Social and Economic Organization* (Talcott Parsons ed, Alexander M Henderson and Talcott Parsons trs, Free Press 1964) 328
[369] Weber, *Economy and Society: An Outline of Interpretive Sociology* 215 Barker argues that at some points Weber identifies a fourth type of legitimate order and which is value-rational. For Weber, value-rational legitimacy holds 'by virtue of a rational belief in its absolute value.' Barker 49
[370] Weber, *Economy and Society: An Outline of Interpretive Sociology* 215

obeying an order that is legal-rationally legitimate rests on the belief that the order operates according to the duly enacted rules.[371] In Weber's own words, belief in legality rest on 'the compliance with enactments which are formally correct and which have been made in the accustomed manner.'[372]

To sum up, an explanation based on legitimacy presupposes a fundamental connection between legitimacy and the stability and effectiveness of a regime. A social arrangement is deemed legitimate because actors accept the rules of the arrangement as part of their own normative 'worldview' and act accordingly.[373] In other words, social norms are internalized by those being dominated and as a result they are motivationally effective. This idea is one of the basic tenets in the international law literature on legitimacy and many arguments start from there. With this laid out, we are ready to move on to the substantial analysis of legitimacy, which has two parts. I will first concentrate on the conceptual properties of legitimacy and then return to the descriptive side of the concept, in particular to the link between legitimacy and the stability of social arrangements.

IV.3. The struggle for legitimacy

Examining the literature on legitimacy in international law, one observation quickly emerges. Despite the pervasiveness of legitimacy, it is quite difficult to ascertain of what precisely legitimacy consists. The different elements that allegedly comprise legitimacy are extremely varied such that the impression arises that almost any consideration can potentially fall under the scope of legitimacy. In principle, this should not be seen as a major flaw of legitimacy per se. Concepts, especially those of political and legal nature, often tend to be open and contested with multiple meanings and definitions. For example, ideas like democracy, rule of law, or authority are subject to ongoing discussions. Yet, the scope and extent of ambiguities associated with legitimacy are far more substantial than with respect to any of those other concepts.

In this section, I will analyse in more detail the nature of the concept of legitimacy and argue that the boundaries of legitimacy are so wide that it is extremely difficult to use legitimacy

[371] Marquez 13
[372] Weber, *Economy and Society: An Outline of Interpretive Sociology* 37
[373] Marquez 15

as an analytical tool. As a result, we will see that attempts to provide some workable definition are often insufficiently justified or somewhat arbitrary. This, in turn, has the unfortunate consequence that the concept is often used without any clarification of which use they are discussing and with internal incoherencies, both in academic discussions and in practice.

IV.3.a Classifications of Legitimacy

To begin with, I will first illustrate how expansive the concept of legitimacy is by providing a typology whereby one can identify the elements that have been associated with the term in the international law literature. This endeavour is not without its own complications. Given that there are countless different usages of legitimacy, it is to be expected that there are equally many classifications and typologies.[374] Moreover, as for the conceptualization of legitimacy itself, any of those classifications generally runs the risk of being influenced by some implicit understanding of legitimacy. Relatedly, there is always an element of arbitrariness when it comes to the decision of what to include and what to exclude. Hence, any classification is not a neutral effort. Nevertheless, it may help to structure the debate.

A common route for classifying legitimacy is a separation by field. This division roughly follows disciplinary subjects such as law, politics, philosophy, or sociology. The usefulness of such classification is that it situates each type of legitimacy within one more or less defined academic area. This provides some coherence because the literature typically revolves around a certain set of issues. The disadvantage is that one ends up repeating similar themes within each issue-area, making those classifications slightly repetitive. This chapter takes a broader perspective by employing a classification that is not field specific but stresses more general aspects of legitimacy. In particular, I use the typology put forward by Andrew Hurrell, which consists of a fivefold division of legitimacy.[375] He identifies the following dimensions: 1) process and procedure; 2) substantive values; 3) technical knowledge; 4) effectiveness; and 5) giving reasons and persuasion. Hurrell's typology

[374] Thomas, 'The Uses and Abuses of Legitimacy in International Law'

[375] Andrew Hurrell, 'Legitimacy and the Use of Force: Can the Circle Be Squared?' (2005) 31 Review of International Studies 15 For other lists see, e.g., Matheson 205 Franck, *The Power of Legitimacy among Nations* 44

distinguishes among the various themes that are evoked in discussions about legitimacy and cuts across the different subjects. I follow him except for the final dimension. 'Giving reasons and persuasion' is focused on the question of how a social order might become legitimized and not on what the content of those reasons and persuasion is. It does not tell us what it is that supposedly legitimizes a social arrangement, so we will address this aspect of legitimacy later on. Let us first deal with categories 1)-4).

1) Process and procedure. The first category deals with the validity of rules and institutions regarding their evolution and practice. As Franck writes, a rule can be considered legitimate if '*the perception of those addressed by a rule or a rule-making institution that the rule or institution has come into being and operates in accordance with generally accepted principles of right process.*'[376] Regarding these principles, there are two important instances that have received considerable attention in the literature: the rule of law or legality and 'rules of power.'[377] Defining legitimacy in terms of whether an order operates in accordance with the rule of law is congruent with the etymological origins of the words which refer to what is lawful.[378] Rule of law or legality is often seen as a minimal criterion for a social arrangement to be deemed legitimate.[379] As Daniel Bodansky remarks, legality is preoccupied with the internal perspective of law: 'particular directives are justified in terms of a regime's secondary rules about who can exercise authority, according to what procedures, and subject to what restrictions.[380] In a similar vein, Christopher A. Thomas understands legality 'as a property of an action, rule, actor or system which signifies a legal obligation to submit to or support that action, rule, actor or system.'[381] Both definitions point to the fact that discussions about legality are focused on the

[376] Franck, *The Power of Legitimacy among Nations* 19 Christopher A. Thomas, *The Concept of Legitimacy and International Law* (London School of Economics and Political Science 2013)

[377] I will treat the rule of law and legality, for now, synonymously. It should be borne in mind, however, that depending on one's approach, the rule of law can be identified with 'formal' and 'substantive' conceptions. The latter overlaps with legality whereas the former is more expansive, see Paul Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' [1997] Public Law 467; the notion 'rules of power' comes from Beetham, see Beetham.

[378] Martti Koskenniemi, 'Legitimacy, Rights, and Ideology: Notes Towards a Critique of the New Moral Internationalism' (2003) 7 Associations 349, 358

[379] Thomas, 'The Uses and Abuses of Legitimacy in International Law' 735; Beetham 16

[380] Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?' 608

[381] Thomas, 'The Uses and Abuses of Legitimacy in International Law' 735

regulation of power. As Nicholas W. Barber suggests, legality 'asks what it means to be governed by law, rather than by men.'[382] This reminds us of Weber's definition of legitimacy on legal-rational grounds according to which certain actions, norms or institutions are deemed legitimate because they have 'been established in a manner which is recognized to be *legal*.'[383] As it can be inferred from the discussion, this understanding of legality overlaps with legal positivism. One follows or accepts certain institutions or norms simply because they exist and operate according to the correct legal procedure. While 'rule of law' is an important principle with respect to how some law or institution operates, 'rules of power' concerns the manner in which the law or institution comes into being. In particular, there are rules 'governing the acquisition and exercise of power.'[384] Following David Beetham, such rules can be either custom-based or formalised. As he writes, the majority of the rules for acquiring power tend to be formalised due to the 'need to resolve disputes about power by making the rules both precise and strictly enforceable.' However, 'there still remains considerable role for convention, or 'custom and practice.'[385]

Most discussions about procedural aspects of power acquisition and exercise focus on the presence or absence of democratic principles, but they may refer to any type of political organization. Quite fittingly, one the first instances in which the word legitimacy was used was during the French and Napoleonic domination, when the Prince Talleyrand used the slogan 'Restoration, Legitimacy and Compensation' with respect to the Congress of Vienna. Talleyrand's aim was to denounce the Napoleonic domination because the seizure of power was not undertaken according to the rules of custom of the time – legal descent or lineage.[386]

2) Substantive values. As some authors have noted legitimacy is not deployed solely for arguing whether a certain norm or institution was made 'according to the usual,

[382] Nicholas W Barber, 'Must Legalistic Conceptions of the Rule of Law Have a Social Dimension?' (2004) 17 Ratio Juris 474, 474
[383] Weber, *The Theory of Social and Economic Organization* 361
[384] Beetham 16
[385] Ibid
[386] Bensman 18

recognised, prevailing ways of doing things,'[387] which would reduce issues of legitimacy to questions of process. As a matter of fact, discussions regarding legitimacy often evolve around the question of whether a certain rule or institution has normative standing, that is, whether it can be justified or accepted. In Friedrich V. Kratochwil's words, the '"acceptance" of a certain proposal or alternative can be expected to be adhered to *by others* because of its reasonableness.'[388] This emphasis on the substantive adequacy of norms is also present in Weber's writing. He dubs it substantive rationality whereby certain norms are deemed legitimate 'because they express moral principles which are held as absolute values in themselves.'[389]

That said, there is no clear agreement on what those substantive grounds are. On the one hand, we find cases in which a broad spectrum of values can be part of legitimacy. For example, for Ian Clark an essential part of legitimacy, alongside legality and constitutionality, is morality. Other proposals regard fairness,[390] human rights,[391] transparency, accountability, global welfare, democracy, justice and so on as essential ingredients of legitimacy. Justice is an interesting case. Political philosophers and some psychologists tend to make an analytical separation between legitimacy and justice.[392] Legitimacy refers to the idea of whether a certain procedure is sustained by certain moral conditions such as fairness or representation, while justice refers to distributive issues or to the actual outcome of a procedure. This distinction is contested. Authors like Buchanan or Kumm acknowledge that justice is another factor that falls under legitimacy. In particular, they argue that a minimal core of justice has to be fulfilled in order for a decision or an action to be legitimate.[393]

3) Technical knowledge. Under this heading an action or institution can be deemed legitimate when it provides reliable expertise on a certain matter. That is to say, the

[387] Geuss 35
[388] Friedrich V Kratochwil, 'On Legitimacy' (2006) 20 International Relations 302, 303
[389] Spencer 127
[390] Thomas M Franck, *Fairness in International Law and Institutions* (Clarendon Press 1995)
[391] Jan Klabbers, Anne Peters and Geir Ulfstein, *The Constitutionalization of International Law* (Oxford University Press 2009)
[392] See e.g. Fabienne Peter, *Democratic Legitimacy* (Routledge 2008); Tom R Tyler, *Why People Obey the Law: Procedural Justice, Legitimacy, and Compliance* (Yale University Press 1990)
[393] Kumm 927; Allen Buchanan, *Human Rights, Legitimacy, and the Use of Force* (Oxford University Press 2010)

validity of a certain institutions is dependent on its competences. For example, the legitimacy of a commission like the Congressional Budget Office (CBO) in the US depends on how well it performs its job. The WTO's Appellate Body's decision regarding whether or not to impose certain measures that favour free trade is deemed legitimate not only depending on how well it follows the law but also on how adequate is the economic knowledge on which it relies.[394]

4) Instrumental legitimacy. According to this notion of legitimacy, an institution's legitimacy is judged by its effectiveness. This refers to the idea that a decision can be considered legitimate as long as it produces certain benefits or delivers a solution to a certain problem. Kumm refers to instrumental legitimacy when discussing the rule of law as part of legitimacy, arguing that the rule of law creates important benefits and expectations. As he argues, a well-functioning legal order has several advantages: it 'enables and fosters the establishment of welfare-enhancing cooperative endeavour … [it] can help reduce transaction costs … [it] contributes to the checks and balances of a constitutional system … it also provides predictability and enhances the freedom of individual actors.'[395] Likewise Tasioulas, following Raz's Normal Justification Thesis (NJT), adopts an instrumental notion of legitimacy, paired with elements of technical legitimacy. According to NJT,

> the normal way to establish that a person has authority over another person involves showing that the alleged subject is likely better to comply with reasons which apply to him (other than the alleged authoritative directives) if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to follow the reasons which apply to him directly.[396]

In other words, 'authoritative directives should be based on reasons which already independently apply to the subjects of the directives and are relevant to their action in the circumstances covered by the directive.'[397] Behind this notion of legitimacy stands a paternalistic understanding of authority whereby authority is obeyed because of its superior capabilities. As Tasioulas argues, Raz's concept of legitimacy,

[394] Thomas, 'Of Facts and Phantoms: Economics, Epistemic Legitimacy, and Wto Dispute Settlement'
[395] Kumm 918ff
[396] Joseph Raz, *The Morality of Freedom* (Oxford University Press 1986)
[397] Ibid

> dubbed a 'service conception', is centred on the assumption that there are actual objective reasons that a subject should obey. By obeying the authority a subject may end up in a better position as a result of those reasons and, as a result, the authority can be deemed legitimate.[398]

The four dimensions of legitimacy outlined here are subject to various criticisms. Let us start with the notion of legitimacy that refers to the validity of process and procedure. This concept of legitimacy is largely equivalent to the concept of legality. Specifically, an institution or a norm is considered legitimate according to this notion if it is created and works according to the law or generally accepted principles. The only aspect in which legitimacy differs from pure legality under this definition is that the laws according to which legitimacy is assessed can be formal or informal.[399]

Second, the definition of legitimacy according to substantive values is equally problematic. Here legitimacy can be viewed as an umbrella concept overarching different sub-concepts such as morality, justice, fairness, democracy, etc. The main problem that arises with this idea of legitimacy is that there is no common consensus of what precisely are the normative values encompassed by legitimacy. Some authors, such as Franck, reduce legitimacy to fairness,[400] others like Beetham associate it with justice,[401] and others like Clark equate it broadly to morality, which in turn can subsume many values.[402] Beyond that, even if we agree on the content of the values within the substantive part of legitimacy, we are faced with the secondary issue that those values sometimes stand in direct conflict to each other. A clear instance is the ongoing struggle between freedom and security and the extent to which states can protect their citizens or the institutions of the state from risks and dangers without endangering the liberty of individuals.

Third, legitimacy evaluated in terms of technical knowledge can be contested for the following reasons. Unlike in the natural sciences, many questions regarding decisions in societal life are complex and do not have clear and definite answers. As an example, take

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[398] John Tasioulas, 'The Legitimacy of International Law' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press 2010) 100-102

[399] This is what Clark, drawing on Ikenberry, calls 'constitutionality,' see Clark, *Legitimacy in International Society*. And there are sufficient doubts that individuals do believe in the legitimacy of a norm because it came through the adequate procedure or because it has legal form, see Hyde

[400] Franck, *Fairness in International Law and Institutions*

[401] Beetham

[402] Clark, *Legitimacy in International Society*

economic international institutions such as the European Central Bank (ECB), the IMF or the World Bank. These institutions take important economic decisions that profoundly affect the communities at which the measures are aimed and beyond. The legitimacy of such decisions is based on the technical competences of the committees in those institutions. However, economic models on which the decisions are grounded are highly contested between experts and are far from being associated with any definite truth. The two main competing models of economics – neoclassical economics and Keynesian economics – differ vastly in their policy implications. Given the lack of a clear consensus on the effectiveness of such policies, the decision of which theoretical approach to follow becomes somewhat ideological, calling into doubt the technical legitimacy of such institutions.

This brings us to the final notion of instrumental legitimacy according to which an authority or a norm is legitimate if it makes those affected better off. As the wording suggests, this notion of legitimacy is of a relative nature. In order to assess whether an authority or a norm is legitimate, we would have to compare the well-being of those affected by it with their well-being in the counter-factual situation. The evident problem is that any counter-factual is purely hypothetical, as in reality we can only assess the situations we observe. For example, the removal of Saddam Hussein in 2003 was argued to be legitimate by the US Government because his elimination would improve the situation of the Iraqi population. This claim was highly presumptuous from the beginning and, in the aftermath, turned out to be flatly wrong. This points to a more general problem of instrumental legitimacy as a concept because there is no possibility of knowing ex ante how things will turn out and how they would have turned out if alternative decisions were taken. Besides this practical dimension of the problematic nature of instrumental legitimacy, there is another conceptual one. Recall that according to Weber the stability of a social arrangement is based either on coercion, self-interest, legitimacy or a combination of them. Instrumental legitimacy however is closely intertwined with self-interest. A social arrangement is regarded as instrumentally legitimate precisely when it meets the self-interest of those affected by it. As an example, Kumm notes that the rule of law, as part of his legitimacy framework, produces certain benefits for those under its reach such as the reduction of transaction costs. Such a conflation of legitimacy with material interest makes the possibilities of tracing legitimacy even slimmer.

Taken together, all four notions of legitimacy typically used in the literature have shortcomings. Even more problematic than these internal issues is the task of reconciling them. The main issue is that for most discussions concerning legitimacy taking one notion of legitimacy as opposed to another leads us to draw different conclusions regarding the legitimacy of the institution or action of interest.[403] A clear instantiation of how the different notions of legitimacy can stand in direct contrast to each other is the 1999 Kosovo intervention. On the one hand, there is the issue of legality – more precisely the fact that the use of force is prohibited except for self-defence or in case the Security Council authorization, neither of which was the case during the events of Kosovo. Thus, from a procedural point of view the intervention has to be deemed illegitimate. On the other hand, the intervention was justified by the NATO member states as a defence of substantive values, in particular the right to self-determination and the prevention of crimes against humanity. From the viewpoint of legitimacy in terms of substantive values, one could regard the intervention as legitimate. The question is thus how to judge situations in which some aspects of legitimacy are justified while others are not. One extreme possibility is to view an institution or an action as legitimate if and only if it is legitimate according to *all* dimensions of legitimacy. This is clearly too demanding as we would consider illegitimate everything from the creation of the UN Charter, to the overthrowing of any dictator, and so forth.[404] The second possibility is to view something as legitimate if it can be regarded legitimate according to *any* of the different notions of legitimacy. This form of aggregation is clearly too weak, as almost anything could be deemed legitimate. Taken to the extreme, this could even include genocide as long as it makes some community better off and thereby met the standard of instrumental legitimacy. In most discussions concerning the legitimacy of particular institutions or decisions, neither of the extreme stances is taken but the different aspects of legitimacy are weighted against each other. This weighting is of course highly subjective and contextual.

In sum, the outlined typology shows how much ground legitimacy covers and how demanding it is. For a social order to be legitimate, it has to fulfil procedural conditions,

[403] Brubaker and Cooper 8

[404] In the first case, the UN Charter would violate the substantive principle of sovereign equality while procedurally it would be legitimate. The second and third cases, on the other hand, cannot be deemed legitimate from a procedural point of view, but can be regarded legitimate from a substantive perspective.

reach certain substantive values, produce some benefits, and so forth. Legitimacy is so conceptually diverse that its use becomes highly ambiguous, ultimately giving rise to a 'blunt, flat, undifferentiated vocabulary.'[405] The general question is why legitimacy as an umbrella-concept comprising other already complicated concepts such as legality, justice or morality can be useful. This issue will be examined in more detail in the following discussion.

IV.3.b. Conceptual features of legitimacy

I will now delve deeper into the conceptual features of legitimacy and try to trace some of the origins of its inherent ambiguity. As a starting point, I rely on Ross's insightful article *Tû-Tû*.[406] Drawing on the work of the anthropologist Ybodon on the Noît-cif tribe, whose members live on the Noîsulli Islands, he describes the existence of a particular word: *tû-tû*.[407] The most remarkable feature of this word is that it does not have a clear first-order meaning, but that it has a function in the daily life of the tribe: it expresses commands and makes assertions about facts.[408] *Tû-tû* can be explained approximately 'as a kind of dangerous force or infection which attaches to the guilty person and threatens the whole community with disaster.'[409] Following Ybodon's account, Ross explains how *tû-tû* operates, and that its usage, as it stands, can be regarded as superfluous. He notices that *tû-tû* is normally deployed within the tribe in the following manner:

(1) If a person has eaten from the chief's food he is *tû-tû*.

(2) If a person is *tû-tû* he shall be subjected to a ceremony of purification.[410]

According to Ross, if we follow the rules of logic, an equivalent statement would be:

(3) If a person has eaten from the chief's food he shall be subjected to a ceremony of purification.[411]

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[405] Brubaker and Cooper 2

[406] Alf Ross, 'Tû-Tû' (1957) 70 Harvard Law Review 812

[407] One needs to point out that Ross invented the whole account regarding the existence of the tribe and the anthropologist. Both Ybodon and Noît-cif are respectively wordplays with nobody and fiction. In fact, at a certain point in the paper, Ross asserts that we need 'to drop all pretense' and admit the 'allegory concern with ourselves,' ibid 817. The connection between magic and law, which is what *tû-tû* is all about, is related to prior arguments made by exponents of Scandinavian legal realism such as Axel Hägerström who argued that law, from its Roman law origins, was like magic.

[408] Ibid 812-813

[409] Ibid 813

[410] Ibid

Given that proposition 3) expresses the same content as proposition 1) and 2), Ross argues that *tû-tû* stands for nothing, that 'the word in itself has no semantic reference whatever,' and that there is no connection, logical or casual, between the use of the word and the descriptive and prescriptive affairs.[412] *Tû-tû* operates as a 'technique of expression' of the following kind: if x implies y and y implies z, then x implies z, 'a proposition which holds good whatever "y" stands for, or even if it stands for nothing at all.'[413] However, the use of the word is not employed arbitrarily; rather the usage of *tû-tû* seems to be stimulated 'in conformity with the prevailing linguistic customs by quite definite states of affairs.'[414] More precisely, even though the word does not have a first-order meaning, it serves as a device to systemize different contingencies and causal implications. *Tû-tû* thus operates as a categorization device, bundling contingencies, such as eating the chief's food or killing a totem animal, which imply the undergoing of a ceremony of purification. Similarly, it may bundle together consequences such as the ceremony of purification and others, which are implied by the former contingencies. *Tû-tû* consequently works as a category or rubric, helping to systemize contingencies, events and outcomes in the world of the Noît-cif tribe.

Ross draws a parallel between the usage of *tû-tû* and the way certain legal concepts operate.[415] He uses the following legal example to highlight the similarities:

1) If a loan is granted, there comes into being a claim;
2) If a claim exists, then payment shall be made on the day it falls due.

As in the *tû-tû* example above, these two propositions can be combined in the following manner:

3) If a loan is granted, then payment shall be made on the day it falls due.

As Ross argues, the omission of the legal concept 'claim' comes without any loss of meaning. Similar to the case of *tû-tû*, the concept does not have a distinct first-order meaning but merely serves as a device to connect a set of contingencies to a set of consequences. Ross contends that this is the fundamental function of legal concepts. Rather than having a

[411] Ibid
[412] Ibid 815, 816
[413] Ibid 814
[414] Ibid
[415] Ibid 817

distinct semantic reference, they are categorization devices that link certain actions and events to their legal consequences. Ross illustrates this claim with the example of ownership, which can arise as a consequence of different circumstances such as purchase, inheritance or the collection of collateral in the case of credit default, and entails a number of different consequences such as the right to sell, the right to bequeath or the right to collateralize. He concludes that legal concepts can be understood as a technique of presentation, helping to systematize manifold situations and consequences within an appropriate 'box.'

For the case of legitimacy, a similar account can be put forward, although certain differences need to be highlighted. To begin with, similarly to *tû-tû*, typical causal statements involving legitimacy can, without loss of meaning, often be expressed without any explicit reference to legitimacy. Along the lines of Ross, the usage of legitimacy can be described as follows:

1) Social order x fulfils/is believed to fulfil normative requirement y.
2) Accordingly social order x is legitimate.
3) Hence, social order ought to be/is obeyed.

As we can observe, legitimacy could be dropped from this series of propositions, as there is no logical connection both at the descriptive and prescriptive side of legitimacy. One way in which one could evaluate the value of legitimacy is thus through its effectiveness as a categorization device – like *tû-tû*. My contention is that due to its inherent ambiguities, legitimacy as a systemizing scheme is highly inadequate. I will now argue why.

First, one of the fundamental functions of concepts like *tû-tû* is that they distinguish certain types of situations from others. In the context of legitimacy, we are interested in which type of institutions or decisions can be categorized as legitimate and which cannot. *Tû-tû* serves this function well because there is a clearly demarcated set of contingencies such as eating the chief's food or killing a totem animal, that qualify a person to be called *tû-tû*. Similarly, the legal concept of ownership refers to a well-defined set of circumstances that entail clearly specified rights and obligations. This stands in contrast to the case of legitimacy. Ideally, the concept should enable us to distinguish situations that deserve the rubber stamp of legitimacy from those that do not. However, the concept of legitimacy does not

necessarily focus on the properties of diverse situations, but is inherently built on diverse and complex concepts. These concepts, e.g. morality or legality, can often be regarded as systemizing devices by themselves. Since the set of contingencies they categorize are not only contested but will generally differ from each other, and since it is not clear how legitimacy should aggregate in case of such conflicts, the functioning of legitimacy as a systemizing tool is, to an extent, compromised. This shortcoming of legitimacy has an important practical ramification. One of the main virtues of words like *tû-tû* is that they foster a common understanding of the consequences of particular situations or actions, which in turn has implications for ex-ante decisions to take those actions and the ex-post enforcement of the prescribed consequences. This understanding is crucially based on the common agreement of what the concept entails. Legitimacy, however, is lacking any common ground on basic conceptual features. For example, for Franck, legitimacy of international rules is based on a fourfold criterion: determinacy, coherence, symbolic validation, and adherence. This contrasts with Dencho Georgiev, for whom the legitimacy of international rule comprises substantive values and not only certain procedural rules.[416] These two accounts of legitimacy categorize a very different set of circumstances as legitimate and even though there may be overlap, generically they will make differing predictions. This stands in contrast to systemizing concepts like *tû-tû*, for which there is a shared agreement about their reference. The lack of common understanding of what legitimacy entails thus significantly hampers its analytical purchase. It makes an identification of legitimate versus non-legitimate situations, actions or institutions arbitrary at best, impossible at worst.[417]

But why is there no agreement on what legitimacy entails? The ongoing disputes over which criteria belong to legitimacy are rooted in the underlying view of legitimacy as an analytical concept when actually it is more appropriately treated as a modal or appraisive concept. Analytical concepts 'are those that … are used to discriminate and classify things that have

[416] Georgiev 555

[417] This becomes most apparent in Beetham's account. For him, one of the elements that make something legitimate within a society is the respect for the rules in acquiring power. However, he recognizes that there have been situations in which there have been coups d'état that were supported by the population. Thus, he argues that while this is the case, the stability of a military regime will be more fragile than that of a democracy because they will rely more on effectiveness than a democracy. Even accepting that, the point is that the attempt to establish what is or is not legitimate fails, see Beetham.

often already been theoretically constituted.'[418] Modal or appraisive concepts, on the other hand, tend to

> represent form rather than substance … they do not carry with them any necessary ontological commitments and are not confined to a particular practice. Although they have a universal or invariant force or meaning, their criteria of application are relative to particular practices and language-games.[419]

Viewing legitimacy as a modal concept rather than an analytical one seems to be a better fit with how it has been used. It can also make sense of why attempts to circumscribe legitimacy could only be partially successful, as the lack of any substantive commitment makes the search for definite criteria fruitless.

Friedrich V. Kratochwil raises a similar argument in his discussion about legitimacy. He argues that 'legitimacy is badly understood when it is treated as a descriptive term rather than one of appraisal.'[420] For him, to reduce 'the operations involved in appraising to one of describing is likely to engender the same difficulties that we encounter in the ascription of 'goodness' if we treat the latter as a simple 'property' of an object or action.'[421] Here, Kratochwil is invoking Moore's argument about the naturalistic fallacy according to which, when discussing the concept of good, it is a mistake to infer what is good from those objects that we consider to be good. For Moore, good cannot be defined as it 'is one of those innumerable objects of thought which are themselves incapable of definition, because they are the ultimate terms of reference to which whatever is capable of definition must be defined.'[422] The upshot of this argument for legitimacy as a modal concept is that there cannot be a clear 'match' between the objects of legitimacy, such as certain institutions and rules, and what one thinks about legitimacy. The evaluative character of legitimacy precludes the possibility of objectively matching certain practices with the concept itself. To illustrate the argument, let me quote Wittgenstein's analysis of 'inexact' and 'exact.' He

[418] Gunnell 139

[419] Ibid 139-140. Gunnell makes a third distinction among concepts beyond analytical and modal. He also identifies 'theoretical concepts.' For him, theoretical concepts are those that constitute the ontologies of different life-forms. Thus, a state would be a theoretical concept as it is connected with what here is in the social world. Legitimacy would simply make an assessment of that theoretical concept.

[420] Kratochwil, 'On Legitimacy' 305

[421] Ibid

[422] George E Moore, *Principia Ethica* (Thomas Baldwin ed, Revised edn, Cambridge University Press 1993 [1903]) § 10. This is not to deny that what can be understood as 'good' might depend on the properties of an object, the point is that there relationship is not intrinsic ornecessary.

asserts that 'inexact' is really a reproach, while 'exact' is praise. That is to say, what is inexact attains its goal less perfectly than what is exact. Any assessment depends on the point of reference. In consequence, 'no single ideal of exactness has been envisaged; we do not know what we are to make of this idea - unless you yourself stipulate what is to be so called.'[423]

Both Gunnell and Kratochwil hint at how we can circumscribe legitimacy – namely by its criteria of application. More specifically, they sustain that what is considered legitimate will depend on particular practices and will be based on recognized and shared criteria. However, what those shared criteria can be and how they come into existence is left open. This is crucial, as many discussions about legitimacy evolve around precisely the question of what is the nature of those criteria. In the next chapter, I will pick up this point and examine the issue of shared criteria in more detail in the context of my approach to legitimacy and legitimation.

IV.3.c. Is this a problem?

Given the conceptual features of legitimacy outlined above, agreement on the criteria for legitimacy seems to be unlikely, if not impossible. Now, one could argue that such agreement is not even desirable and instead embrace the open nature of the concept. Indeed there exist different lines of argument that defend the plurality of certain concepts as a general matter. According to those arguments, the fact that a concept cannot be fitted into a box of clear-cut criteria should sometimes be viewed as a virtue rather than as a shortcoming. One of these lines of defence rely on the notion of 'essentially contested concepts.'[424] The expression, famously coined by Walter Gallie, aims to convey the idea that there exist concepts for which an agreement on the proper use and composition is impossible and unnecessary. Instead, 'there is no clearly definable general use of any of them which can be set up as the correct or standard use.'[425] Thus, any given proposal defends their 'case with what it claims to be convincing arguments, evidence and other

[423] Wittgenstein § 88
[424] W. B. Gallie, 'Essentially Contested Concepts' (1955) 56 Proceedings of the Aristotelian Society 167
[425] Ibid 168

forms of justification.'[426] For Gallie, such endless disputes demonstrate that there can be differing explanations without the need for any of them to be the solely correct one.[427] In particular, he claims that there are some disputes that by 'nature cannot be settled by appeal to empirical evidence, linguistic usage, or the canons of logic alone.'[428] According to this idea, discussions concerning legitimacy cannot be solved once and for all. Instead, each competing usage of legitimacy has equally valid standing and the only fruitful path of debate lies in improving each other's understanding without having to settle on a single correct usage.

Which features make a concept essentially contested? Gallie initially proposed five conditions for identification of such concepts. In detail, the conditions are:

a) The concept 'must be appraisive in the sense that it signifies or accredits some kind of valued achievement.'
b) The achievement 'must be of an internally complex character, for all its worth is attributed to it as a whole.'
c) Any sufficient explanation 'must therefore include reference to the respective contributions of its various parts or features; yet prior to experimentation there is nothing absurd or contradictory in any one of a number of possible rival descriptions of its total worth, one such description setting its component parts or features in or order of importance, a second setting them in a second order, and so on. In fine, the accredited achievement is *initially* variously describable.'
d) 'The accredited achievement must be of a kind that admits of considerable modification in the light of changing circumstances; and such modification cannot be prescribed or predicted in advance.'
e) Each party defending a position 'recognizes the fact that its own use of it is contested by those other parties, and that each party must have at least some appreciation of the different criteria in the light of which the other parties claim to applying the concept in question.'

[426] Ibid 168
[427] Ibid 169
[428] John N Gray, 'On the Contestability of Social and Political Concepts' (1977) 5 Political theory 331, 344

The concept of legitimacy can indeed be argued to fulfil these conditions. (a) Legitimacy is clearly an appraisive concept, not only in the sense as argued above, but also in the sense that in order to determine whether or not a certain social order is legitimate, it is necessary to assess different normative standards associated with the concept. This is also the case for the sociological conception of legitimacy as it refers to the normative considerations of those obeying the authority. (b) Legitimacy can be regarded as internally complex. As we saw in the first part of this section, the different accounts of legitimacy stress several components – procedural, substantive, and so forth – which in turn can be disaggregated into further elements. (c) There does not exist a ranking order for the various elements comprising legitimacy. As a result, no element has pre-eminence over another and different uses of legitimacy rely on different sets of criteria. (d) The various achievements of legitimacy can change and vary with time and there is no way of foreseeing the use and modifications of the concept under new circumstances. (e) Lastly, those discussing legitimacy are aware that the concept is contested and typically recognize that their particular understanding does not represent the final truth.

Although Gallie initially argues that these five conditions are necessary and sufficient, he then admits that they do not allow for a distinction between confused and essentially contested concepts. This leads him to introduce additional two requirements.[429]

f) The use of a concept comes 'from an original exemplar whose authority is acknowledged by all the contestant users of the concept.'
g) The ongoing contest between the different usages of the concept 'enables the original exemplar's achievement to be sustained and/or developed in optimum fashion.'[430]

While legitimacy clearly satisfies criteria (a)-(e), it is more questionable that it also meets the final two requirements, namely (f) that there is an exemplar around which the different uses of legitimacy revolve and (g) that through the continuing discussions evolving around legitimacy we increase our knowledge of the concept. Let us begin with the notion of 'original exemplar.' The idea of an 'original exemplar' is open to somewhat different

[429] Gallie 168; Simon J Evnine, 'Essentially Contested Concepts and Semantic Externalism' (2014) 8 Journal of the Philosophy of History 118, 122; Peter Ingram, 'Open Concepts and Contested Concepts' (1985) 15 Philosophia 41, 42
[430] Gallie 171-172,180

interpretations. Gallie simply states that an original exemplar is an instance of a concept that is accepted by all participants and from which discussions emanate. As Evnine puts it, one discusses how different phenomena or things are related to the common exemplar.[431] The most accepted interpretation of Gallie's use of original exemplar is of historical character. According to this view, an 'original exemplar' refers to some archetypal phenomenon in relation with some historical tradition.[432] As an example, contests about the right interpretation of 'Christianity' are disputes about which interpretation is the most appropriate one in relation with the origins, namely the Bible and the person and biography of Jesus Christ.[433] While this, at first glance, seems to be an appealing idea, in the context of legitimacy it turns out to be somewhat problematic. First and foremost, it is not clear what a historical exemplar of legitimacy would be. Legitimacy as a concept is abstract and it is not tied to any specific field of application. In consequence, there is no historical instance that serves as a point of reference. Due to the sheer diversity of situations in which legitimacy has been raised, one could at best hope to find a collection of exemplars, which in turn would give rise to a contest about the relative appropriateness of each one of them. This takes us to the Weberian point that legitimacy will vary according to the type of authority or domination involved.[434] In particular, Weber asserts that there is no universal criterion of legitimacy; rather, depending on the type of institution that is exercising power, the form of justification will be adapted to how the particular institution operates.

The final condition for Gallie's essentially contested concepts is that through the ongoing contestation between the different understandings of the concept there is progress about its knowledge.[435] More specifically, it entails that the continuous competition among the different conceptions 'enables the original exemplar's achievement to be sustained and/or developed in optimal fashion.'[436] Clearly, the belief that through open contestation we can achieve a better understanding of a concept relies on a liberal idea whereby honest disagreement benefits everyone.[437] In principle, the notion of optimum development can be

[431] Evnine 138
[432] Ibid 119
[433] Gallie 180-181; Evnine 123-124
[434] Weber, *Economy and Society: An Outline of Interpretive Sociology* 213
[435] See a version of this defence in Jason Brennan, 'Beyond the Bottom Line: The Theoretical Aims of Moral Theorizing' (2008) 28 OJLS 277
[436] Gallie 189-190
[437] Evnine 125

considered either with or without an original exemplar in mind.[438] In light of the doubts just raised, it is clear that in the context of legitimacy the latter notion seems to be of interest. However, even here, the question of whether competition among different accounts of legitimacy has led to conceptual progress, as posited by Gallie, is debatable. Gallie asserts that competing versions of a given concept can be internally consistent and that contests among them foster the development of their internal logic. According to this argument, optimum development essentially has to be judged by the achievement of clarification of a particular use of the concept.[439] In general, it is not obvious that the co-existence of competing versions of some larger concept improves the internal logic of the particular versions. Abstract concepts are typically faced with a trade-off between the tightness of their definition and their applicability to the relevant topics. Some notions of legitimacy may be highly consistent but too narrow in order to address the significant questions. Since both dimensions matter for success, it is not clear that competition between different notions of legitimacy necessarily leads to improved internal logic of each one of them. More importantly, it is not clear that an improved understanding of the particular versions of legitimacy really leads to a better understanding of legitimacy itself. As John Gray notices, if essentially contested concepts are appraisive by their character, the strong normative baggage that those concepts bring with themselves in opposite directions may preclude them from being logically reconciled or harmonized through debate.[440] Taken together, whether legitimacy can be considered an essentially contested concept in Gallie's sense is questionable. Certainly, this does not imply that the concept cannot be debated endlessly but simply that it may not satisfy the essential requirements that make such debate desirable.

Another line of defence regarding the plurality of legitimacy may rely on the notion of 'family resemblance'.[441] The term originates with Wittgenstein and is presented in

[438] David Collier, Fernando Daniel Hidalgo and Andra Olivia Maciuceanu, 'Essentially Contested Concepts: Debates and Applications' (2006) 11 Journal of Political Ideologies 211, 220

[439] See, inter alia, Christine Swanton, 'On the "Essential Contestedness" of Political Concepts' (1985) 95 Ethics 811; Collier, Daniel Hidalgo and Olivia Maciuceanu; Ian Shapiro, 'Gross Concepts in Political Argument' 17 Political theory 51

[440] Gray 392

[441] Wittgenstein. Kenneth Smith taking its cue from Gallie's account adopt a similar stance. He talks about 'Standard General Use' and which refers to those classes whether it is accepted or not the usage of a concept. For him, it is clear that there are concepts in; which there are no doubts about the usage. In any case, it is

opposition to the conventional idea of concepts being defined in terms of necessary and sufficient conditions. The conventional account, developed since antiquity, asserts that for something to be recognized as belonging to a concept, it has to fulfil the necessary and sufficient conditions ascribed to the concept. This does not preclude variety among the instances that fall under a concept; it simply postulates that some core conditions need to be satisfied. For example, for something to be considered a table, it has to have a number of legs and a flat piece of material where things can be put. If an object does not have those properties, then it is not a table. It is something else.

The classical account is appealing because, as Eric Margolis and Stephen Lawrence state, it offers a 'unified treatments of concept acquisition, categorization, and reference determination.'[442] Nevertheless, it has come under attack for some time now, in response to which alternative accounts have been put forward. The most interesting one for our purpose is the prototype theory, which has its philosophical origins in Wittgenstein's account of family resemblance.[443] The idea of family resemblance diametrically opposes the classical account by positing that it is futile to look for necessary and sufficient conditions when we talk about concepts. In Anat Biletzki and Anat Matar's words,

> [t]here is no reason to look, as we have done traditionally—and dogmatically—for one, essential core in which the meaning of a word is located and which is, therefore, common to all uses of that word. Family resemblance … serves to exhibit the lack of boundaries and the distance from exactness that characterize different uses of the same concept.[444]

The underlying idea of this theory is that there is no essential core determining a concept. Instead one should check how a concept is used and which properties it tends to subsume. This entails that not all instances of the concept will possess the same properties. Prototype theory can thus be viewed as a probabilistic model whereby one identifies similarities or overlapping properties. Put differently, according to this model, a 'similarity is computed as

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broadly similar to the idea of family resemblance. Kenneth Smith, 'Mutually Contested Concepts and Their Standard General Use' (2002) 2 Journal of Classical Sociology 329

[442] Eric Margolis and Stephen Laurence, 'Concepts' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Spring edn, 2014) <http://plato.stanford.edu/archives/spr2014/entries/concepts/> accessed 22/09/2014

[443] There are two other accounts concerning concepts: the atomistic and the empty. While they are interesting on their own, it is the prototype account which has been routinely deployed in the defence of certain social, political, and legal concepts.

[444] Anat Biletzki and Anat Matar, 'Ludwig Wittgenstein' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Spring edn, 2014) <http://plato.stanford.edu/archives/spr2014/entries/wittgenstein/> accessed 22/07/2014 (Footnote omitted).

a function of the number of constituents that two concepts hold in common.'[445] Rather than searching for necessary and sufficient conditions that identify a concept, the main aim is, therefore, to find a prototype for the concept and to look for similarities. Formally, prototype theory thus maintains the notion of sufficient conditions but breaks with the idea of necessary conditions.

The advantages of the prototype theory are twofold. First, it accounts for the fact that in many instances it is difficult if not impossible to produce convincing definitions, especially when it comes to social and political concepts. Secondly, the theory is parsimonious with how people tend to reason about concepts. That is, individuals typically do not think about concepts in terms of definitions but rather in terms of how different objects are similar and dissimilar.[446] When thinking about legitimacy, at first glance prototype theory seems to be a promising path. Given that a prototype is merely one instance comprising many elements that are frequently associated with legitimacy, the account avoids, for example, the reliance on an original exemplar, as found in Gallie. However, prototype theory also comes with a number of caveats. First of all, one of its main advantages, namely that the theory is parsimonious with respect to the way people approach concepts in reality, only partially applies to the context of legitimacy. Evaluating situations by their similarities and dissimilarities to some prototype is particularly useful when individuals have to make quick and, to an extent, unreflective judgements. When it comes to legitimacy, it is not clear that such judgements are particularly relevant for the ongoing discussions. This objection overlaps with Daniel N. Osherson and Edward E. Smith's assertion that prototype theory is 'best suited' to particular type of notions – e.g. kind, artifacts, or descriptive – rather than to more 'intricate' concepts such as belief, desire, or justice.[447] Secondly, prototype theory, by construction, precludes any objective judgement of whether a particular situation or instance belongs to the concept or not, unless it is the prototype itself. In the context of legitimacy, this implies that any judgement of whether a particular situation or decision is legitimate corresponds to a purely subjective assessment of how similar that situation or

[445] Margolis and Laurence 54

[446] Eric Margolis and Stephen Laurence, 'Concepts' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Spring 2014 edn) <http://plato.stanford.edu/archives/spr2014/entries/concepts/> accessed 26/08/2015

[447] Daniel N Osherson and Edward E Smith, 'On the Adequacy of Prototype Theory as a Theory of Concepts' (1981) 9 Cognition 35, 38

decision is to some hypothetical prototype. Given these caveats, it is not clear whether the theory of family resemblance offers a credible path for overcoming some of legitimacy's main conceptual problems.

In sum, the arguments put forward assert that legitimacy as a concept entails various inherent difficulties that undermine its usefulness. The concept, as it stands, is overly broad, incoherent, and difficult to differentiate from related concepts such as morality, justice, etc. I argued that these difficulties partly stem from the fact that legitimacy tends to be treated as an analytical tool when it is better understood as an appraisive concept. As a result, there are severe disagreements as to what the concept entails, which might be so great as to be insurmountable.

IV.4. The explanatory limits of legitimacy

We now move from the conceptual side of legitimacy to the explanatory level. Scholars' attempts to explain why political and social orders change or persist are often based on legitimacy. However, the arguments put forward in the previous section regarding the conceptual content of legitimacy raise serious doubt over the attempt to try to understand the evolution of social, political, or legal orders in terms of legitimacy. If we view conceptual work as logically prior to its empirical counterpart, we should expect the conceptual difficulties associated with legitimacy to make it rather difficult to pin down what to include and what to exclude in any descriptive notion without falling into arbitrariness or without it becoming a universal point of entry from which little can be gleaned.[448] As Mulligan argues, due to the 'historically determined breadth of application' of legitimacy, any attempt to observe or measure legitimacy can become a rather illusive enterprise.[449]

That said, let us assume for the sake of argument that the conceptual problems surrounding legitimacy are not insurmountable. Likewise, let us assume that despite the sheer complexity of legitimacy and its concomitant problems, it is still possible to somehow adequately delimit legitimacy. Even assuming that, we will see that legitimacy as an explanatory device is loaded with some fundamental problems that hamper its descriptive

[448] Giovanni Sartori, 'Concept Misformation in Comparative Politics' (1970) 64 The American Political Science Review 1033
[449] Mulligan 353

power. In particular, I will contest the notion that legitimacy serves as a reliable framework from which we can understand how political and legal orders come about or sustain themselves. Crucially, and in contrast to the previous section, the argument put forward is not that legitimacy is riddled with severe conceptual ambiguities, but rather that the role it plays is limited and substantially different from that usually ascribed to it in the literature.

This will be undertaken in three steps. First, I will focus on disaggregating legitimacy as an inherently social phenomenon into its constituent parts, namely those that dominate and those that are dominated. This type of relationship becomes more complicated when we move from the 'stable' pattern of states with somewhat fixed populations towards the supranational realm in which the hierarchical relationship prevalent in states becomes more diffuse and more heterogeneous. Secondly, we delve into the causal role of beliefs in sustaining a regime. We will see why beliefs may play little role and that there are several mechanisms that can explain the persistence of regimes alternatively. Thirdly, I will discuss the conceptualization of a belief and contest the prevalent understanding of beliefs, which underpins the majority of legitimacy accounts in the literature.

IV.4.a. The two sides of legitimacy

Legitimacy as a concept generally refers to a social relationship, in particular to the right to rule or to govern.[450] It is focused not so much on the capacity to act, but rather on the ability to act according to a certain set of rules, norms, and principles that are socially endorsed.[451] Legitimacy is a complex social concept with at least two sides. On the one hand, there are those that act and are to be legitimized, e.g. a government, an agency, a state, an international organization, but also particular actions or norms. These can be viewed as the 'objects' of legitimacy. On the other hand, there are those that 'grant' legitimacy, e.g. individuals, groups, states, international organizations, and so forth. As we shall see, the diversity of 'takers' and 'givers' of legitimacy makes the task of determining who and what belongs to which side of legitimacy, and the question of how the different

[450] Jean-Marc Coicaud, *Legitimacy and Politics: A Contribution to the Study of Political Right and Political Responsibility* (David Armes Curtis ed, David Armes Curtis tr, Cambridge University Press 2002) 10
[451] Reus-Smit 159

levels of legitimacy are interrelated, quite complex. In consequence, it will become clear that the extension of legitimacy is vast and its reach is highly ambiguous.

IV.4.a.i The 'objects' of legitimacy

Let us begin with those that are to be legitimated. The idea of social order typically, although not explicitly, refers to national orders. Since states have become the paradigmatic mode of political, legal, and social organization, discussions of legitimacy have focussed in large parts on the legitimacy of states and on the question of why certain state regimes change or remain stable. The fact that states demarcate quite clearly their population and institutions made it possible to centre discussions on states as a totality, even if the reality of states has been more fluid and less static.[452]

Nonetheless, legitimacy is not restricted to the order of a particular state but can be analysed at any possible level. Let us focus first on legitimacy within the state and then move on to international law. When a state's legitimacy is assessed, the state is evaluated according to the quality of a large set of institutions, requiring the aggregation of all acts, activities, and operations undertaken by those institutions. Thus, whenever a particular decision or act has been undertaken, the underlying assumption is that the decision or act legitimizes or de-legitimizes the entire order. To an extent, this seems like a reasonable proposition as the set of institutions is connected, normally through the constitution. However, the literature quite often does not focus on the whole system but on the different institutions composing the state and this disaggregation can be taken arbitrarily far. Accordingly, the literature assesses the legitimacy of the parliament, the executive, the judiciary, as well as the legitimacy of certain ministries, bureaucracies, or departments, but also the legitimacy of particular norms, principles, rules, or actions.[453]

In contrast to discussions regarding the legitimacy of states and their institutions, in the realm of international law, the pretence of unity is dropped. Despite arguments about the existence of the international legal order as a system, the literature has never treated the legitimacy of international law as a whole but rather discussed legitimacy detached from

[452] Peter J. Taylor, 'The State as Container: Territoriality in the Modern World-System' (1994) 18 Progress in Human Geography 151
[453] Reus-Smit 159; Hyde 403

considerations of systematicity. Instead, we find legitimacy considerations about international criminal law, international economic law, and so forth, as well as about the international institutions within those issue areas.[454] For example, within international criminal law, one might analyse the legitimacy of the ICC or the SC. One can further the disaggregation and focus on particular procedures, norms, or actions. Franck, for instance, argues that some international rules are 'more' legitimate than others,[455] for example the norm against the use of force is viewed as more legitimate than the norm against aggression.

This demonstrates the diversity of 'objects of legitimacy' and shows how wide is legitimacy's reach. In principle, every action, every norm, every institution falls under the scope of legitimacy. Generally speaking, this is nothing to be held against legitimacy. Concepts, especially those that try to have wide explanatory reach, tend to be quite abstract and, as a result, may appear in a multiplicity of places. Also the literature does not seem to follow any agreed pattern. Analyses of legitimacy tend to either focus on a particular realm, to confront one treatment versus another, or to posit that there is some relationship between the spheres without delving into details. Again, the presence of a multiplicity of approaches is itself not worrisome. After all, there might be parsimony within the approaches, despite the lack of engagement. That said, it would be preferable to flesh out how the perceptions of legitimacy at different levels of disaggregation are related, as they often paint a very different picture. In the case of international law, how do we assess the legitimacy of the international legal order? Is it necessary to evaluate all actions and aggregate them? If that it is not the case, which actions should we give priority? These are extremely demanding questions.

Franck acknowledges such issues. Although his analysis focuses on the legitimacy of international legal norms considered separately, he discusses them systematically within the international legal order and attempts to provide a certain order in terms of their legitimacy. He maintains that depending on the properties of these norms, some 'manifest' a higher compliance rate than others. Nevertheless, he concedes that testing such order empirically is practically impossible.

[454] This is the argument of Tasioulas which argues that because of the decentralized nature of international law one can simply assess the different areas separately, see Tasioulas
[455] Franck, *The Power of Legitimacy among Nations*

> While such an empirical approach might be technically feasible, it would also be fraught with conceptual and practical difficulties, not to mention huge costs in collecting and processing data. How would we categorize what was gathered? Was Tanzania, when it invaded Uganda and overthrew Idi Amin's dictatorship, violating the text prohibiting the use of force or upholding the texts pertaining to human rights and self-defense? Thousands of disputed cases could cloud the credibility of our statistical results.[456]

A direct consequence of these complications is that accounts of legitimacy in international law tend to focus on particular events or moments, involving only a restricted set of norms or actions. In sum, while the reach of legitimacy seems to be unlimited, the practical question of what the 'correct' focus is remains open. Not addressing this question adequately inhibits our understanding of the relation between the concept's usages for different objects of legitimacy and thereby confines the strength of any descriptive account.

IV.4.b.ii. The 'subjects' of legitimacy

We now move from those that are to be legitimated to those that supposedly 'grant' legitimacy. Unsurprisingly, the range of actors that 'approve' a certain social arrangement, norm, rule, action – and thereby legitimize whatever is of interest – is equally expansive. Let us first focus on legitimacy within the state, as the least controversial case. Given the rise of the sovereign state as an entity controlling a particular territory, there is a clear relationship between the ruler and the ruled, which facilitates the conceptualization of legitimacy. One debated issue, directly related to our question of who it is that legitimizes, is the importance of the incorporation of mass populations as part of politics. For Beetham, for instance, legitimacy necessarily involves the presence of mass politics.[457] According to him, the relationship between the King and the Nobles during the Middle Age in any given country in Europe would not be considered a relationship of legitimacy because of the qualitative difference of their status and relation. However, this understanding, which is closely related to liberal-democratic conceptions of the state, is challenged. Weber, for instance, discusses legitimacy within the modern state as a relation between the ruler or 'chief' and its subordinates. Although, according to Weber, the need for legitimacy is more pressing in

[456] Ibid 47
[457] David Beetham, *The Legitimation of Power* (Second, revised edn, Palgrave Macmillan 2013)

situations involving mass politics, he emphasizes the general importance of the presence of solidarity based on material interests by direct and indirect subordinates. In his own words, '[b]oth the extent and the way in which the members of an administrative staff are bound to their chief will vary greatly according to whether they receive salaries, opportunities for profit, allowances, or fiefs.'[458] Weber also points to the need of solidarity at the ideational level by those close to the ruler.[459] This account of legitimacy has given rise to the notion of legitimacy among elites, especially in discussions beyond democracies such as dictatorships.[460] The underlying idea is that the stability of a regime may not necessarily be related to the acceptance by the respective population but potentially by a much smaller part of it. This points to the fact is that even with a fairly narrow focus on legitimacy within the state, the answer to the question of who it is exactly that 'gives' legitimacy is far from obvious.

One can readily infer that this issue becomes more pressing when we move from the national to the supranational realm. The starkest difference to the case of the state is that in the international sphere, there is no unity between the rulers and the ruled but rather a variety of heterogeneous and vastly fragmented relationships. In particular, the 'system' is highly decentralized and there is nothing like a uniform polity. At best, we have some imperfect comparisons, such as the UN as the 'world government'; however these comparisons quickly collapse as soon as one takes a deeper look. Accordingly, in the literature on legitimacy in the supranational realm, there is little discussion about the question of how to appropriately identify those that legitimize the order beyond the analysis of specific cases or situations.

A useful starting point to tackle the issue is Reus-Smit's distinction between '*the realm of political action*' and '*the social constituency of legitimation*.'[461] He posits that '[t]he question of which constituency an actor must establish legitimacy in can be answered only with reference to the political realm in which he or she seeks to act.'[462] In Reus-Smit's example of

[458] Weber, *Economy and Society: An Outline of Interpretive Sociology* 265
[459] Ibid 264
[460] See eg Thomas H Rigby, 'Political Legitimacy, Weber and Communist Mono-Organisational Systems' in Thomas H Rigby and Ferenc Fehér (eds), *Political Legitimation in Communist States* (Macmillan 1982)
[461] Reus-Smit 164. Notice that this only establishes the legitimacy of particular actions at particular moments, it leaves out any systemic consideration of legitimacy with respect to the particular social arrangement.
[462] Ibid

a mayor of a town, the realm of action would be the confines of the city in which the person acts as a mayor, and the social constituency would be the citizens of that city. In principle, the distinction is useful as it is not circumscribed to a specific realm and may have some explanatory weight. As Reus-Smit remarks, 'these constituencies can be domestic, international, or transnational; they can constitute broad cross-sections of national societies (or of international society), or they can be sectoral or issue based.'[463] Furthermore, he insists that 'for an actor to attain a comprehensive legitimacy dividend, its realm of political action (which itself may be geographic or sectoral) and its social constituency of legitimation need to be coextensive, or at least approximate one another.'[464] The problem with the concept of a social constituency of legitimation in relation with the realm of some political action is that it is often indeterminate. For instance, take Reus-Smit's example of the controversies surrounding the Bush administration, in particular the second Gulf War. When the Bush administration prepared the actions for the second Gulf War, the administration acted internationally, making the realm of political action the international arena. The respective social constituency of legitimation in that case would be the countries of the world. The opposition by some of those against the actions of the Bush administration, notably France and Germany, raised severe doubts as to the legitimacy of those actions, according to Reus-Smit. However, even if, in a hypothetical world, the administration had had the approval of all governments, the population of a state could have still rejected it, as in the example of Spain. In such case, the actions prior to the war would have followed through without the legitimacy discussions that ensued. This suggests that, contrary to Reus-Smit's suggestion, the social constituency of legitimation may simply correspond to those with power – the elites and actors close to the institution – and thus to a very small part of those falling into the realm of the political action of interest.[465]

In sum, the question of how to identify the actors 'granting' legitimacy to a particular regime, institution, rule or action can be more difficult than it seems at first glance and no definitive answer has yet been found.

[463] Ibid
[464] Ibid
[465] Ibid

IV.4.b Legitimacy and Stability

The discussion so far has shown how challenging the descriptive concept of legitimacy becomes once we attempt to disaggregate it. However, there is a more crucial aspect of the concept undermining its explanatory role to a greater extent: that of beliefs and internal motivation. Whereas problems concerning the empirical validity of the two sides of legitimacy are, at the end of the day, a practical matter of how to analyse legitimacy with the best methods available, problems concerning the notion of belief and its role with respect to legitimacy go somewhat deeper into the structure of the positive concept. This section aims to show that beliefs tend to be overvalued in explaining why social arrangements persist and that there are alternative explanations that avoid the baggage of legitimacy. While the following account might not entirely 'disproove' legitimacy, it may at least undercut its alleged role within international law.[466]

To recall, explanations of stability/instability of social arrangements relying on legitimacy aim to 'point to the ways in which particular relationships are structured by reference to publicly identifiable *norms* that are acknowledged by … participants as motivationally relevant or "valid."'[467] The positive concept of legitimacy thus focuses on the question of whether specific actors consider 'a particular norm valid *because* the authorities in question make a credible claim to meet the standards of publicly relevant evaluative norms.'[468] Based on how those normative standards are met, individuals will or will not, according to their beliefs, consent to the particular social arrangement. Within international law, the account differs slightly as there is no the clear separation between the rulers and the ruled, but the basic idea remains; namely that actors follow international rules because of the normative properties that those rules have. Accordingly, this account presumes that there is a crucial link between the performance of social arrangements, national or international, and the normative beliefs of the relevant actors.[469]

This idea can be viewed as the relevant actors taking *'ownership'* of the publicly justified norms allegedly underpinning the social arrangement. These norms are taken by all actors

[466] Although I draw from a variety of sources, the next section was greatly helped by the discussion in Xavier Marquez, 'The Irrelevance of Legitimacy' [2015] Political Studies n/a
[467] Marquez, *The Irrelevance of Legitimacy* 7
[468] Ibid
[469] Ibid 9

as their own personal reasons for support or opposition; they become internalized.[470] The explanatory chain goes as follows: certain normative rules become (for reasons that we do not know) 'shared or public *reasons for action*'; these rules become internalized, to the point where they can override any 'non-shared private reasons'; as a consequence, they determine subsequent actions of the relevant actors.[471] As an example, consider the ban on the use of force according to art. 2(4) of the UN Charter. To make things simple, take the relevant actors to be the states, even if the concept of 'internalization' in relation to states should be taken with some scepticism. Following the descriptive account of legitimacy, the argument would be that states follow the prohibition because they have taken the norm to be theirs and believe in its validity. This reminds one of the idea of the 'logic of appropriateness', a notion coined in IR literature that has sometimes spilled over to the international law literature, as opposed to the 'logic of consequences' – normally rationalist accounts based on economics models. States thus follow the norm not out of self-interest but because for them it the normatively correct thing to do.[472]

However, it is not at all immediately clear that actors within a social arrangement decide to obey because they believe in the public justificatory claims rather than for other reasons.[473] Let us take the case of slavery, following Marquez. Although slaveholders provided several public justificatory claims regarding the existence and continuation of the institution, it is quite obvious that those claims would not have convinced, by any means, the slaves. As another example, consider the case of the legal system of Micronesia, described in Brian Z. Tamanaha's account about the Pacific island's order of law.[474] He shows that the legal system of Micronesia operates completely independently of the customs and normative understandings of the population. Most prominently, while the law prohibits discrimination, Micronesia still has a thriving caste system. We thus encounter a functional and stable legal order, which operates under public justificatory claims, but which stands in stark contrast to the population's ideals and norms.[475] As in the case of slavery, there is a clear divergence between publicly justified norms and 'private' beliefs. In the case of Micronesia, this

[470] Ibid 14
[471] Ibid 14
[472] See e.g. Harald Müller, 'Arguing, Bargaining and All That: Communicative Action, Rationalist Theory and the Logic of Appropriateness in International Relations' (2004) 10 EJIR 395
[473] Marquez, *The Irrelevance of Legitimacy 14*
[474] Brian Z Tamanaha, *A General Jurisprudence of Law and Society* (Oxford University Press 2001)
[475] Ibid xi-xii

divergence does not seem to affect the functioning of the institutions comprising the legal system, although, following the conventional account of legitimacy, it would be hard to claim that the Micronesian legal system was legitimate. Accordingly, it seems possible for a social arrangement to be operative and stable without the need for the relevant actors to fully believe in the order.[476]

Unsurprisingly, Weber was keenly aware of the fact that not everyone might believe in the particular configuration of a social order. A careful analysis of Weber's writings on legitimacy shows that Weber focuses not so much on the idea of 'belief in' than on different sorts of legitimation activities. Thus, although 'Weber ultimately defined legitimacy in terms of *the capacity of a populace to believe in or accept* claims, promises and justifications, virtually his entire work in this area … is concentrated on the presentation of claims, promises, and justifications, and not on their acceptance.'[477] In particular, Weber acknowledges that

> [i]t is by no means true that every case of submissiveness of persons in positions of power is primarily (or even at all) oriented to this belief. Loyalty may be hypocritically simulated by individuals or by whole groups on purely opportunistic grounds, or carried out in practice for reasons of material self-interest. Or people may submit from individual weakness and helplessness because there is no acceptable alternative.[478]

In other words, actors do not necessarily have to be motivated by the particular norms. However, Weber insists that for a social order to be stable, the norms and rules underpinning the system should be 'to a significant degree and according to its type treated as "valid."'[479] The precise meaning of 'valid' remains somewhat open. In particular, the way in which actors can accept a public norm as valid may be highly varied: on the one hand, we may encounter situations in which the norms of interest are truly internalized and thus fully motivational; on the other hand, we may find circumstances in which actors simply act 'as if' they believe in the norms, contrary to their true points of view.[480]

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[476] See generally James C Scott, *Weapons of the Weak: Everyday Forms of Peasant Resistance* (Yale University Press 2008); Timur Kuran, *Private Truths, Public Lies: The Social Consequences of Preference Falsification* (Harvard University Press 1997)
[477] See Bensman 32
[478] Weber, *Economy and Society: An Outline of Interpretive Sociology* 214
[479] Ibid
[480] Although as we shall see later on, it is quite doubtful that norms can be somehow 'internalized.'

Due to these difficulties affecting parts of Weber's account of legitimacy, several authors have put forward alternative accounts that attempt to provide some remedies. The most prominent case is Beetham's own account of legitimacy.[481] Unlike Weber's argument, according to which legitimacy is based on actors' beliefs in the legitimacy of a system, for Beetham, a social relationship can be deemed legitimate if 'it can be *justified in terms of* their beliefs.'[482] As Beetham acknowledges, this distinction may seem negligible but he argues that it is fundamental. According to this account, assessing the legitimacy of a system means to assess in how far it conforms to the normative standards of the people, that is, in how far there is or there is not congruence 'between a given system of power and the beliefs, values and expectations that provide its justification.' However, what remains crucial, both in Weber's original account and its subsequent developments, is the idea that beliefs, regardless of what they concern exactly, are taken to be the reference point according to which the legitimacy and thus the stability of a system is assessed. However, there are grounds to believe that the role of beliefs for the explanation of why orders remain stable or collapse may be of limited importance. In particular, there exist several alternative explanations that do not rely on the idea of beliefs and may paint a more realistic picture than belief-based accounts. I will present several of those explanations in the remainder of this section.

A good starting point for the exhibition of alternative explanations for the stability of a social order without the need for 'legitimacy' is Barnes's discussion of legitimacy in his insightful book *The Nature of Power*.[483] As the title of his book suggests, Barnes aims to put forward a 'non-essentialist' account of power'[484] that can explain how 'a modern society sustains itself on the basis of a *limited range* of sanctions.'[485] He notices that in modern society extreme types of coercion are de-institutionalized and that there is a 'continuing tendency … for the range of routinely applicable sanctions to become ever narrower and their maxim impact less and less.'[486] As a result of such a decline of sanctions, the range of actions that fall under the purview of sanctions and the range of actions for which pursuing

[481] Beetham, *The Legitimation of Power*; Beetham, *The Legitimation of Power, 2013 second edition.*
[482] Beetham, *The Legitimation of Power* 11
[483] Barnes
[484] See Turner
[485] Barnes 118
[486] Ibid, footnote omitted

surveillance is profitable are also on the decline.[487] For some, the fact that certain institutional settings persist despite the regression of sanctions and force can only be explained by accounts of legitimacy. Barnes follows a different route. He puts forward the idea that the persistence or non-persistence of an institutional order is connected to the distribution of knowledge. As an extreme benchmark, he discusses a notion of common knowledge in the acquiescence of the system.

> Everyone knows that everyone else acquiesces in the regime, wherein this is known to everyone, and wherein the general knowledge of the general level of acquiescence is what sustains the acquiescence of which there is general knowledge. This is the point at which the power of the regime achieves both its greatest stability and its greatest extension, and the minimum in the need for coercive resources that appertains at this point is simply a correlate of this.[488]

Accordingly, Barnes argues that power attains its greatest reach as a 'resonance in a distribution of knowledge extending across both rules and ruled. Knowledge of might may thus diffuse and transform itself into knowledge of right.' Furthermore, Barnes puts forward the idea that in the event of regime change, as soon as the new rulers have conquered the regime and reduced the opposition, a new distribution of knowledge arises. He asserts,

> [a] new regime is likely still to take an interest in whatever legal system it inherits and to adjust it to its purposes: it may well establish legal bounds to its privileges and legal protection for those it rules, in order further to encourage acquiescence by giving the ruled a stake in the system and hence something positive to lose by opposition. Similarly, a new regime will probably concern itself with propaganda and the media communication, in order to facilitate the required shifts in the distribution of knowledge and to prevent the re-emergence of the old distribution. It will be important to the new regime that people know what they have to know. But, for better or worse, this process of assisting the diffusion of knowledge does not need a passive and credulous audience: although the learning of the new official version of society may possibly be not to the collective good of the ruled, it will generally be useful and beneficial at the individual level, so that there is no fundamental difficulty in understanding why it should occur. Just as people find it all too easy to over-graze the common land or to have too many children for the collective good, so they may find it all too easy to assimilate the emerging system of self-referring knowledge. The very fact that this knowledge, far from being incorrect or inadequate, will, even as it is being diffused, have strong tendencies to be confirmed will make its assimilation all the easier.[489]

[487] Ibid
[488] Ibid 123
[489] Ibid 123-124

This paragraph is quite rich and suggestive. Although not analytically separated, there are several underlying mechanisms explaining the persistence of a certain regime. I will address each of them in turn.

IV.4.b.i. Adaptive preferences

To begin with, Barnes hints at the fact that epistemic change may give rise to the adaption of people's attitudes, which in turn may explain why actors 'accept' the validity of norms and certain institutional configurations. In particular, there might be situations in which actors, due to the lack of alternative beliefs, simply adapt to the new institutional setting or rationalize the situation. This is what Jon Elster calls adaptive preferences, a notion according to which preferences of individuals in deprived circumstances are formed in response to their restricted options.[490] As Raymond Geuss argues,

> people who have little power and see little chance of ever gaining any more power tend to develop low aspirations and that those with very low aspirations may not exhibit the symptoms of subjective discontent with what seem to the external observer to be highly coercive, oppressive, or otherwise unsatisfactory agreement.[491]

While this gives us the context, the reasons behind the 'acceptance' of the relationship might be diverse. For example, it might be that those dominated lack knowledge of any alternative. Likewise, it might be that even if there is awareness of alternative modes of organization, there is insufficient evidence about its superiority in relation to the current relationship. In such situations, adaptive preferences serve as a process of 'dissonance reduction.'[492] As Barnes argues, '[p]eople might be adjusting to contingencies they find themselves unable to change.'[493]

Related to the idea of adaptive preferences, there are two behavioural phenomena that can play an important role for people's acceptance of certain regimes. First, individuals often

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[490] Jon Elster, *Sour Grapes: Studies in the Subversion of Rationality* (Cambridge University Press 1983) Chapter III

[491] Geuss 87, footnote omitted

[492] Elster 123

[493] Barnes 124; As a result, actors develop more 'realistic' expectiations, what Heath calls 'ambition-sensitive,' see Joseph Heath, 'Problems in the Theory of Ideology' in William Rehg and James Bohman (eds), *Pluralism and the Pragmatic Turn: The Transformation of Critical Theory: Essays in Honor of Thomas Mccarthy* (The MIT Press 2001) 183

exhibit a 'status quo bias.'[494] As Marquez notices, '[s]ocial systems are complex, and conservatism is often quite rational.'[495] Actors might simply acquiesce to the current state of affairs because of the uncertainty regarding the possible outcomes of the alternative. In particular, in situations where the existing relationship has been relatively beneficial, whether economical or societal, those belonging to the relationship might decide to 'put up' with the regime not because of any 'internalization' of the justificatory discourse but because of a simple cost-benefit analysis.[496] Secondly, there is an ample body of research that shows the great capacity of individuals to rationalize their own situation. The acceptance of those that rule by those that are ruled might thus be connected to what is called 'system justification,'[497] an idea according to which individuals adapt their mind-set in order to rationalize their situation in light of a lack of alternatives or a lack of ability to change it.[498] Accordingly, the justificatory discourses may not play any '*causal* role' for the stability of a regime, as noticed by Marquez. Instead, actors' beliefs about the relationship should be regarded as an effect rather than a cause of the particular situation in which they find themselves.[499]

An example of how adaptive preferences operate can be found in a possible alternative reading of Ian Hurd's discussion about the negotiations on forming the UN in San Francisco in 1949. The basic observation made by Hurd is that despite the fact that the Great Powers hardly gave in to any of the demands of the other countries, these countries decided to accept the treaty anyway. Hurd's attempt to explain the acceptance of the treaty focuses on the presence of procedures that allowed countries to present their cases and objections. Due to the fact that there was ample space for deliberation and voicing of opinions, the outcome was perceived as legitimate, even though very few of the demands of the countries were met.[500] However, following the previous discussion, a different plausible

[494] Aaron C. Kay, Maria C. Jimenez and John T. Jost, 'Sour Grapes, Sweet Lemons, and the Anticipatory Rationalization of the Status Quo' (2002) 28 Personality and Social Psychology Bulletin 1300
[495] Marquez, *The Irrelevance of Legitimacy* 18
[496] Ibid ; although Geuss does not puts it in economist terms, the gist is the same, see Raymond Geuss, 'Liberalism and Its Discontents' (2002) 30 Political Theory 320, 321
[497] Aaron C. Kay and Justin Friesen, 'On Social Stability and Social Change: Understanding When System Justification Does and Does Not Occur' (2011) 20 Current Directions in Psychological Science 360
[498] Ibid ; Kristin Laurin, Aaron C. Kay and Gavan J. Fitzsimons, 'Reactance Versus Rationalization Divergent Responses to Policies That Constrain Freedom' (2012) 23 Psychological Science 205
[499] Marquez, *The Irrelevance of Legitimacy* 20
[500] Obviously, there were some modifications but these were peripheral and by no means affected the central concerns of the great powers.

interpretation can be put forward, without the need to resort to legitimacy. In light of the circumstances created by the Great Powers in which the basic elements of the treaty would remain unaffected, other countries may simply have 'rationalized' their situation and accepted the outcome. Put differently, the lack of alternatives and the restriction of choices may have given rise to a situation in which countries adjusted their objectives and thus were content with what they got.

A crucial factor for adaptive preferences to play a role for the acceptance of norms and the stability of a regime is thus the absence of feasible and perceivable alternatives, which in turn is closely related to Barnes' starting point of societal knowledge and its pattern of distribution. It is important to stress that, '[t]he belief (whether true or false) that *no acceptable alternatives to this relationship are currently available or feasible* is not equivalent to the acceptance of the justificatory discourses for the relationship.'[501] In other words, the fact that those belonging to the relationship are unable to find a plausible alternative cannot be equated with the acceptance of the relationship.

IV.4.b.ii. Coordination

Barnes' account hints at another explanation for why a relationship can be stable despite the lack of approval by those that are ruled: the problem of coordination. In particular, Barnes notes that the stability of a regime is greatest when 'everyone knows that everyone acquiesces in the regime.'[502] While the quote is not explicit, it hints at the idea that what matters is not only what individuals think about the regime but what they think that others think. Taking it one step further, one can argue that individuals' attitudes towards the regime may not matter at all, as long as their beliefs about other individuals' opinion make any opposition pointless. Michael Polanyi picks up this point and explains how it can lead to a failure of coordination.[503]

> If in a group of men each believes that all the others will obey the commands of a person claiming to be their common superior, all will obey this person as their superior. For each will fear that if he disobeyed him, the others would punish his disobedience at the superior's command, and so all are

[501] Marquez, *The Irrelevance of Legitimacy* 19
[502] Barnes 123
[503] Michael Polanyi, *Personal Knowledge: Towards a Post-Critical Philosophy* (Corrected edn, Routledge & Kegan Paul 1962) 238

> forced to obey by the mere supposition of the other's continued obedience, without any voluntary support being given to the superior by any member of the group.[504]

He deduces that even though '[i]t is commonly assumed that power cannot be exercised without some voluntary support,' this does not necessarily have to be the case.[505] Although Polanyi's discussion is centred on power, it can be easily extended to legitimacy. In particular, Polanyi's account hints towards a plausible scenario in which a social order can be sustained without legitimacy playing any considerable role. In particular, even though individuals may not believe in the public norms propagated and enacted by those in power, they may be (falsely) convinced that other individuals do. This itself may be enough to hinder the rise of any relevant opposition. One can take this argument further and construct situations of coordination failures even at levels of higher order beliefs. For example, we could think of circumstances in which all individuals are opposed to publicly propagated norms and believe that also other individuals are opposed to those norms, but (falsely) believe that other individuals believe that everybody else believes in the norms. It is irrelevant at what level of the belief hierarchy the error occurs, as long as individuals believe that other individuals will not act against the social arrangement, the rise of opposition is impeded.

Another factor that aggravates the coordination problem is what Timur Kuran calls 'social proof,' a heuristic device which is summed up as follows: 'if a great many people think in a particular way, they must know something that we do not.'[506] Actors may believe in certain norms not because of their true preferences but because they are convinced that other people believe in them and because they take this as a proof for the norms' validity. In other words, it is not always clear to what extent individuals believe what they believe. Finally, coordination problems may arise due to a lack of awareness of alternatives or due to disagreements on which alternative to pursue.[507] The problems surrounding legitimacy and the persistence of a social order in relation to collective action problems can be better understood by drawing on discussions about ideology. Ideology, a concept introduced by Marx and the Young Hegelians, attempts to explain why individuals tend to take part in the

[504] Ibid.
[505] Ibid
[506] Kuran 163
[507] Marquez, *The Irrelevance of Legitimacy* 21

sustenance of institutions that seem to exploit or oppress them and why, in exceptional cases, they might defend those institutions in the face of attempts to change them.[508] It seems puzzling that individuals may act contrary to their 'evident' self-interest. This attitude, if one follows the notion of ideology, is considered irrational. The underlying idea is that whenever we observe people keep making the same mistakes, e.g. blue-collar workers not overthrowing capitalism, we start thinking that something 'deeper … has impaired their ability to assess the information they have been given.'[509] The problem with the argument, as Joseph Heath posits, is that individuals' beliefs may actually play little role in the sustainment of that relationship. That is, despite the lack of logical error, 'individuals often get outcomes they don't want, not because they have chosen wrongly, but because their actions combine with those of others in undesirable ways.'[510] Due to such problems of collective action, one does not need to presume some 'passive and credulous audience,' resorting to the existence of some profuse and insidious ideology afflicting individuals.[511] Instead it is 'the structure of social interaction' that creates and maintains the particular situation.[512]

IV.4.b.iii. Free-riding

When reminding us that '[p]eople find it all too easy to over-graze the common land or to have too many children for the collective good,' Barnes points to a further reason that may account for why a social order can be sustained despite a possible lack of approval by the relevant actors: the problem of free-riding. This notion is related to the previous discussion on problems of collective action and refers to the idea that when making choices, individuals tend to weigh private benefits against private costs of each particular action, without taking into account their effects on third parties. In economics, public benefits as a consequence of private actions are referred to as positive externalities, while public costs as a consequence of private actions are referred to as negative externalities. Since actors do not internalize such externalities, actions with negative externalities are taken too often,

[508] Heath 164
[509] Ibid 164-165
[510] Ibid 168
[511] Barnes 123; Heath 174, 188
[512] Heath 168

whereas actions with positive externalities are taken too rarely. Going into opposition and fighting for a change of existing rules or the current regime is an instance of an action with positive externalities. While costs have to be borne privately, the benefits are to a large extent public. In particular, there may be circumstances under which the majority of individuals disagree with current norms or rules, but the disagreement is not so large such that any particular individual would incur the private costs of fighting for a change. This may happen even in situations where public benefits far outweigh private costs.

Taken together, Barnes account already hints at three of many possible reasons for why the stability of a regime may not be at all connected to the congruence of public norms and individual beliefs. The arguments regarding adaptive preferences, coordination failures and free-riding problems put forward here should illustrate that, at closer examination, there is no necessary link between the stability of a system and actors' belief in the legitimacy of that system.

IV.4.c. The Role of Beliefs

The previous discussion suggests that accounts based on the causal importance of beliefs for the maintenance of social orders are typically incomplete and to some extent misleading. While this discussion focused on the explanatory role of beliefs for the stability of a system, we now turn to the conceptualization of beliefs in the literature on legitimacy. Marquez observes that the perception of beliefs at a conceptual level is often flawed and suggests that a wrong understanding of the concept can lead to an inadequate understanding of the role of beliefs. The basic idea is that actors' beliefs in particular social arrangements might shed little light on their actual level of 'commitment' to the stability of the relationship during some transforming situation.[513] As Colin Jerolmack and Shamus Khan point out, there is a noticeable disconnect between the attitudes and dispositions people voice and the things they actually do.[514] Attitudes and dispositions may thus be a poor predictor of how individuals react in a particular situation.[515] This is not to imply that the

[513] Marquez, *The Irrelevance of Legitimacy* 24

[514] Colin Jerolmack and Shamus Khan, 'Talk Is Cheap Ethnography and the Attitudinal Fallacy' (2014) 43 Sociological Methods & Research 178

[515] See Lee Ross and Richard E Nisbett, *The Person and the Situation: Perspectives of Social Psychology* (2nd revised edn, Pinter & Martin Publishers 2011)

attitudes expressed by different actors are insincere. Individuals may believe in a certain relationship in *abstracto*, and yet not act in defence of that relationship when it matters.[516] In particular, psychological experiments suggest that individuals' 'commitment to principled actions … are highly "situational" and can change with even relatively minor changes of circumstances.'[517] As a result, individuals are 'grossly inconsistent in any but the most local, highly formalized contexts, and are constantly changing.'[518] Given that actors are typically confronted with a diversity of situations and frequently have to negotiate their way through a 'dense thicket of … diverse and, potentially at least, conflicting demands,'[519] any empirical attempt to assess the legitimacy of certain institutions by surveying the attitudes of those participating, as Jens Steffek proposes, is necessarily compromised.[520]

Another troublesome feature of the discussion around the idea of a belief in the literature on legitimacy is the notion of 'internalization.' To recall, the argument is that actors take ownership of publicly justified norms, overriding their private beliefs and, as a consequence, act according to those public standards. However, as we will now see, there are reasons to doubt the idea that actual internalization takes place. As a result, one should be cautious regarding the extent to which such beliefs can sustain a certain relationship.[521] Traditionally, the concept of internalization is connected to individuals, their beliefs, and how those beliefs motivate them. In the literature on legitimacy and international law, the idea of internalization has been extended to collective entities such as states or international organizations, partly out of necessity. I will first deal with the concept of internalization in relation to individuals and then turn to its extension regarding more complex entities.

The basic idea of internalization is that certain norms and values become 'implanted' in the mind of individuals. That is, they become part 'of the very self of the socialized agent, so that he acts out of inclination along lines that are normatively indicated, to obtain individual desires which are normatively desirable.'[522] Put simply, once certain norms and values are effectively parts of ourselves, we orient ourselves towards them; they become a source of

[516] Marquez, *The Irrelevance of Legitimacy* 24
[517] Ibid
[518] Raymond Geuss, *Philosophy and Real Politics* (Princeton University Press 2008) 3-4, footnote omitted.
[519] Geuss, *History and Illusion in Politics* 1
[520] Jens Steffek, 'Why Ir Needs Legitimacy: A Rejoinder' (284) 10 EJIR 485
[521] Barnes 26
[522] Ibid 24

motivation. This account, explicitly or implicitly underpinning the literature on legitimacy, is afflicted by several issues. To begin with, it presumes a form of normative determinism. That is to say, norms are regarded as fixed, as part of the self; they are perceived to be resistant and to be not easily overridden. If this was not the case, they would have no explanatory value.[523]

The idea of normative determinism raises a series of problems, which we discuss now in more detail. First, there is a problem of reversed causality. It is not clear that a stable framework of norms and values within a society is an indicator of the alleged stickiness of actors' norms. In particular, there is a rich literature showing that it is rather stable contexts of action that produce stability of norms.[524] Given the social psychological findings on the contextual nature of values, according to which people tend to be consistent in their actions only in highly localized environments,[525] this suggests that the stability of norms and values within a society may not be caused by the immovability of actors' normative frameworks, but rather by the stability of the context within which they act. Secondly, norms do not provide or, in and of themselves, specify any course of action. A norm is a verbal formulation from which implications for action cannot be taken as a matter of logic; it does not tell you what is appropriate to do.[526] As Wittgenstein famously put it, 'no course of action could be determined by a rule because every course of action can be made out to accord with the rule.'[527] As an example, consider article 2(4) of the UN Charter on the prohibition of the use of force against the territorial integrity or political independence of a state. The temporary invasion of Syria by the US, without permission, in order to fight a terrorist group could be given two different interpretations. The US would claim that its actions did not threaten the territorial integrity of Syria, as its objective was to fight a terrorist group, while Syria could claim that in fact its territorial integrity was violated by the fact of the US entering into its territory and using force. Accordingly, the range of actions that can be interpreted to be in accordance with a norm can be quite extensive.

Typically, one starting point for grasping the essence of a norm is the finding of examples and counter-examples of actions considered to be 'part' of the norm. Such examples,

[523] Ibid 27
[524] See, e.g., Howard S Becker, 'Personal Change in Adult Life' (1964) 27 Sociometry 40
[525] Geuss, *Philosophy and Real Politics* 3
[526] Barnes 29
[527] Wittgenstein passage 201

however important, cannot determine the realm of the norm. As Barnes reminds us, '[e]very example of a norm both resembles yet differs from every other; every next case resembles yet differs in some way from every previous case.'[528] Accordingly, actions that try to follow a norm are merely extensions of past practices. Current actions that are considered to belong to a norm provide guidance for future actions but cannot deliver clear-cut determination.[529] Certainly, this discussion will not be surprising to international lawyers. Courts and tribunals, especially those of common law provenance, operate under the guidance of precedence, which requires an on-going analysis of whether or not the different cases can be considered to be in accordance with certain norms. Even within civil law, courts, while not bound by precedence, follow a similar approach. However, if we accept this type of reasoning, we should be doubtful about the idea of the 'internalization' of fixed norms which is at the heart of legitimacy's descriptive accounts. In fact, one might argue that it is better if norms are not internalized in a deterministic manner, 'so that continuing active mutual adjustment and development of norms may occur.'[530] Given this, it is surprising that even though the literature is keenly aware of the 'indeterminate' character of rules, there is a wide acceptance of the idea of 'internalized' norms at the individual level, a point that I will discuss in more detail below.

Thirdly, internalization of values and norms in complex societies may stand in conflict with the limited cognitive resources of individuals. The norm-based understanding of how individuals react presumes that norms are 'stored' in the minds of relevant actors and guide their behaviour from there. Given the variety of norms and their vast range of application, this assumes that individuals carry around an enormous mental rulebook from which they can identify the adequate action in each particular situation.[531] There are reasons to doubt that we have the capacity for holding such an amount on information.[532] Instead, our way of interacting with the world relies on relatively naive methods of 'recognition' and simplifying 'heuristics' from which we reduce the complexity of social life.[533] As Geuss posits,

[528] Barnes 29
[529] Ibid 30
[530] Ibid 31
[531] Ibid 27; John L Martin, *Thinking through Theory* (W. W. Norton 2015); Charles Taylor, *Philosophical Arguments* (Harvard University Press 1995) 166
[532] John L Martin, 'Life's a Beach but You're an Ant, and Other Unwelcome News for the Sociology of Culture' (2010) 38 Poetics 229, 231
[533] Ibid 235

> [p]eople often have no determinate beliefs at all about a variety of subjects; they often don't know what they want or why they did something; even when they know or claim to know what they want, they can often give no coherent account of why exactly they want what they claim to want … [Accordingly,] people's beliefs, values, desires, moral conceptions, etc., are usually half-baked (in every sense), are almost certain to be both indeterminate and, to the extent to which they are determinate, grossly inconsistent.[534]

Taken together, these issues cast severe doubts on the idea of the internalization of beliefs and, concomitantly, of norms and values. The fact that values are highly contextual, that norms have no clear implications for the course of action to be taken, and that cognitive limitations restrict the way in which we can store a system of values and deduce their implications all make it highly doubtful that individuals hold determinate norms in relation with the complex environment of the state. Consequently, the idea that individuals 'take ownership' of publicly propagated norms seems fanciful. Given that this idea is at the very core of most descriptive accounts of legitimacy in international law, the issues surrounding it pose a severe challenge to such accounts.

If the idea of 'internalization' in connection with individuals is flawed, it can be fathomed that problems are aggravated when moving towards collective entities like states. The notion of internalization at the supra-individual level parallels the original one. For our purposes, I will focus in Harold H. Koh's 'internalization' account as he is one the most prominent advocates of the analogy.[535] In order to lay out the groundwork for his approach to explaining why states obey international law, dubbed 'transnational legal process', Koh first focuses on the question of why individuals might follow the law. He distinguishes between four causal elements: coincidence, conformity, compliance, and obedience.[536] In his terminology, internalization is an important part of the process leading to obedience. He posits that obedience refers to a situation in which a rule is accepted by individuals because it has become part of their 'internal value system.'[537] His argument is that through sheer repetition, the expression of a norm can be transformed from grudging compliance to

[534] Geuss, *Philosophy and Real Politics 2-3*

[535] Harold H Koh, 'Trasnational Legal Process' (1996) 75 Nebraska Law Review 181, 203ff; Harold H Koh, 'The 1998 Frankel Lecture: Bringing International Law Home' (1998) 35 Houston L Rev 623, 627ff; Harold H Koh, 'Jefferson Memorial Lecture - Transnational Legal Process after September 11th' (2004) 22 Berkeley Journal of International Law 337, 338ff

[536] He follows Weber's in identifying the shift from acceptance to internalization a matter of empirical gradation, see Weber, *Economy and Society: An Outline of Interpretive Sociology*

[537] Koh, 'The 1998 Frankel Lecture: Bringing International Law Home' 628

habitual obedience. Compliance, conversely, refers to a situation in which people are aware of a rule and accepts its influence consciously but, crucially, the acceptance is based on self-interest. In order to make his point, Koh uses the example of driving a car in a highway with a speed limit of sixty miles per hour. If the person driving the car slows down in the presence of the police car, the behaviour is purely instrumental as the action is driven by external factors, e.g. avoiding a fine. However, if the person drives always within speed limit, regardless of the presence of police, his actions are considered as an '*internalized normative form of behaviour.*' It is this type of behaviour that then enters considerations of legitimacy or fairness.

Moving from the individual level to collective entities like states, Koh continuous to pursue the basic idea of the 'incorporation' of norms. He differentiates between three types of internalization: social, political, and legal internalization. Social internalization refers to the process and outcome where a certain norm 'acquires so much public legitimacy that there is widespread general adherence to it.' Political internationalization refers to a situation where political elites accept a norm and advocate its adoption within their state. Lastly, legal internalization refers to the incorporation of an international norm into the legal system of a state.[538] For Koh, the sequence of the three types of internalization can vary. He states,

> [s]ometimes an international norm is socially internalized long before it is politically or legally internalized. In other cases, *legal* norm-internalization, prompted by a transnational legal process of interaction and internalization, helps to trigger the processes of political and social internalization of global norms. By domesticating international rules, transnational legal process can spur internal acceptance even of previously taboo political principles.[539]

The process through which internalization occurs is further divided into four phases: interaction, interpretation, internalization, and obedience. Although not specified specifically, this process is to be understood chronologically. Koh also aims to identify the agents that take part of the internalization process. He classifies six of them: transnational norm entrepreneurs, governmental norm sponsors, transnational issue networks, interpretive communities , bureaucratic compliance procedures and issue linkages.[540]

[538] Ibid 642
[539] Ibid
[540] Ibid 644, 646-655. Obviously the way Koh uses the word 'agent' is peculiar in so far as it would be hard to argue that 'issue-linkages' can be consider agents.

For the sake of argument, I will for now accept Koh's view of why individuals follow norms and focus instead on the question of whether or not the analogy between individuals and collective entities holds, especially in light of the concerns raised in the previous discussion. At first sight, the analogy seems appealing; similar to individuals who have adopted norms as their own, we can think of states as incorporating certain norms by inscribing them into their state identity, be it through the legal order, the political system, public opinion and so forth. The analogy probably works best when it comes to social internalization. Abstracting from problems of aggregation, here we can simply carry over the definitions and requirements for individuals to the respective population. Although any requirement of social internalization is much stronger than that of individual internalization, conceptually not much changes. This implies that focusing on social internalization only, we are left with exactly the same issues that surround the concept of internalization at the individual level. When we move to legal and political internalization, things become more complicated. Internalization at the individual level implicitly presumes a form of passiveness. That is, individuals do not actively decide to incorporate a certain set of norms into their mental framework but rather do so unconsciously. This stands in contrast the active inscription of norms into the legal framework of the state or the deliberate advocating of norms by the political elite. Given that the latter two are deliberated on and reflect decisions by the relevant actors (to a large extent guided by self-interest) it should be clear that the nature of norms, which, in principle, can be legally and politically 'internalized,' is much more restricted. Nevertheless, Koh argues that, through repetition, 'international law acquires its "stickiness," and nations come to "obey" out of a perceived self-interest that becomes institutional habit.'[541] The question of how one would separate self-interest from obedience immediately arises here, and the fact that Koh talks about 'institutional habit' immediately after self-interest is quite telling. Internalization would have nothing to do with how one would perceive a norm. The shift from compliance to obedience thus remains mysterious.

Furthermore, the issues arising in the context of individual internalization become severely aggravated when we move to collective entities. Starting with the problem of the context of values, it should be clear that the ongoing change of state leaders, government officials, judges and responsibilities makes it even more unrealistic to think of norms as something

[541] Ibid 655

determinate or fixed. Also the problem that norms do not have clear implications regarding courses of action seems to be even more relevant when it comes to collective entities where different actors may have different interpretations. Finally, collective entities typically have the feature that decisions are not absolutely consolidated but are taken in a more decentralized manner. Given the complexity of a state's normative and legal framework and the enormous variety of contingencies which need to be managed, it is difficult to uphold a view according to which a state 'internalizes' its rules, norms and values and, as a consequence, follows the actions most in accordance with all of them. Instead, the way in which norms and their application are fought out and agreed upon at the different horizontal and vertical levels is highly complex and often non-linear, as Koh emphasizes.

A good example of why the concept of internalization in connection with states can be misleading is the case of torture. Koh has a very interesting description of the different channels through which the treaty against torture was 'incorporated' in the US. Following Koh's account, the prohibition of torture could be viewed as a deeply institutionalized norm embedded in the state, which, according to his theory, one should assuredly expect to be followed. However, the sudden shift of the Bush administration after September 11th towards a limited authorization of torture greatly undermines Koh's own account. If the norm had been truly internalized, such a swift moral turn should have been impossible. Instead, it seems that there was no 'internalization' as such, but rather that the upholding of the norm was dependent on the situation and the actors in charge.

The idea of norm internalization is equally connected to issues of motivation. As we have observed, different accounts of legitimacy frequently bring up internal motivations as part of the explanation for the persistence of certain social arrangements. Franck insists on the fact that states follow certain norms because they 'perceive' them to be legitimate. Brunnée and Toope emphasize that through the practice of legality actors have a 'felt' sense of obligation. Although most accounts do not delve deeply into the issue, with the notable exception of Brunnée and Toope, the internalist reading of legitimacy in the literature relies on the assumption of social learning whereby the relevant actors 'acquire new values and interests from norms,' such acquisition typically being viewed as the internalization of those

values, and interests.[542] Brunnée and Toope are an exception in so far as they explain in more detail, through their analysis of security communities, how communities and 'shared understandings' emerge.

To put it in simple terms, the literature implicitly assumes that whenever we observe a behavioural regularity that fits a certain norm, this is the case because the actors following the norm believe in the norm. Accordingly, 'actions and language [are treated] as external manifestations of subjective and deeper lying elements in individuals.'[543] Thus, if the United Kingdom (UK) complies with the resolution of the ICJ, this compliance is viewed as representing the internal conviction of the UK with the institution and with the norms at play. The underlying presumption is that it is possible to identify the 'real motives' of actors from their particular choices.[544] However, to determine what the real motives or intentions behind a particular action are is somewhat illusive as the observer has no 'access to the motivations of another person but must instead rely on behavioural cues and accepted community standards in order to *attribute* motive.'[545]

As an illustration of such difficulties, consider the quarrel between George W. Bush and Gerhard Schröder over the Second Gulf war. The disagreements between the Bush administration and Schröder's government evolved around the question of whether or not Germany had promised full support for any action in relation to the Iraq situation, including the possibility of an intervention. Independent of whether such a commitment was made or not, two important facts are that during the war preparations in 2002 Schröder was up for re-election and that the German Social-Democratic Party (SPD) and the Green Party, both part of the government, were trailing in the polls. Schröder used the widespread opposition in Germany to the possibility of an US-intervention in Iraq as means of bolstering his popularity and ultimately winning the election. Bush and other members of the administration claimed that Schröder acted opportunistically, while Schröder claimed that he followed his principles. The crucial point is that whether Schröder acted out of internal conviction or pure opportunism (or whether it was a mix of the two) is something to which

[542] Jeffrey T Checkel, 'Norms, Institutions, and National Identity in Contemporary Europe' (1999) 43 International Studies Quarterly 84 89-90
[543] Mills 913
[544] Neta Crawford, *Argument and Change in World Politics: Ethics, Decolonization, and Humanitarian Intervention* (Cambridge University Press 2002) 49-52
[545] Jackson, *Civilizing the Enemy: German Reconstruction and the Invention of the West* 24

the external observer has no access. Instead, what we have is a series of statements and counter-statements that evolve around a very contentious public issue. This example illustrates that the appearance of 'specific attitudes and evaluations, from actions of a kind … are actually consistent with a vast range of such evaluations, and may be indicated by innumerable different kinds of considerations, given agent's knowledge and its distribution.'[546] As Barnes rightly remarks, '[i]t is difficult enough to find evidence of the existence of approval and legitimacy in some specific situations, some of the time, and to establish that such problematic entities may be given an explanatory role as causes of specific actions.'[547]

The difficulties regarding the possibility of ascertaining actual motives are connected to the way in which norms and values are 'used' by individuals. The idea of real motives is based on what John Levi Martin calls a folk theory of motivation. According to this idea, actors are driven by norms and values such as justice or equality;[548] they take norms as 'vital inner forces' motivating their actions.[549] Actors are thus depicted as

> self-propelling, self-subsistent entities that pursue internalized norms given in advance and fixed for the duration of the action sequence under investigation. Such individuals aspire not to wealth, status, or power, but rather, to action in conformity with the social ideals they have accepted at their own.[550]

Following this idea, one would have to conclude that Schröder acted out of principle, because the intervention was normatively inappropriate. This understanding is widespread in the literature. A prime example is Brunnée and Toope. When discussing compliance with international law, they present their account explicitly in opposition to rationalist approaches. While they do not deny that actors might act out of self-interest in some situations, they argue that there will be occasions in which actors' behaviour is driven purely by normative considerations. However, psychological research shows that the impact of norms on how actors behave is relatively weak and that social expectations, for example,

[546] Barnes 124
[547] Ibid 125
[548] John L Martin, *The Explanation of Social Action* (Oxford University Press 2011) 308
[549] Differently put, norms or values are the 'unmoved mover' establishing the ends that actors pursue, see Ann Swidler, 'Culture in Action: Symbols and Strategies' American sociological review 273, 274
[550] Emirbayer 284-285

can play a much more important role.[551] Accordingly, the actual position of actors within particular situations may be significantly more relevant for how actors behave compared to the norms they may or may not believe in.[552]

How, then, do norms enter the picture? As Martin remarks, norms tend to be brought up whenever actors are confronted with the question of why they pursued the action that they did. He argues that, in such situations, actors 'feel that the questioner is potentially critical … and uninterested in the particular situation and substance.'[553] Accordingly, the justification of a particular action through norms is driven by the motive of obtaining the acceptance of other actors based on certain intersubjective standards.[554] This immediately suggests that the presentation of a norm as a form of justification should be perceived as an effect of the action rather than the cause. A motive, then, (a topic we will explore in more detail in the next chapter) should be seen as a 'strategy of action' whereby actors justify their position and attempt 'to motivate acts for other members in a situation.'[555] This is not to suggest that motives - as *post hoc* rationalizations - are not effective. As Mills comments,

> motives actually used in justifying or criticizing an act definitely link it to situations, integrate one man's action with another's, and line up con-duct with norms. The societally sustained motive-surrogates of situations are both constraints and inducements.[556]

All of this suggests that even though norms play a significant role in socially conducted situations, to treat them as causes of actions pursued is a significant leap. We thus need to keep in mind that besides the difficulties associated with ascertaining what the 'real' motives of the relevant actors are, the motives put forward by those actors may have little to do with their actual ones.[557]

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[551] See e.g. Gregory R Maio and others, 'Addressing Discrepancies between Values and Behavior: The Motivating Effect of Reasons' (2001) 37 Journal of Experimental Social Psychology 104

[552] Barry Barnes, *The Elements of Social Theory* (UCL Press 1995) 59

[553] Martin, *The Explanation of Social Action* 309

[554] Ibid 310-311

[555] Mills 907

[556] Ibid 908

[557] This raises the question as to what extent international law constrains. It is quite often argued that international law has a constraining effect on how states, even powerful ones, act. The most recent case where this defence has been raised is in the context of Russia's annexation of Crimea. It has been argued that while international law may not have deterred Russia in taking over Crimea, Russia had to present its actions in the light of international law. But what this shows is that Russia presents this justification in light of the expectations and actions of others not necessarily because international law is a constraining force. The idea of norms as constraints is closely related to norm internalization and how we are guided by norms. Perhaps it can be argued that this type of argument is a shorthand for acknowledging that it is the pressure of others

The general tension between internal beliefs and external behaviour is also analysed by Laffey and Weldes. They notice that the move from internal to external and vice versa is based on the premise that

> [t]he analyst infers that a particular set of 'ideas' (or 'beliefs' or 'mental events') exists in the heads of a specified group of individuals. These 'mental events' are then taken to be decisive for the explanation of individual and, by extension, group action. The interpretation depends on a model (usually unspecified) of human beings as the kind of entities that have internal mental states and a set of assumptions about the relationship between those states and various kinds of performances. For example, it must be assumed that answering the question 'do you believe X?' in the affirmative, writing certain kinds of sentences in documents, and otherwise acting in particular ways are evidence that a certain 'belief' is held' by the individual in question. The translation from such evidence to justified claims about both the existence of mental states and their content is no easy matter.[558]

Despite such caveats, in the literature on legitimacy and international law, the relation between beliefs, actions and causes is typically taken for granted. Brunnée and Toope, for instance, when discussing their notion of security communities and the idea of those belonging to a particular community, through practices, create shared understandings, treat the relationship as straightforward. According to their account, these shared understandings emerge through the beliefs of actors, the introduction of ideas to those beliefs, the replication through practices, and so forth. However, their analysis, as do many others, leaves 'the exact relationships among words, concepts, mental states, and actions as mysterious as ever.'[559]

In sum, the way beliefs are perceived in the literature on legitimacy and international law should be carefully re-examined. We saw that the underlying idea of a determinate normative framework held by individuals is highly contestable and that the concept of internalization is problematic for various reasons, both at the individual level but even more so at the level of collective entities.

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which influences international law. In fact, Franck's discussion on why states might violate norms seems to suggest that states evaluate the reaction of others. However, it seems to me that whenever the argument appears it refers to the power of norms and not to the constraining force of other actors' expectations. On the lack of constraining force of norms see Barnes, *The Elements of Social Theory*

[558] Laffey and Weldes 214-215

[559] Gunnell 135.

IV.5. Conclusion

We began this chapter with Weber's account of legitimacy and his idea of a fundamental connection between the stability of a system and individuals' belief in the legitimacy of the social arrangement. We then moved on to a detailed examination of the conceptual features of legitimacy. After providing a typology that conveyed the variation in understandings of legitimacy, I argued that the deep disagreements regarding the substance of legitimacy can be traced back to its appraisive character, explaining why these disagreements severely hamper its usefulness for furthering our understanding of relevant debates. We then turned to the descriptive notion of legitimacy. The distinction between the objects and subjects of legitimacy illustrated how far the reach of legitimacy's two sides can be. Finally, we took a closer look at the connection between beliefs and the stability of a system. The discussion of non-belief based explanations for why regimes can be stable demonstrated that there are grounds to question the prominent role of beliefs typically found in the literature on legitimacy and international law. We also examined in detail the conceptualization of beliefs in the literature and I argued that a careful re-examination is necessary.

V – From Legitimacy to Legitimation: a Processual Understanding of Social Life and International Law

V.1. Introduction

The prior chapter has highlighted various problems surrounding the prevailing accounts of legitimacy. This chapter proposes an alternative approach, which entails moving away from legitimacy as a property of institutions or a particular state of affairs and instead towards understanding legitimation as a dynamic process of bounding action. Normally, legitimacy and legitimation tend to be treated as two sides of the same coin. In particular, legitimacy tends to be treated as the outcome of legitimation. Legitimacy then refers to something that is possessed or something that can be acquired.[560] In contrast, legitimation is an inherently dynamic concept that stands logically prior to legitimacy. It refers to the pattern of actions and activities destined to 'convince' a certain set of actors about the legitimacy of a social arrangement - a continuous process of justification aiming at legitimatizing or delegitimizing particular courses of action.[561]

My proposal is to shift our focus from the static concept of 'legitimacy' to the dynamic process of 'legitimation.' In the analysis of the previous chapter we saw that the circumscription and assessment of legitimacy is quite problematic. In particular, we saw that the elements that can fall under legitimacy are highly varied and deeply contested. This conceptual elasticity of legitimacy makes it impracticable to identify what a 'legitimate' order is, the problem of which is aggravated by the fact that stability and change can be explained through a variety of factors not connected to legitimacy. Instead of questions of which elements make the social arrangement legitimate and whether actors believe in it, a focus on legitimation shifts the discussion towards understanding 'how the limits of

[560] Barker 13-14

[561] The difference between the normative and the descriptive is that those 'convinced' by the legitimacy or illegitimacy of a social arrangement is based on the fact that the social arrangement is genuinely legitimate or illegitimate, not because actors merely think so.

acceptability are drawn.'[562] More specifically, we will see that the move to legitimation breaks away from an internalist understanding of legitimacy as beliefs and motivation. Instead, we will be concerned with public patterns of justifications. 'What matters is not the supposed content of people's heads, but how people *refer to* [public patterns of justifications] and justify their actions as being *based on* them.'[563] The turn away from legitimacy as a 'stable and clearly defined state' towards a dynamic conception of the role of justification also takes us to a different understanding of social life, namely one that stresses its processual nature.[564] Under this alternative understanding, processes (or relations) are treated as the basic unit of analysis from which institutions, norms, and values emerge. Thus, there are no entities as such but only diverse sets of relations and processes that create and mould the structures and institutions. This approach to social life, and concomitantly to international law, rests on a diverse set of literature. Its basic tenet of understanding social life in terms of processes and relations challenges what has been the backbone of Western thought: that entities – substances, essences, etc. – are the primary unit of analysis from which everything else flows. I will argue that a process-based account can help us to better comprehend what role legitimation plays in social life and how it relates to international law. As we shall see, this particular view departs from other process-oriented approaches within international law.

The chapter is divided as follows. The next section goes back to Weber. Although Weber develops what is considered to be the most conventional account of legitimacy, there is also an alternative interpretation of his writing according to which legitimacy can be understood as bounding action. This interpretation has been suggested by various authors, among them Jackson, who has probably put it in most explicit terms.[565] Next, we will explore in more detail the processual approach to social life in relation to legitimation. I will compare it briefly with other process-oriented accounts within international law, in particular with Lasswell and McDougal's analysis and its offspring. I will then present my view on legitimation with specific application to international law. Finally, I will return to the issue of

[562] Jackson, *Civilizing the Enemy: German Reconstruction and the Invention of the West* 25
[563] Ibid 24
[564] See Francois Bourricaud, 'Legitimacy and Legitimization' (1987) 35 Current Sociology 57 57, 67
[565] Jackson, *Civilizing the Enemy: German Reconstruction and the Invention of the West*; Jackson, 'Rethinking Weber: Towards a Non-Individualist Sociology of World Politics'; Quentin Skinner, *Visions of Politics*, vol I (Cambridge University Press 2002); Barker

legitimacy crises in international law, in particular to the discussions about the need for a new basis of legitimacy as a consequence of ongoing transformations in the international legal order.

V.2. Alternative interpretation of Weber

A good starting point from which we can begin constructing our account of legitimation takes us once more back to Weber. At the beginning of the previous chapter, we established how discussions about legitimacy have been structured by Weber's account, whether approvingly or disapprovingly, especially with respect to the notion of legitimacy in terms of beliefs. At first sight, this notion seems indeed to be what Weber proposes as the general conception of legitimacy.[566] However, a different reading of Weber offers the basis on which we can start sketching out our account of legitimation. In order to understand the subtle shift he makes, a closer look at his writings is necessary. Let us start with a (slightly extended) quote, already presented above in Chapter IV.

> Naturally, the legitimacy of a system of domination may be treated sociologically only as the probability that to a relevant degree the appropriate attitudes will exist, and the corresponding practical conduct ensue. It is by no means true that every case of submissiveness to persons in positions of power is primarily (or even at all) oriented to this belief. Loyalty may be hypocritically simulated by individuals or by whole groups on purely opportunistic grounds, or carried out in practice for reasons of material self-interest. Or people may submit from individual weakness and helplessness because there is no acceptable alternative. But these considerations are not decisive for the classification of types of domination. What is important is the fact that in a given case the particular claim to legitimacy is to a significant degree and according to its type treated as "valid"; that this fact confirm the position of the persons claiming authority and that it helps to determine the choice of means of its exercise.[567]

Weber begins the paragraph by insisting on the notion of legitimacy in terms of beliefs, as it is normally understood in the literature. Whenever the appropriate attitudes and the corresponding actions are present, a social arrangement will be stable.[568] Weber qualifies

[566] See Bensman
[567] Weber, *Economy and Society: An Outline of Interpretive Sociology* 214
[568] However, as we have noted, Weber never explains how much legitimacy is needed. We see that at the beginning of the paragraph he talks about 'probability,' 'to a relevant degree,' or 'corresponding' which are never further specified. The relationship in Weber's writings remains mysterious, see Bensman

the general statement by conceding that not everyone might obey out of belief but due to a variety of reasons. That said, he insists that those internal considerations are not relevant for how to classify the type of domination. What is important, according to Weber, is that groups or individuals treat a particular *claim* to legitimacy as if it was 'valid,' because that is what reinforces a social arrangement as a particular way of acting.

Let me adapt an example by Geuss in order to illustrate what this statement may convey. Geuss, in his *History and Illusion in Politics,* presents an account, which, following Nietzsche, treats society as permanently based on conflict – '*sub specie belli*.' According to Geuss' view, politics is about disagreement and conflict wherein individuals have motivations for exploiting 'shared beliefs and values' in order to impose their desires upon others. As an example, he posits that

> at certain times and places there might be a widely shared belief that society is naturally hierarchical with a king at the head, and also that there should be an established church. This is compatible with disagreement about who is to be king, what the king's specific powers are, and how the king is to be related to the established church.[569]

One can adapt this example and imagine a situation in which individuals might not like the idea of a king within a hierarchical society, but might especially dislike the particular king exercising power at a given time and thus contest the king's right to be king. Paradoxically, by insisting on the 'illegitimacy' of the particular king, they might actually reinforce the general structure of domination based on a hierarchical society with the king at the head. Thus, by treating as 'valid' a particular type of domination, despite not 'believing in' it, the relationship becomes reinforced as the appropriate way in which a social arrangement is organized.

Another important aspect in Weber's quoted paragraph is the emphasis on the 'claim' to legitimacy. As Bensman notices, Weber uses the term almost every single time he discusses legitimacy.[570] Even in his most often quoted phrase, his definition of the state, the word reappears. To recall, the state for Weber is 'the human community which (successfully) claims the monopoly of legitimate coercion.' As Barker comments, the meaning of this definition has often been misrecognized.

[569] Geuss, *History and Illusion in Politics 5-6*
[570] Bensman 19

> He was not arguing that governments needed some quality called 'legitimacy' to survive, nor that one of the things that governments sought was such a resource. His focus was upon an activity, legitimation or the making of claims to authority, which was one of the defining characteristics of all government. His principal depiction of it was as a constituting feature of government, and of its function within the apparatus of rule.[571]

Also beyond the state, Weber emphasises the importance of how different authorities try to justify a particular type of social arrangement.[572] In particular, he stresses that patterns of justificatory claims emerge as a consequence of the elite's or authority's need to self-justify their position. As Weber puts it,

> [t]he fates of human beings are not equal. Men differ in their states of health or wealth or social status or what not. Simple observation shows that in every such situation he who is more favoured feels the never ceasing need to look upon his position as in some way "legitimate," upon his advantage as "deserved," and the other's disadvantage as being brought about by the latter's fault.[573]

As a result, relations of domination are not only grounded on the appeal 'to material or affectual or ideal motives as a basis for its continuance,' but they are equally centred on establishing and cultivating 'the belief in its legitimacy.'[574]

By putting emphasis on claims rather than on beliefs, the focus is shifted to the social context rather than to what goes through the minds of actors. Legitimacy thereby becomes 'a matter of shaping action indirectly by changing the contours of the social environment into and out of which action arises.'[575] In particular, the different sets of claims and justifications are centred on circumscribing 'action to a certain conceptual region and thereby helping to ensure that actual behaviour remains more or less within a certain range variation.'[576] In other words, legitimation is concerned with '*bounding actions':* it is an

[571] Barker 13
[572] Weber, *Economy and Society: An Outline of Interpretive Sociology 78, 953*
[573] Ibid 953, but also 252
[574] Ibid 213. This does not mean that the cultivation has to be successful. Rather, the idea is the fact that authorities rely on various claims in order to underpin their position and to draw acceptable boundaries of action. Likewise, the insistence on claim does not mean that authorities are pursuing the inculcation of belief. Sometimes this is undertaken in order to put off competing alternatives. This is what Wedeen calls 'symbolic legitimation.' She shows that in Syria the use of discourses and claims are not aimed at conversion but on stating what the appropriate of conducts are, see Lisa Wedeen, *Ambiguities of Domination: Politics, Rhetoric, and Symbols in Contemporary Syria* (University of Chicago Press 1999)
[575] Jackson, 'Rethinking Weber: Towards a Non-Individualist Sociology of World Politics' 452
[576] Jackson correctly notes that this focus on legitimacy as bounding action requires an adaptation of Weber in relation to the linguistic turn, although the resources are already there, ibid 449, 453.

activity that contingently stabilizes 'the boundaries of acceptable action, making it possible for certain policies to be enacted.'[577]

In order to establish, sustain or modify boundaries, one needs to make claims and justifications. The rules, norms and other elements used in justificatory claims are part of what Charles Wright Mills treats as 'vocabularies of motive.'[578] Mills is sceptical about treating the motives given by actors as something internal to the actors. Instead, he conceptualizes them as 'terms with which interpretation of conduct *by social actors* proceeds.'[579] For Mills, motives are thus linguistic conducts that are based on social activities. In other words, '*a motive tends to be one which is to the actor and to the other members of a situation an unquestioned answer to questions concerning social and lingual conduct*.'[580] Public justificatory claims, regarded as public encounters to which we respond and which we use in order to motivate or defend certain actions, are intimately related to such vocabulary of motive. Given a series of actions, their public justifications simply represent a 'diplomatic choice of motives' in order 'to motivate acts for other members in a situation.'[581] The underlying social dimension of this notion is crucial: 'motives actually used in justifying or criticizing an act definitely link it to situations, integrate one man's actions with another's, and line up conduct with norms.'[582]

As one can quickly infer, by focusing on the social context legitimation can accommodate a wide range of attitudes and motivations.[583] For me, this is an advantage rather than a problem. In particular, unlike Koskenniemi, I am not concerned with the fact that the language of legitimacy is used instrumentally. According to Koskenniemi, once the language of legitimacy is deployed, '[t]he normative framework is in place. The action has been decided. The only remaining issue is how to reach the target with minimal cost and delay.'[584] On the one hand, I do not challenge Koskenniemi's assessment. For me, this is part of what

[577] Jackson, *Civilizing the Enemy: German Reconstruction and the Invention of the West* 16
[578] Although Mills does not discuss legitimation, or legitimacy, his general framework of vocabulary of motives dovetails nicely with in the aim of the present chapter.
[579] Mills 904
[580] Ibid 907
[581] Ibid
[582] Ibid 905, 908
[583] Cf. Robert Grafstein, 'The Legitimacy of Political Institutions' Polity 51
[584] Koskenniemi, 'Legitimacy, Rights, and Ideology: Notes Towards a Critique of the New Moral Internationalism' 369

the politics of international law are.[585] Processes of legitimation are a mode of control of how to exercise power.[586] On the other hand, Koskenniemi's view on legitimation, whereby those in power present their claims and other social actors credulously accept them, is to an extent one-sided.[587] Instead, as Kratochwil argues, legitimation can both close and open debates.[588] So even if legitimacy 'dissimulates a substantive void that blunts legal and political criticism and lets power redescribe itself as authority *on its own terms*,' as Koskenniemi posits, this does not imply that the authority's redescription has to be accepted.[589] Furthermore, an implicit assumption underlying Koskenniemi's description is that the use of legitimacy-speak is driven by dishonest intentions, as otherwise arguments would be presented in terms of law or morality. Given our previous arguments about the difficulties of eliciting actors' intentions from their actions, including their verbal statements, I will instead accept the fact that justificatory arguments can be made for a variety of motivations and avoid the question of internal motivations all together.[590]

V.3. Social life as process

The shift of focus from legitimacy to legitimation as a dynamic process is linked to a processual understanding of social life and by extension of international law. This processual understanding of social life contrasts with the underlying view in most social and political theory, which, following Mustafa Emirbayer, can be dubbed as 'substantialism.'

[585] To an extent, it is somehow surprising that Koskenniemi rails against that type of action despite his affinities with authors like Hans Morgenthau and Carl Schmitt. This type of action should not be surprising but part of what politics is.

[586] Jackson, *Civilizing the Enemy: German Reconstruction and the Invention of the West* 449

[587] As Barnes observes, accounts of legitimacy tend to present a very skewed perception of society where the rules are rational, free from distortions, but those subjected to the rulers are simply dopes accepting whatever claim is given forth, see Barnes, *The Nature of Power*

[588] Kratochwil, 'On Legitimacy'; also see Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?'

[589] Koskenniemi, 'Legitimacy, Rights, and Ideology: Notes Towards a Critique of the New Moral Internationalism' 367. Likewise, it is interesting to notice how Koskenniemi, ever sceptical of law or morality being transcendental, is implicitly arguing in favour of legitimacy as the 'transcendence of power by right of law or truth.' He cannot have it both ways, see Jackson, *Civilizing the Enemy: German Reconstruction and the Invention of the West* 449

[590] Additionally, I would like to add that this takes a very simplistic view of individuals and their motivations. There is no switch between instrumental and normative considerations as Koskenniemi suggests. Actors are part of complex patterns of relations and react depending on the circumstances and contexts. Thus, it is not that actors alternate between instrumental and normative but both are fused and evolve coterminously in relation with where actors are operating.

Substantialism refers to an understanding of the social world 'consisting primarily in substances … in static "things,"[591] which are considered the ontological primitives of analysis. According to this mode of thinking, the starting point of our analysis is a collection of 'preformed' entities. Only from there we can investigate the unfolding dynamics among the different entities, which remain unaffected by those very same dynamics.[592] This mode of thinking can, for instance, be observed in Ernst Cassirer's writings, who argues that '[r]elation is not independent of the concept of the real being; it can only add supplementary and external modifications to the latter, such as do not affect its real 'nature.''[593]

Thinking in terms of objects which have certain properties and qualities is extremely widespread, including in the literature on legitimacy and international law. Franck insists that legitimate norms, among other features, *are* coherent and determinate. Likewise, Brunnée and Toope enumerate a list of qualities that legality *has*. The list could go on, but the point is clear: discussions about legitimacy within international law are predominantly understood in terms of properties. This type of reasoning, whereby some 'object' has certain 'qualities', seems in principle reasonable and uncontroversial. Our worldview and our modes of thinking are shaped in object-like ways. Language, our principal way of communicating, is exemplary in that regard. Language not only crucially shapes our mode of thinking – our way into the world – but, as Quine suggest, it is principally oriented towards discussing the world in terms of objects.[594] However, approaching social life through the lens of substantialism has certain consequences. The first issue is that discussions based on entities tend to slip into 'essentialism' or 'reification.'[595] In particular, thinking in terms of entities entails the unconscious assumption that these entities possess some inherent properties. Accordingly, such entities are regarded as characterised by certain "elements' or other detachable or independent 'entities,' 'essences,' or 'realities,' and without isolation of

[591] Emirbayer 281
[592] Ibid 283
[593] Ernst Cassirer, *Substance and Function and Einstein's Theory of Relativity.* (William Curtis Swabey and Marie Collins Swabey trs, Dover 1953) 8
[594] 'Linguistically, and hence conceptually, the *things* in sharpest focus are the *things* that are public enough to be talked of publicly, common and conspicuous enough to be talked of often, and near enough to sense to be quickly identified and learned by name; it is to these that words apply first and foremost,' see Willard VO Quine, *Word and Object* (Revised edn, MIT press 2013) 1, emphasis added
[595] I put it into scare quotes to highlight the fact that even if one is not committed to 'essentialism,' one might unconsciously adhere to that.

presumptively detachable 'relations' from such detachable 'elements."[596] In relation to legitimacy, 'essentialism' may cause one to think in terms of what Jackson calls 'motivational quantity.' This can take two particular forms. First, essentialism may give rise to the insidious connection between legitimacy and the number of individuals (entities) that sustain a given social arrangement. An example for this type of thinking is the usual assertion that a political party that won the elections with an outstanding majority 'has a lot of legitimacy'. Secondly, legitimacy is often perceived as 'a generic and fungible reserve that power-holders can utilize to justify whatever they wish to justify.'[597] According to this view, legitimacy is indirectly treated as a commodity, as a particular and concrete object that can be manipulated, extended, reduced, lost, and so forth. [598] Even though 'any conceptual system is metaphorical in nature,' it is not clear whether such subconscious parallels between legitimacy and physical commodities help us in furthering our understanding of the relevant issues or whether they obfuscate.[599]

In contrast to substantialism, a process-oriented approach does not treat entities such as institutions, norms, rules, or groups as having some inherent properties or elements, invariant to change. Instead, entities are regarded as the result of an ongoing series of processes and relations. As Abbott sustains, '[i]nstitutions and social groups are not so much fixed beings that can succeed one another as they are lineages of events strung together over time, to which new things are always being bound, and from which old things are always being lost.'[600] Under this view, what seems to be 'fixed' is nonetheless the result of 'sites of differences' in which certain events modify the underlying pattern by delimiting one thing or another. In sum, the process-oriented approach regards 'relations between terms or units as pre-eminently dynamic in nature, as unfolding, ongoing processes rather than as static ties among inert substances.'[601]

[596] John Dewey and Arthur F Bentley, *Knowing and the Known* (Beacon Press 1960) 108
[597] Jackson, 'Rethinking Weber: Towards a Non-Individualist Sociology of World Politics' 448, 451
[598] I take the idea from Laffey and Weldes although they use the metaphor in relation with how ideas have been conceived in mainstream International Relations, see Laffey and Weldes 206-209
[599] George Lakoff and Mark Johnson, *Metaphors We Live By* (Chicago University Press 1985) 185
[600] Abbott 317
[601] Emirbayer 289

But what is process exactly? Like many other concepts, the term 'process' has been used in various ways.[602] A fairly general and useful definition is provided by Rescher. For him, a process can be understood as

> [a]n integrated series of connected developments unfolding in programmatic coordination: an orchestrated series of occurrences that are systematically linked to one another either causally or functionally. Such a process need not necessarily be a change in an individual thing or object but can simply relate to some aspect of the general "condition of things" … A natural process by its very nature passes on to the future a construction made from the materials of the past … Each such process envisions some sector of the future and canalizes it into regions of possibility more restrained in range that would otherwise, in theory, be available.[603]

By giving precedence to processes as the primordial 'unit' of analysis, entities are moved away from the centre of analysis. This gives a different perspective, for instance, on the recurrent discussions within the literature about the question of when states 'are' states. As we know, the 1933 *Montevideo Convention on the Rights and Duties of States* established the necessary and sufficient conditions for an entity to be considered a state: population, territory, government and the capacity to enter into relations. However, in subsequent practice, states were recognized as states even if they possessed hardly any of these characteristics.[604] To be fair, scholars have criticized the conditions posited by the Montevideo Convention, precisely because of their incongruence with practice. Nevertheless, there has been a widespread insistence on providing some criteria, which has resulted in equally unsatisfying results. The problem is that attempts to categorize the state start from the assumption that there are certain elements that constitute the state and other attributes that may change. These are what Rescher calls 'primary' and 'secondary' attributes, where the former refers to the attributes that categorize a certain entity, while the latter refers to the attributes that can vary among the entities in the category.[605] Because international lawyers typically begin from a substantialist point of view, they tend

[602] Sally Falk Moore, *Law as Process: An Anthropological Approach* (Routledge and Kegan Paul 1978) 42-48
[603] Nicholas Rescher, *Process Philosophy: A Survey of Basic Issues* (University of Pittsburgh Press 2000) 22
[604] James R Crawford, *The Creation of States in International Law* (Second edn, Oxford University Press 2006)
[605] Nicholas Rescher, *Process Metaphysics: An Introduction to Process Philosophy* (State University of New York Press 1996) 47

to insist on the state having some fixed attributes, which often ends in logical contradictions or historical denial.[606]

From a processual point of view, there is no need become wrapped up in such explanatory difficulties as there is a principled denial of entities having any 'essential' attributes. Instead, through the ongoing 'force' of processes we find that 'new actors, new entities, new relations among old parts' emerge.[607] Hence, even though one might perceive 'entities', these 'entities' are in fact nothing but particular patterned relations that have a certain temporary form.

Coming to the question of how such 'entities' come into existence and remain temporally stable, it is useful to turn to Andreas Glaeser's analysis of social processes, which provides a good starting point for better comprehending how processes operate. For Glaeser, 'entities' – or social formations as he calls them – are the '*effects* of interconnected reactions to antecedent actions.'[608] His idea of how social formations emerge rests on a number of assumptions. First of all, actions are undertaken by individuals. These actions do not have to be performed consciously, but they can also comprise 'habitual, non-reflexive behavior, unconsciously motivated actions such as parapraxes, and so forth.'[609] Instead of perceiving actions as the outcome of some sovereign decision, Glaeser insists on actions as

> nodes connecting an often diverse set of other people's actions performed at various times and in different contexts, such that these obtain a common thrust in a particular action as reaction … [A]n actor is less a source than a collector and transformer producing actious out of confluences. The confluences from which actors can produce their action are contingent on opportunity.[610]

Any sequence of action-reaction is thus related to 'concrete spatio-temporal locations.' Moreover, even though social formations come into existence as a result of action-reaction sequences, they transcend them. In particular, social formations are comprised of multiple action-reaction pairs but at the same time they point 'backwards and sideways to other reaction pairs with similar effects and forward to the future, creating the expectation that there will be additional such pairs with comparable effect.'

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[606] Ibid 65
[607] Andrew Abbott, *Time Matters: On Theory and Method* (University of Chicago Press 2001) 256
[608] Andreas Glaeser, 'An Ontology for the Ethnographic Analysis of Social Processes: Extending the Extended-Case Method' (2005) 49 Social Analysis 16 18-19
[609] Ibid
[610] Ibid 21

Finally, what gives social formations the perceived quality of 'entities', and the concomitant sense of stability, is the continuity and reproduction of action-reaction sequences.[611] As Glaeser posits, social formations have the appearance of 'independent, objective entities, even though we all together keep reproducing them through our reactions to other people's actions.'[612] As Berger and Luckmann noted long ago, it is through institutionalization that social formations gain that thing-like character.[613] Social formations can also be stabilized through the interaction of various types of action-reaction sequences far beyond the immediate. In Glaeser's own words,

> actions and reactions can be far removed in space and time and must be understood in a framework that departs decisively from the face-to-face model … The implication is that the relevant context of a particular action is by no means evident. In fact, any particular action can be a reaction to any number of other people's actions in a diverse set of faraway places and distant times.[614]

Taken together, through the various sequences of action-reaction, social formations emerge, change, and temporally stabilize. Crucially, stabilization is not to be equated with fixedness, as social formations remain fluid even if changes are minimal. Processes can thus both transform and sustain social formations, or, as Abbott remarks, social life is '*always* instantaneous … all structures are continuously re-enacted … all reproduction hinges on continuous action.'[615]

V.3.a. Process in international law: a brief comparison

The understanding of process presented here differs to some extent from how process has typically been understood within international law.[616] The most famous account - and that from which other accounts have flourished - is the New Haven School of Harold D. Lasswell and Myres S. McDougal. For them, international law should be seen as 'the process of authoritative decision insofar as it approximates a public order of human dignity.' Process, according to their account, generally refers to the way 'in which the established decision

[611] Ibid 19
[612] Ibid 20; Jackson, *Civilizing the Enemy: German Reconstruction and the Invention of the West* 252
[613] Peter Berger and Thomas Luckmann, *The Social Construction of Knowledge: A Treatise in the Sociology of Knowledge* (Anchor Books 1967)
[614] Glaeser 25
[615] Abbott, *Time Matters: On Theory and Method* 257
[616] Nonetheless, I draw from other areas of law where the notion of process differs from international law, e.g. Moore.

makers of the world community seek to clarify and implement the common, shared interests of the members of appropriate groups.'[617] International law is perceived as part of a system of public order, 'embedded in a larger context of world events which is the entire social process of the globe.'[618] Accordingly, international law is part of a global social process of power in which decisions are authoritative and controlling.[619]

Lasswell and McDougal's conception of (international) law differs greatly from more conventional accounts, like those offered by Kelsen or Hart, who consider law to be as a set of norms that can be derived logically and that can be attached to some specific institutional configuration.[620] Lasswell and McDougal's distrust in defining law as a set of abstract and definable rules is captured in the following statement:

> [f]rom any relatively specific statements of social goal … can be elaborated an infinite series of normative propositions of ever increasing generality; conversely, normative statements of high-level abstraction can be manipulated to support any specific social goal.[621]

For them, international law cannot be conceptualized as a mere composition of norms and precedents, but they regard law to be comprised of a wider array of interacting sources such as standards, policies, or the preferences of various policy-makers. Likewise, whether a decision is of legal character is only determined 'by means of appraisal which includes the description of past trends, factors affecting the decision, projection of future trends, and evaluations of policy alternatives.'[622] Thus, for McDougal and Lasswell, international law is unsystematic. In particular, even though international law is considered as part of a system of public order, they acknowledge that this system is incomplete due to a partial absence of

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[617] Myres S McDougal, 'Some Basic Theoretical Concepts About International Law: A Policy-Oriented Framework of Inquiry' in Richard A Falk and Saul H Mendlovitz (eds), *The Strategy of World Order: International Law*, vol 2 (World Law Fund 1960) 129

[618] Myres S McDougal and Harold D Lasswell, 'The Identification and Appraisal of Diverse Systems of Public Order' (1959) 53 AJIL 1, 6

[619] Ibid 6-10

[620] Richard A Falk, 'Casting the Spell: The New Haven School of International Law' (1995) 104 Yale Law Journal 1991, 1992; Kratochwil, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* 194; Iain Scobbie, 'Wicked Heresies or Legitimate Perspectives? Theory and International Law' in Malcom D Evans (ed), *International Law* (Second edn, Oxford University Press 2006) 94

[621] Harold D Lasswell and Myres S McDougal, 'Legal Education and Public Policy: Professional Training in the Public Interest' (1943) 52 Yale Law Journal 203, 213

[622] Kratochwil, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* 195

'authoritative and controlling arrangements for minimal security.'[623] Likewise, they view the set of actors that are part of the authoritative decision-making process not to be restricted to certain type of actors, such as judges for instance, but to encompass a wide array of them. There is also the recognition that law is not a value-neutral enterprise but that it is deeply embedded within politics:

> Reference to 'the correct legal view' or 'rules' can never avoid the element of choice (though it can seek to disguise it), nor can it provide guidance to the preferable decision. In making this choice one must inevitably have consideration for the humanitarian, moral, and social purposes of the law.[624]

The question regarding the purpose of law takes us to one of the most notable aspects of Lasswell and McDougal's account. They sustain that international law has an inherent teleological orientation toward the goal of human dignity, viewed as 'a social process in which values are widely and not narrowly shared and private choice rather than coercion is emphasized as the predominant modality of power.'[625]

The New Haven school has been widely criticized for a variety of reasons. The various criticisms can be aptly captured by Falk's assessment that the New Haven school embodies 'the modernist legacy of the Enlightenment, with its particular turn toward universal science and reason, a meta-narrative of society and humanity that implicitly and operationally situates the West at the centre.'[626] Rather than delving into those criticisms, I will focus on the comparison of the notion of process adopted in their account to the one outlined here.[627] Of course, there exist some points of convergence, in particular the insistence on the processual character of society and the openness of international law. That said, there are several notable differences. To start with, there is Lasswell and McDougal's teleological reading of international law, which has been the most criticized part of the New Haven School approach. While they insist that law, and by logical extension international law, has

[623] Myres S McDougal and Harold D Lasswell, 'The Identification and Appraisal of Diverse Systems of Public Order' in Richard A Falk and Saul H Mendlovitz (eds), *The Strategy of World Order: International Law*, vol 2 (World Law Fund 1966) 40

[624] Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford University Press 1994) 5, 267

[625] McDougal and Lasswell, 'The Identification and Appraisal of Diverse Systems of Public Order' 129

[626] Falk 2007, footnote omitted

[627] The literature criticizing the New Haven school is ample but for a precise criticism see Kratochwil, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs 195-200*. One could argue, polemically, that a closer reading of the New Haven School with the first wave of the New Stream would show that both approaches are complimentary. The only difference being that one side is more optimistic than the other.

an inherent goal, I view process as purely contingent on the actual circumstances and actors involved in a particular sequence. Certainly, individuals are intentional actors with goals in mind, but that cannot be equated with the existence of a higher goal pursued by an abstract entity like law as Lasswell and McDougal assert. Instead, law, like any other social process, is open ended and compatible with a wide array of goals. There is nothing indicative of law having human dignity as its only purpose.[628]

Concerning the processual aspect of Lasswell and McDougal's account, my contention is that, despite the emphasis on process, the underlying theoretical view is still to a considerable extent static. In particular, it is striking that process as a concept remains largely untouched. Instead, it is treated as a given that needs little explanation. So even though Lasswell and McDougal insist that legal concepts are not immutable and that any attempt to define them 'once and for all' is illusory, the dynamism determining them is left untreated.[629] For Lasswell and McDougal, process is simply equated with 'interaction.' Interaction in turn is described as

> a matter of going and coming, of buying and selling, of looking and listening; and more. The most far-reaching dimension is the taking of one another into account in the making of choices, whether these choices have to do with comprehensive affairs of state or private concerns of family safety.[630]

Notably, the way in which Lasswell and McDougal present interaction and consequently process focuses mostly on particular actions as one-off situations. They talk about buying and selling but there is no hint of how this interaction might reverberate, how it can draw from old processes and how new processes emerge. Whether their account can be interpreted as truly dynamic thus remains unclear. In contrast, the processual view of social life outlined earlier emphasizes the interconnectedness of different processes, in particular the way in which they reach backwards and forward at the same time.

Another aspect in which the accounts differ is the social character of systems of public order. The way actors are presented by McDougal and Lasswell is highly individualistic and to an extent asocial. To see this, it is useful to consider McDougal and Lasswell's treatment

[628] Lasswell and McDougal, like Habermas, simply posit a transcendental argument, instead of communicative action, human dignity.
[629] McDougal quoted in Abraham D Sofaer, 'International Law and Kosovo' (2000) 36 Stanford Journal of International Law 1-11
[630] McDougal and Lasswell, 'The Identification and Appraisal of Diverse Systems of Public Order' 7

of values. They start with the observation that actors pursue a number of values, such as power, wealth, respect, etc.[631] These 'base' values, as Lasswell and McDougal refer to them, are used in order to influence outcomes. Depending on how outcomes unfold, the 'value position' of each actor may be changed and consequently the 'basic composition and modes of operation of the world community' may also be changed.[632] The way in which this process is viewed is thoroughly individualistic. Every actor operates as an autonomous centre of rational calculation.

> Each such [actor] has her own fixed goals, ranked in a fixed order of priorities or preferences. Each confronts and environment (which may in part be constituted by other [actors]), and is able, by use of knowledge and reason, to calculate how different actions will affect it and thereby further her various preferences.[633]

In that regard, the consideration of others, or 'interaction', has to be viewed merely as a means of furthering one's own outcome. In contrast, the processual account presented here treats the behaviour of actors as much more contextual and circumstantial. This is not to suggest that actors have no free will or are not able to pursue any desire. Instead, the simple and obvious point is that 'individuals and social forces are *always* implicated in very social situation, and neither individuals nor social forces stand in complete autonomy from one another.'[634]

Finally, it remains to emphasis McDougal and Lasswell's particular understanding of change. Despite the appearance that actors change through interaction, what changes according to their account are the quantifiers of values like wealth or power, while actors remain unaltered. As Jackson remarks, actors 'remain fixed and unchanging throughout such inter-action, each independent of the existence of the others, much like billiard balls or the particles of Newtonian mechanics.'[635] The static character of McDougal and Lasswell's perception of change can be traced back to what Abbot calls a 'variable-centred approach' to social life.[636] This approach relies on an image of fixed entities that possess attributes that may vary. Accordingly, it is the attributes which 'interact, in causal or actual time, to create

[631] Ibid 8
[632] Ibid 9
[633] Barry Barnes, *Understanding Agency: Social Theory and Responsible Action* (Sage 2000) 17
[634] Jackson, *Civilizing the Enemy: German Reconstruction and the Invention of the West* 34
[635] Emirbayer 285-286
[636] Andrew Abbott, 'Transcending General Linear Reality' (1988) 6 Sociological Theory 169. For explicit talk of variables by McDougal and Lasswell see Lasswell and McDougal 217-232

outcomes, themselves measurable as attributes of fixed entities.'[637] Thus, the action takes place among the different attributes, whereas entities themselves remain unaffected. Following McDougal and Lasswell's account, we thus find actors whose values may clash with other values, while actors remain constant; wealth opposes wealth, power opposes power, and so forth. As a consequence, actors 'are reduced to locations in which or between which variables can interact.'[638]

V.4. From legitimacy to legitimation

Now that we have the contours of the process-based account of social life, we can move on to legitimation. Similarly to process as an ongoing sequence of action-reaction sequences, legitimation can be viewed as an ongoing sequence of justificatory patterns regarding certain actions or arrangements. Legitimation can thus be treated as part of the collection of 'tools and weapons of ideological debate' employed to bound action.[639] Such boundaries circumscribe the type of actions that can or cannot be performed. Crucially, boundaries of action never refer to some real or externally observable line. Instead, a boundary of action 'is a line drawn internally, *within* the network of institutional mechanisms through which a certain social and political order is maintained.'[640] Legitimation issues arise in situations when practical matters are at stake.[641] As an example of how legitimation matters for the evolution of social arrangements, let us consider the attempt of the Bush administration to expand the range of actions available on the basis of self-defence. This attempt represents a clear instantiation of how legitimation is used in order to modify the set of available actions. If successful, it would have had the potential to change the very notion of self-defence and the status of the UN as a structure of peace and security. In the end, the Bush administration failed to expand the boundary of actions falling under the justification of self-defence because the reactions to the action prevented it. But even though this particular boundary of the international legal order remained intact, it should not be overlooked that

[637] Abbott, 'Transcending General Linear Reality' 170
[638] Patrick Thaddeus Jackson and Daniel H Nexon, 'Relations before States: Substance, Process and the Study of World Politics' (1999) 5 EJIR 291, 294
[639] Skinner 177
[640] Timothy Mitchell, 'The Limits of the State: Beyond Statist Approaches and Their Critics' (1991) 85 APSR 77, 90
[641] Kratochwil, 'On Legitimacy' 304

the preservation of boundaries was not due to some obvious external manifestation but that it was driven internally from previous practices and that it had to be reproduced.

The example takes us to the importance of discourse, which determines how boundaries of action are produced, expanded, or restricted. As we just stated, legitimation, as part of processes of action-reaction sequences, corresponds to patterns of claims and justifications through which some actions are enabled and others are foreclosed. Every time this occurs, future processes are affected. What is the content of those justifications and claims? Generally speaking, justifications are embedded in larger discourses. These discourses are an amalgam of ideographic resources, which are social and intersubjective but not shared. Such ideographic resources comprise values, norms, symbols, etc. Crucially, they are not to be viewed as 'objects' which people necessarily believe in or which are inscribed in their minds. Instead, ideographic resources refer to 'systems of representations … that have developed in specific spatio-temporal and cultural circumstances and that make possible the articulation and circulation of more or less coherent sets of meanings.'[642] Despite the fact that ideographic resources may convey a certain set of meanings, they should generally be viewed as open, indeterminate, and ambiguous. So even though certain symbols, classifications, or texts may have 'apparent determinacy,' indeterminacy might be generated through 'internal contradictions, inconsistencies, and ambiguities.'[643] Ideographic resources should thus be perceived as 'living traditions' that are not fully predetermined or coherent. They are 'topological resources,' which can be formulated or presented in different ways.[644] In sum, ideographic resources, which provide the background from which justificatory patterns emerge and evolve, are 'loosely integrated, contested, mutable and highly permeable.'[645]

Legitimation claims are rhetorical arguments in public settings that rely on ideographic resources and that are destined to enable or curtail a certain action.[646] They are directed at 'gaining adherence to an alternative in a situation in which no logically compelling solution

[642] Laffey and Weldes 209
[643] Moore 49
[644] John Shotter, *Cultural Politics of Everyday Life: Social Constructionism, Rhetoric and Knowing of the Third Kind* (University of Toronto Press 1993) 170-171
[645] William H Sewell Jr, 'The Concept(S) of Culture' in *Logics of History: Social Theory and Social Transformation* (Chicago University Press 2005) 169
[646] Jutta Weldes, *Constructing National Interests: The United States and the Cuban Missile Crisis* (University of Minnesota Press 1999) 117-118

is possible but a choice cannot be avoided.'[647] These rhetorical arguments take as resources the discourses 'already in circulation and link them to particular policies, legitimating those policies and attributing them as actions to some particular actor.'[648] The purpose is to 'naturalize' some 'existing social arrangements' so they come 'to seem obvious and self-evident, as if they were natural phenomena belonging to a world 'out there."[649] These resources, as we have established, do not in and of themselves determine any specific course of action, and thus do not enable predicting in advance which course of action will prevail.[650] This is not to say that discourses can be stretched indefinitely. There exist limits, however weak, within which arguments can be deployed and resources can be strained. As Jackson suggests, depending on the setting, there are distinctive 'rhetorical commonplaces.' These rhetorical commonplaces do not only 'establish "starting-points" for arguments, but locate the issue of a debate in a substantive set of common understandings that provide for the crucial connections within the structure of the argument.'[651] It ought to be emphasized that the power of rhetorical commonplaces is highly varied and often contextual. As Jackson posits,

> [t]he success of any particular specification depends on the specific history of that commonplace: its prior dissemination throughout the relevance audiences, its use in distinct (earlier or contemporaneous) legitimation struggles, and in general the whole pattern usage that made the commonplace available for deployment in the debate in question. Specification participates in an ongoing process of attempting to "fix" a commonplace's meaning and policy implications, so as to make the commonplace available as a rhetorical resource for use in legitimating a course of action.[652]

This paragraph reminds us of Moore's twofold distinction between process as regulation and process as situational adjustment. The latter type of process refers to those situations in which 'people try to control their situations by struggling against indeterminacy, by trying to fix social reality, to harden it, to give it form and order and predictability.' Such processes provide a baseline whereby not 'every instance and interaction … have to be completely renegotiated in a totally open field of possibilities.' In contrast, process as regulation refers

[647] Kratochwil, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* 210
[648] Jackson, *Civilizing the Enemy: German Reconstruction and the Invention of the West* 28
[649] Marks 22
[650] Jackson, *Civilizing the Enemy: German Reconstruction and the Invention of the West* 29
[651] Kratochwil, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* 219
[652] Jackson, *Civilizing the Enemy: German Reconstruction and the Invention of the West* 44

to circumstances and interactions in which individuals pursue their objectives by exploiting 'the indeterminacies in the situation, or by generating such indeterminacies, or by reinterpreting or redefining the rules or relationships.' Both type of processes can operate simultaneously and can even be furthered by the same actor during the same course of actions.[653] Crucially, those opposite processes can be observed frequently in the patterns of justificatory claims deployed in the various legitimation debates. As a result, rhetorical commonplaces are not only used ambiguously and incoherently but they are often pushed to opposite or contradictory ends.[654]

With this notion of legitimation, we can now move on to the specific questions concerning legitimacy and international law. We will first turn our attention to 'rhetorical commonplaces' in international law. In the literature, there is normally a clear distinction between the domestic and the international arena. It is held that while the domestic arena can be regarded as having a 'thick' culture due to a shared space, in the international realm the shared elements are less pronounced. As a consequence, one would expect that rhetorical commonplaces are also less widespread and less powerful in the international sphere. The idea that culture is 'thinner' in the international realm compared to the domestic one appears, for instance, in Brunnée and Toope's account of legitimacy. After discussing the importance of communities of practices in developing shared understandings, they argue that these communities of practices are not restricted to domestic settings but that they can also appear transnationally and internationally. However, Brunnée and Toope posit that the international legal community cannot yet be fully considered as a community of practice because that would require a larger amount and a higher density of interactions among the members of that community. As they assert, 'an international legal community can exist only through a practice that sustains basic shared understandings and, most importantly, a practice that sustains shared understandings of legality.'[655] For them, the amount of shared understanding within the international society is still restricted. As a

[653] Moore 50
[654] Jackson, *Civilizing the Enemy: German Reconstruction and the Invention of the West* 30; Shotter, *Cultural Politics of Everyday Life: Social Constructionism, Rhetoric and Knowing of the Third Kind* 170
[655] Brunnée and Toope 70

consequence, they posit that although it is not impossible to reach agreements or produce law, severe limitations arise because there is too 'little common ground.'[656]

One problem with accounts positing a clear distinction between the domestic and the international arena is that they reify a division which is far from obvious. Furthermore, they reinforce the perception of states as homogeneous and sealed off societies.[657] In my view, to think of these societies as compartmentalized and separate is flawed in various ways. As Michael Mann points out,

> [s]ocieties are not unitary. They are not social systems (closed or open); they are not totalities. We can never find a single bounded society in geographical or social space. Because there is no system, no totality.[658]

The assumption of pre-existing and unified societies can be traced to the rise of the sovereign state in the early modern period. The emergence of sovereign territoriality as the basic mode of political organization led to the (ideological) opposition between the domestic and the international realm, what is sometimes called the 'great divide.'[659] The fact that the two realms were 'conceived of as spheres of action, structures of authority and forms of normativity that are distinct and different,'[660] gave rise to the perception of the territorial state as containing a particular society within its demarcated boundaries. However, the fact that the symbols comprising the 'shared' understandings within those societies should be regarded as fragmented, contradictory, loosely related, and open to multiple readings and courses of action, undermines this view.[661] The 'great divide' also gave rise to the conception of certain social and political organizations as belonging to a

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[656] Ibid 71

[657] Jackson and Nexon 300

[658] Mann Michael, *The Sources of Social Power: Volume 1, a History of Power from the Beginning to Ad 1760* (Cambridge University Press 1986) 1

[659] Clark, *Globalization and Fragmentation: International Relations in the Twentieth Century*

[660] Walker 12

[661] It is true that they argue that security communities might experience internal fighting, but despite this acknowledgment, it seems to me that the whole idea of security communities is that it creates a community and a shared understanding and that, as a result, there will be agreement and consensus. They might not say that explicitly but that it is the sense in which one can read the text. Especially when they used words like 'shared' or 'community.' Thus, if there are conflicts within security communities the whole purpose of talking about them loses any purchase. Likewise, despite the avowed social construction of communities, there is a whiff of essentialism as it is also intimated that due to the particular character of security communities 'they are less likely to resort to force,' but that is something that needs to be demonstrated not assumed, see Jackson, *Civilizing the Enemy: German Reconstruction and the Invention of the West* 241

particular state.[662] Of course, the sovereign state has had an important role in shaping social and political relations, or, as Peter J. Taylor states, the state had an enormous influence in 'sucking social relations to mould them through its territoriality.'[663] Nevertheless, the state has never been capable of containing or producing some 'total' society. Instead, throughout history there has always been a diffusion of ideas and norms.[664]

Taken together, the persistent idea regarding the presence of some existential divide between the harmony of the domestic sphere and the anarchy in the international sphere should be discarded. It is well established that there is more cultural diversity within states than between them. In consequence, the perception that the international sphere is inherently inimical to intersubjective understandings also cannot be upheld. In that regard, we should expect to encounter the use of rhetorical commonplaces in the international realm, just as we find them within domestic societies.

What exactly are these rhetorical commonplaces we find in international law? The ideographic resources used for the support of legitimating claims are varied. They not only comprise the rules, norms, and principles at the core of the international legal order, but also policy, interests and other influences. We further find 'previous decisions or other pronouncements of varying quality' as resources for bolstering legitimating claims.[665] For example, in the attempt to justify the Iraq invasion in 2002, the Bush administration resorted to various resolutions that the SC had previously agreed upon in relation to Saddam Hussein and the dismantling of Weapons of Mass Destruction. In general, legitimating claims, like legal claims, create and react to a world in conjunction. 'A rhetorical claim,' which is what law is, 'reveals the world in a certain way, even as this revelation gives rise to particular actions to be performed within the world, which now "make sense" as a part of the world that has been revealed.'[666] It is worth repeating that the ideographic resources backing legitimating claims, including those in international law, are generally ambivalent, vague or contradictory. I thus disagree with the statement that there exist fixed

[662] John Agnew, 'Mapping Political Power Beyond State Boundaries: Territory, Identity, and Movement in World Politics' (1999) 28 Millennium 499, 503
[663] Taylor 152
[664] See e.g. Beth A Simmons, Frank Dobbin and Geoffrey Garrett, *The Global Diffusion of Markets and Democracy* (Cambridge University Press 2008)
[665] Kratochwil, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* 209
[666] Jackson, *Civilizing the Enemy: German Reconstruction and the Invention of the West* 30

limits 'because those who use legal language are typically in a relationship of some duration, from which common meanings, values, and expectations have emerged.'[667] This is not to say that the legal language is completely open. As Johnstone posits, '[t]here is a limit to which any language, including the language of the law, can plausibly be stretched.'[668] In particular, with the presence of legal standards and practices, 'purely idiosyncratic uses' of a particular norm or rule will not be accepted.[669] Nevertheless, as noted in the prior chapter, it is possible that even from the same understanding – e.g. a norm - opposite interpretations can be derived. Thus, what David Kennedy asserts about the laws of wars can be extended to international law in general: 't]he astonishing thing is that these are differences in *perspective* on a quite similar set of legal doctrines and political consideration.'[670]

To sum up, the move to legitimation, understood in terms of the processual framework laid out at the beginning of this chapter, departs from the substantialist mode of thinking. It abandons the goal of determining a priori what we can call legitimate by breaking with the perception of legitimacy as some deep and mysterious quality belonging to a particular social arrangement. Equally, it sidesteps the question of whether those in the social arrangement really believe in it or not.[671] Instead, legitimation highlights 'how actual arguments produce relatively stable boundaries of acceptable action, by drawing on the common stock of rhetorical commonplaces making up the relevant social environment.'[672] In my view, this may provide a more parsimonious view of how society operates. In what follows, we will explore the consequences of adopting this view for our understanding of the changed realities in the international legal order.

V.5. Legitimacy crises through the lens of legitimation

Having laid out my account of legitimation in the previous section, I now want to turn to a very popular topic in the literature on legitimacy and international law: that of legitimacy

[667] Johnstone 25
[668] Ibid, footnote omitted
[669] Kratochwil, 'How Do Norms Matter?' 52
[670] David Kennedy, *Of War and Law* (Princeton University Press 2009) 39. Personally, I do not find it astonishing.
[671] The point is not that beliefs or motivations do not exist but that the hurdles they present and how to connect them with stability and larger social arrangements are quite formidable.
[672] Jackson, *Civilizing the Enemy: German Reconstruction and the Invention of the West* 31

crises. The argument in the literature takes the form that whenever there is a disjunction between world-views and practice, a crisis of legitimacy arises. As we already established, the underlying assumption is that any society is characterized by a certain distribution of beliefs held by those belonging to it. This comprises beliefs concerning institutions, structure, and the present shape of the society. Simultaneously, these institutions 'act' and produce a series of constant pattern of practices. To say that the members of a particular society

> take a basic social institution to be 'legitimate' is to say that they take it to 'follow' from a system of norms they all accept; agents think the norm-system capable of conferring legitimacy because they accept a set of general beliefs (normative beliefs and other kinds of beliefs) which are organized into a world-picture which they assume all members of the society hold. So a social institution is considered legitimate if it can be shown to stand in the right relation to the basic world-picture of the group.[673]

Under this conception of legitimacy, a legitimacy crisis thus arises whenever there is a discrepancy between the world-picture held by the society and the actual practices in that society.[674]

Such world-pictures also comprise academic debates and theories. Cutler, for instance sustains that a crisis of legitimacy occurs 'when there is a disjunction or asymmetry between theory and practice that becomes so great that it strains the foundations of the order.'[675] Cutler's analysis follows in part the arguments we discussed in Chapter II. She focuses on the rise of transnational and global authorities beyond the state, especially the rise of private authorities. She argues that we are currently witnessing a transformational moment that undermines the Westphalian paradigm. She asserts that the assumptions underpinning the Westphalian 'scheme of reference'[676] - states as independent and sovereign entities, claiming comprehensive authority within a particular and delineated territory - does no longer hold up to reality. As a result, '[t]raditional Westphalian inspired assumptions about power and authority are argued to be incapable of providing contemporary understanding

[673] Raymond Geuss, *The Idea of a Critical Theory: Habermas and the Frankfurt School* (Cambridge University Press 1981) 56, 59.
[674] Perhaps, 'as soon as' is a strong wording, but it is keenly suggested that a legitimacy crisis will ensue, nonetheless.
[675] Cutler, *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy* 241. It goes without saying that my comments can be extended to similar accounts.
[676] Walker 13

or locating the authority and historical effectivity of transnational merchant law.'[677] For Cutler, this implies that international law is experiencing a crisis.[678]

As Jackson and Nexon assert, such arguments tend to be on the verge of triviality. A change or breakdown of a social arrangement occurs because of a crisis of legitimacy. A crisis of legitimacy occurs because new assumptions have replaced the previous ones.

> But when would this *not* be the case? *By definition*, there cannot be changes in "long-held" collective notions unless an orthodoxy is discredited and a new one emerges that can take its place. Arguing that an orthodoxy is likely to be discredited when events disconfirm its image of the world is to state a truism. When would an orthodoxy be discredited *without* these conditions? It might be possible that a set of beliefs could be so internally contradictory as to make them ripe for change, but the development of such internal contradictions probably wouldn't occur without the effects of external events.[679]

Nevertheless, I want to go further and focus on some of the premises underpinning the argument. The starting point of the argument is that initially there is congruence between worldviews and practices. In social theory vocabulary, '[c]ultural and ideological materials have been … considered the reflection of an existing structure.'[680] Despite the issue of how such congruence could ever be determined, this assumption entails that worldviews are coherent, fixed and that there is consensus regarding them. However, as I have argued both in the previous and in the present chapter, those worldviews should rather be perceived as vague, loosely connected, variable and contradictory, allowing actors to conceive of and react to 'reality' differently. Take the case of Westphalian sovereignty, which is at the heart of Cutler's comment. Despite the insistence on autonomy and independence, the notion of sovereignty has had a complex evolution which has prompted alternative (and opposite) readings and from which struggles over 'fixing' its meaning have emerged.[681] In consequence, it is fair to claim that the relationship between worldview and practice

> is not a harmonious configuration governed by mutually compatible and logically inter-related principles. It is rather a set of loosely integrated processes, with some patterned aspects, some

[677] Cutler, *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy* 242
[678] Ibid 241
[679] Patrick Thaddeus Jackson and Daniel Nexon, 'Whence Causal Mechanisms? A Comment on Legro' (2002) 1 Dialogue IO 81, 12
[680] Moore 33
[681] Alexander B Murphy, 'The Sovereign State System as Political-Territorial Ideal: Historical and Contemporary Considerations' in Thomas J Biersteker and Cynthia Weber (eds), *State Sovereignty as Social Construct* (Cambridge University Press 1996)

> persistencies of form, but controlled by discrepant principles of actions expressed in rules of custom that are often situationally incompatible with one another.[682]

Nevertheless, ideographic resources may sometimes evoke a sort of worldview or point of reference, however loose. 'Sometimes an ideology or part of it can be constructed precisely to cover the complex mess of social reality with an appearance of order, simplicity, harmony, and plan.'[683] In that regard, the Westphalian narrative of state sovereignty, despite its lack of actual fit with reality, 'has undoubtedly supplied a powerful and self-reinforcing grid for thinking about the Western centre of the political world throughout the modern age.'[684] But even if there are instances in which 'cultural representations of social relationships seem to be much more closely reflective of social reality than others,' it is important to stress that there are always 'elements of inconsistency, ambiguity, discontinuity, contradiction, paradox, and conflict.'[685]

Beyond the fact that the premise of initial congruence between worldviews and practice is rather problematic, the assessment of worldviews and practice is complex and often subjective. Regarding the former, let me refer to Wedeen's discussion on the complexities of culture. Using the example of France and the commitment to republicanism, she notes that if one wants to understand the association between republicanism and being French, one needs to take into consideration the following:

> (1) Republican ideas can come to stand for Frenchness because of the ways in which they have been used (by politicians, historians, and advertisers) to objectify what it means to be French … ; (2) non-French people may also subscribe to republican ideals; (3) not all French people adhere to republican ideals; (4) not all French people interpret republicanism or understand its significance in the same way; (5) antirepublican French people may not have the same relationship to republicanism as do

[682] Victor Turner quoted in Moore 36

[683] Ibid 51; for a similar point but focused more on theory see Roxanne L Doty, 'Aporia: A Critical Exploration of the Agent-Structure Problematique in International Relations Theory' (1997) 3 EJIR 365 376-379

[684] Walker 13, footnote omitted.

[685] Moore 52, 49; Abbott has a similar point of view when he insists that 'stabilization … never ceases, never finishes, and in a sense it never succeeds,' see Abbott, *Time Matters: On Theory and Method 256-257*. Additionally, the argument about the crisis would need to show when exactly there was this correspondence and explain how it differs from when the crisis has arisen, because if the situation that one describes of crisis is similar to that one when there was no crisis, then the argument fails. A variation would be that this is a matter of ideology, and that it was so powerful that even though the reality was another, everyone 'believed' it. The problem then is to show that was the case, which is doubtful, or one of 'false consciousness' which is equally problematic.

> antirepublican thinkers and citizens elsewhere, but they may; and (6) it is not clear who counts as a "French" person.[686]

Wedeen's example not only illustrates the actual complexity of worldviews, but also the difficulties of linking them to particular societies. Next, the assessment of practices is often equally complicated and allows for different interpretations. A good illustration is the so-called democratic deficit of the EU, which refers to the series of ongoing debates about the structure and nature of the EU. In those debates, it has been postulated that the EU suffers from a democratic deficit and that it is not representative. However, some authors, such as Andrew Moravcsick, have opposed this view and argue that if one compares the EU with the democracies it comprises, the EU actually does not perform any worse than them.[687] Others even argue that the problem does not so much appear within the institutions of the EU but within the national democracies themselves.[688] Certainly, these claims have been contested,[689] however, the contestability simply illustrates that not only worldviews are highly complex, but that the evaluation of practices is equally contentious.[690]

Besides the issues surrounding the basic premises of the notion of legitimacy crises, it is also worth emphasizing that there exists an underlying assumption that legitimacy crises are possible to 'fix.' This assumption, once more, can be traced back to a substantialist view of social life. It ignores that social life is constituted by processes that continuously produce and reproduce certain social arrangements. In each occasion, something is added and something else is detached, step-by-step modifying the arrangement. Put differently, social life is what Barnes calls 'bootstrap induction' whereby each act is dependent on the acts of others and, through them, the continuous readjustment and conjoint receptiveness takes place.[691] In consequence, there are always variations within social arrangements even when processes are repeated. The assumption of the possibility of fixing the relationship between worldviews and practice is difficult to reconcile with such a processual view on social life. As Moore perceptively notes, 'such an attempt directly struggles against mutability, attempts

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[686] Lisa Wedeen, 'Conceptualizing Culture: Possibilities for Political Science' (2002) 96 APSR 713, 721, footnote omitted

[687] Andrew Moravcsik, 'The Myth of Europe's Democratic Deficit' (2008) 43 Intereconomics 331

[688] See Vivien A Schmidt, *Democracy in Europe: The Eu and National Polities* (Cambridge University Press 2006)

[689] Follesdal and Hix

[690] On the multiplicity of views and how diverse empirical 'objects' are see Daniel Levine, *Recovering International Relations: The Promise of Sustainable Critique* (Oxford University Press 2012)

[691] Barry Barnes, 'Social Life as Bootstrapped Induction' (1983) 17 Sociology 524

to fix the moving thing to make it hold.'[692] Although Moore particularly refers to the struggle for meaning within worldviews, the corresponding statement holds true for legitimation as portrayed here.

In sum, the struggle for determining a particular course of action through the use of patterns of justifications always necessitates a discontinuity between worldviews and reality. Otherwise the means for action would not be available. A legitimation claim, as Jackson affirms, should be viewed as 'prosthetic.' It creates and reacts to the world at the same time; it 'reveals the world in a certain way, even as this revelation gives rise to particular actions to be performed within the world, which now "make sense" as part of the world that has been revealed.'[693] In that regard, when the argument of a legitimacy crisis with respect to the Westphalian paradigm, the EU, or the Kosovo situation is put forward, the aim is to view the mass of empirical details through a particular lens and to produce certain reactions. Consequently, arguments attempting to explain crises of legitimacy through the disjunction between 'reality' and 'ideals' should be taken with a pinch of salt. The relationship is more complex and deserves a more critical scrutiny. This is not to argue that due to those complexities the notion of a legitimacy crisis is meaningless. My simple contention is that one should meet the debate with caution. In some contexts, there might be a crisis and there might be a disconnection between worldviews and practice, but even if they have occured jointly, the causal relationship is far from obvious.[694]

I want to end this chapter by discussing the issue of legitimacy crises in relation to the ongoing transformations of the international legal order outlined in Chapter II. We noted that in response to the continuous and increasing shift of authority towards supranational institutions, it has been widely argued that we are experiencing a crisis (or that there will be

[692] Moore 40

[693] Jackson, *Civilizing the Enemy: German Reconstruction and the Invention of the West* 30

[694] Cutler's argument also raises a particular interpretation of the disconnection between world-views and practice which suggests that our current theories, at least those of liberal pedigree, impede us from seeing the actual reality and that we need new theories. Here Cutler seems to conflate two things, at least in my view. On the one hand, she seems to suggest that there is a disconnect in relation with how actors within a social arrangement see their world and the actual practices, and that in turn a crisis a legitimacy has arisen. This is the view I have just criticized. On the other hand, her narrative seems to suggest that our theories of the world, those that have been put forth by academics, are unable to account for the new transformations. If that is the case, then, the crisis of legitimacy is not of international law as practice but that of academic disciplines. As such, the reality with its make-meaning practices is operating 'normally.' This version tends also to appear in the literature. These two dimensions should better be treated separately because their conflation leads to confusion. Perhaps she is arguing that academics share the general ideology of the population, in which case the legitimacy crisis would have a double dimension, but this should be made explicit.

a crisis) because the structure of the international legal order is not adequate or unresponsive to the needs of people. The very notion of crisis in that literature refers to different sets of claims that are in one way or another interrelated. The first interpretation of crisis focuses on the erosion of democracy and the need to produce or adapt supranational institutions so as to make them more democratic. This literature is normative in its orientation and covers a wide range of approaches, from full blown philosophical arguments, trying to outline conditions under which the international legal order can be considered normatively justified, to more pragmatic and institutional proposals, such as making the SC more accountable, allowing NGOs to participate in certain deliberations, and so forth.[695] Another interpretation of crisis emphasizes the sociological dimension. The idea is that the undemocratic character of international law makes those that are subjected to it deem the international legal order illegitimate and thereby makes the whole order unstable. The recurrent protests against the IMF, World Bank, G20 and other international institutions are then taken to be evidence for the legitimacy crisis of international law.

In light of the previous arguments, some caveats should come to mind. To begin with, protests against international organizations are not a very recent phenomenon; in the 1980s, for example,there were protests against the IMF in Argentina.[696] But even if we accept that the number of these conflicts has increased and that the increase is connected to the evolution of the international legal order, this does not imply that before the major transformations the international legal order was considered legitimate by those under its rule. Furthermore, the insistence on the legitimacy crisis of international law is often based on the argument that, due to the increasing transfer of power and competences to supranational organizations, the state is becoming hollowed out. For example, Zürn posits that 'the normative legitimacy deficits of international institutions are in fact increasingly generating problems with respect to societal acceptance' of the different polities that are under the purview of those international institutions.[697] This type of

[695] Buchanan is an instantiation of a purely philosophical approach. See Allen Buchanan, 'The Legitimacy of International Law' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press 2010)

[696] This highlights a point raised by Kumm, and with which I agree, that current discussions about legitimacy within international law reflect the preoccupations of Western international lawyers more than the actual events, see Kumm

[697] Michael Zürn, 'Global Governance and Legitimacy Problems' (2004) 39 Government and Opposition 260, 260

inference relies on a partial misreading of the situation in states, as they begin from the assumption that the situation within states is one of consensus and legitimacy.[698] The problems with such image have been laid out in detail in the previous chapter.

In my view, the crisis of international law can be understood better by leaving legitimacy concerns aside and instead viewing social arrangements as *modus vivendi,* as a struggle for domination. Following Talisse, the view of social arrangements as *modus vivendi*, entails that[699]

> each contending party sees it as a less than optimal compromise to be tolerated only for as long as the relative balance of power among the contending parties precludes any one party from dominating the others. But as power relations are unstable and prone to fluctuation, so too is a social order whose justification lies exclusively in power. Under such conditions, it is reasonable to expect the contending parties to not acquiesce in the democratic status quo, but to attempt instead to manipulate the existing balance of power.[700]

Although Talisse's discussion is concerned with the possibility of justifying democracy, his description of democracy as *modus vivendi* can be extended nicely to different social arrangements. In that regard, one should interpret the evolution and contestation of international law as a logical extension of international institutions accruing more power. This might be a trivial thing to state, but it is worth keeping in mind. Institutions are always contested, and to talk about legitimacy may actually obfuscate the problems of interest rather than clarifying them. Whatever institution has the power to decide, it will necessarily be contested at some point or another; according to a processual view, that is the nature of social life. Through action/reaction sequences some actors get the upper hand and others react. That is why for some actors the principle of sovereignty may mean independence and autonomy one day and responsibility to protect the next day. As Turner emphasizes, conflicts of values do not disappear but simply take a particular form in a particular context:

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[698] This view, to a large extent, draws on the liberal view whereby society is characterised as being a moral whole with a 'single, unitary, consistent underlying conception of the world, morality, and politics.' Accordingly, they see society as being inherently consensual, see Geuss, *History and Illusion in Politics* 4

[699] He takes the term from Rawls.

[700] Robert B Talisse, *Democracy and Moral Conflict* (Cambridge University Press 2009) 23. A similar understanding appears in Foucault, for whom '[h]umanity does not gradually progress from combat to combat until it arrives at a universal reciprocity, where the rule of law finally replaces warfare; humanity installs each of its violences in a system of rules and thus proceeds from domination to domination,' see Michel Foucault, 'Nietzsche, Genealogy, History' in James D Faubion (ed), *Aesthetics, Method and Epistemology Essential Works of Foucault: 1954-1984, Vol Ii*, vol II (The New Press 1999) 378

> Loyalty and reciprocity, for example, routinely conflict with altruism and equity. We invent theories, which become basic to institutions, to deal with these conflicts. Feudalism routinized and ritualized the relations of loyalty and reciprocity of patron and client, for example, to the exclusion of general considerations of equity to produce a society of ranks, with Lords and Serfs in mutually reciprocal relations. We replaced them with other institutions when they broke down. *This* is the case with bureaucracy, which eliminates personal loyalty and enforces equality under rules. We construct theories, such as the idea of the *Rechtsstaat,* to justify these new orders.[701]

In sum, social arrangements are a matter of power and struggle and it is through those social arrangements that 'people individually or collectively set the terms of their relations with others.'[702] The supranational level is another stage on which these clashes occur.

V.6. Conclusion

This chapter advocated a shift of focus from legitimacy as a static concept to legitimation as a dynamic activity. The first part of this chapter fleshed out the underlying view of social life present in most accounts of legitimacy and international law. Dubbed substantialism, it was shown that this implicit view on social life leads to a perception of legitimacy in terms of 'substances,' akin to a physical entity that can be detected and that possesses certain attributes. I then presented arguments for why a turn to a processual account of social life might offer a more fruitful way of approaching legitimacy. Using this account, I argued for a shift of focus away from legitimacy and towards legitimation. Specifically, instead of thinking about legitimacy in terms of states that can be achieved, I posited that it was preferable to think about legitimation as part of ongoing processes constituting and reproducing the world. Accordingly, legitimation was treated as patterns of justifications, relying on particular 'rhetorical commonplaces' and destined to pursue certain actions and prohibiting others. This alternative approach sidesteps the question of what kind of institutions or actions are legitimate, and instead focuses on the problem of how boundaries of action are being negotiated, trespassed and produced.

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[701] Stephen Turner, 'Universalism, Particularism, and Moral Change: Reflections on the Value-Normative Concepts of the Social Sciences' in Nikolai Genov (ed), *Global Trends and Regional Development* (Routledge 2011) 265

[702] Roger V Gould, *Collision of Wills: How Ambiguity About Social Rank Breeds Conflict* (University of Chicago Press 2003) 38.

VI – Conclusion

The concept of legitimacy has increasingly captured the interest of international lawyers. Although questions connected to legitimacy have been present in the discipline for some time, it is only recently that the concept has become an important topic in its own right. The reasons behind this newfound revitalization were discussed throughout the dissertation, especially in Chapter II. The outcome of the transformations outlined in that chapter can be regarded as what Walker dubs a 'disorder of orders.'[703] As a consequence of this development, our conventional normative frameworks no longer seem to guide us adequately through the changed realities of the international legal order. In light of this erosion and insufficiency of the established forms of normative justification, it is unsurprising that international lawyers have felt the need to turn to the vocabulary of legitimacy.

While by and large the discipline has embraced legitimacy, some important criticisms have emerged. In particular, we saw that central figures in the discipline, such as Crawford and Koskenniemi, have raised questions about the utility of legitimacy. In response, others have tried to defend the importance of the concept. For instance, Thomas, who acknowledges that legitimacy is riddled with certain ambiguities and difficulties, holds that despite those complications legitimacy should not be discarded from the international lawyers' arsenal. He is not advocating supplanting law for legitimacy, but to consider legitimacy as a useful addition in order to make sense of certain events. He also argues that international lawyers might have a valuable contribution to make in discussions about legitimacy, especially when issues of legality are of concern.[704]

Between the extreme poles of total recognition and total rejection, this dissertation has taken an ambivalent stance with an inclination towards the latter. Picking up the cues of

[703] Neil Walker, 'Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders' (2008) 6 International Journal of Constitutional Law 373

[704] The fact that his discussion of legal legitimacy shows that there are intractable disagreements in the discipline about what constitutes 'law' and what counts as 'valid,' does not seem to affect Thomas's upbeat assessment about the possibilities of international lawyers furthering discussions of legitimacy, see Thomas, 'The Uses and Abuses of Legitimacy in International Law'

Crawford and Koskenniemi, it aimed to demonstrate the difficulties that accounts of legitimacy within the literature of international law run into, partly due to their common reliance on particular implicit assumptions. More specifically, it was argued that the use of legitimacy in the literature is often unreflective and that, as a result, arguments about legitimacy and international law tend, with notable exceptions, to be superficial. Paraphrasing Barnes, whenever a social arrangement is seen as stable it is due to legitimacy, whenever a social arrangement is changing it is due to legitimacy, and whenever a social arrangement is collapsing it is due to legitimacy.[705] The fact that this type of reasoning is widely accepted relies on the conceptual openness of legitimacy, allowing it to appear in a variety of contexts with a variety of meanings. This was explained in more detail in Chapter IV, which illustrated that both the range of reference and the audience of legitimacy is practically limitless. As Mulligan comments,

> [i]n terms of its range of reference, the concept may be applied to the state, the international system, or any number of institutions and actions within this social setting; yet this range is complicated by another less frequently addressed aspect of the relationship, the *audience* of legitimacy. Sometimes we can be fairly clear on the specific audience, whether the community of states, or the populace of a single state. Yet at other times it is far from clear who is supposed to be 'seeing' or 'recognising' legitimacy. In many of its appearances, it seems legitimacy has no particular audience, but rather it appears as a universal or even 'objective' concept.[706]

It is this complex character that makes the use of the concept difficult. Unfortunately, the way legitimacy is used in the literature of international law tends to obscure rather than clarify what legitimacy is and which role it plays, as it merely throws a mantle over a variety of inherently complex situations.

Certainly, the fact that a particular concept is used inadequately should not be considered a fatal charge against the concept itself. Some of the conceptual concerns raised with regard to legitimacy are far from unique; adjacent political and social concepts suffer similar challenges. Concepts of justice, fairness, democracy or the rule of law, like legitimacy, are highly contested. As Geuss notes, some concepts are 'irremediably fuzzy and open-textured'; they can be shaped and bent in various 'flexible ways.'[707] To ask for coherence

[705] He refers to norms, but the similarities are uncanny, see Barnes, *The Nature of Power* 25
[706] Mulligan 367
[707] Geuss, *History and Illusion in Politics* 8

and clear determination thus seems to be the wrong question. As Barnes asserts, '[t]here is no sufficient basis in previous usage for a unique, context-independent, rational decision reflecting 'the real meaning' of the concept.'[708]

In that vein, Thomas's plea to not abandon legitimacy seems eminently reasonable. But that requires confronting the concept and clarifying what legitimacy can do and what it cannot. The clarification attempts in the literature, while providing some useful insights, have, in my opinion, not gone far enough.[709] A starting point should be to accept that legitimacy will remain open and contested. Each particular definition of legitimacy will serve some particular purpose and will not be able to meaningfully restrict or replace any other definition. This openness partly arises from the structural character of legitimacy as a concept. Legitimacy relies on other complex and contested concepts, such as morality, legality and justice, and we saw that the literature often takes opposing stances on the relationship between legitimacy and these concepts. For instance, despite several attempts to restrict the expansion of legitimacy by differentiating it from justice, authors such as Buchanan explicitly base their account of legitimacy on justice. The reason why such disagreement cannot be resolved is that legitimacy is not committed to any particular configuration but instead that it becomes meaningful in relation to other concepts.

> Concepts like law, norms, order and legitimacy give meaning to each other; their meaning *is* the other concepts, and the ways these can be used together – and in opposition – in our language games. Yet neither law, morality, procedural propriety, nor any other rule can provide *grounds* for a claim to legitimacy. Rather, these concepts provide links to each other.[710]

Thus, attempts to ground legitimacy, to argue that legitimacy must 'be' this or that, is, in my opinion, the wrong road to take.

If one relinquishes the hope of fixing what legitimacy really is, one also needs to give up the idea of determining the connection between legitimacy and the stability of a social order. As we have seen, such a connection is based on the idea that a certain authority is deemed legitimate if it is normatively justified in terms of the beliefs of a particular society. If the authority complies with those normative beliefs, those that are part of the particular society

[708] Barry Barnes, 'On the Extensions of Concepts and the Growth of Knowledge' (1982) 30 The Sociological Review 23, 35

[709] See Bodansky, 'The Concept of Legitimacy in International Law'; Thomas, 'The Uses and Abuses of Legitimacy in International Law'

[710] Mulligan 372; Kratochwil, 'On Legitimacy' 307

will accept the authority and obey its commands. This line of thought appears frequently in the literature, especially in the aftermath of specific crises in international law. These events, as already noted, often spark an influx of discussions, such as debates about whether some international institution or rule is legitimate or whether international law is suffering a crisis of legitimacy. However, this inference can often be misleading. As Barnes comments,

> [w]hat such [legitimacy] appeals basically involve is an inference to *specific* attitudes and evaluations, from actions of a kind which are actually consistent with a *vast range* of such evaluations, and may be indicated by innumerable different kinds of considerations.[711]

Even if specific attitudes and evaluations can be determined, we have posited a number of reasons for thinking that a social arrangement can be stable without those attitudes playing any necessary or causal role. In particular, the stability of a social order might be the product of a number of circumstances that have little to do with legitimacy. In fact, even plain materialist accounts can often explain the mystery of stability. Take the case of democracy, which is regarded as the most stable type of regime. It is argued that one of the most important reasons behind the stability of democracies is that, due to their intrinsic normative qualities, they are highly legitimate. Accordingly, even in moments of crisis, democracies show a greater resilience than dictatorships.[712] However, as Adam Przeworski has demonstrated, one can explain the endurance of democracy based on how economically developed the country is. In particular, he establishes that the survival of democracy is highly correlated with the per capita income. Whenever countries surpass a certain economic threshold, the chances of survival and stability of the system increase dramatically.[713]

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[711] Barnes, *The Nature of Power* 124

[712] Beetham, *The Legitimation of Power*; Wedeen, *Ambiguities of Domination: Politics, Rhetoric, and Symbols in Contemporary Syria*

[713] 'The probability that democracy survives increases monotonically in per capita income,' see Adam Przeworski, 'Democracy as an Equilibrium' (2005) 123 Public Choice 253, 253. Obviously, Przeworski discusses in terms of average, so there might be outlier cases, which is precisely the case of Argentina, as he duly notes. But the general point, one that tends to be raised in relation with legitimacy, holds. On the different approaches to the study on democracy and which expressly discuss on a critical note Przeworski's approach see Lisa Wedeen, 'Concepts and Commitments in the Study of Democracy' in Ian Shapiro, Rogers M Smith and Tarek E Masoud (eds), *Problems and Methods in the Study of Politics* (2004). Furthermore, Przeworski equally criticizes those arguments explaining the survival of democracies based on culture. He argues that while it is fine to describe those normative considerations existent within a particular democracy, i.e. that individuals obey the authorities, this should not be conflated with an internal motivation for following the authorities

That said, there is a concern that by focusing on mechanisms such as collective action, self-interest, or free-riding – whose origins lie in economics – one might miss the forest for the trees. It is important to keep in mind that those mechanisms can only operate within the context of a prior cultural and normative background. As Sikkink puts it in relation to interests and ideas,

> [p]olitical and ideological factors influence the very meaning and interpretation of economic ideas and recommendations. Except in its crudest form, the comprehension and formulation of facts and interests implies the existence of a prior cultural apparatus … [i]deas [help] people grasp, formulate, and communicate social realities.[714]

If, for example, a state wants to engage in the pursuit of its national interest, whatever that may be, this national interest is affected and shaped by the wider societal and normative framework in which the state operates. Nevertheless, one needs to be careful not to conflate the fact that we inhabit a particular cultural environment with the argument that this cultural environment has to be legitimate. Reus-Smit, for instance, who argues that rationalist theories of international politics fail to explain the nature of international regimes, posits that the different mechanisms put forth by the literature - sanctions, consent, institutional fairness or dialogue – 'turn out to be inadequate, and only make sense if we assume the existence and legitimacy of the broader international legal system.'[715] However, the necessity of assuming legitimacy is not evident. First of all, there is the issue of 'motivation'. The fact that some action is consistent with a particular norm or institution, does not mean that those acting also 'believe' in it. As explained above, certain actions can be consistent with a variety of attitudes and beliefs. In particular, if certain norms and ideas are part of social life, there might be no grounds from which one can envisage alternative forms of political and legal organization. If democracy is the 'only game in town,' as it has been famously put, then one might engage in democracy because that is what one has been

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'because they respect the normativity of the law, because they cherish democracy, because their behavior is driven by habit.' For him, '[s]ituations induced by interests and those generated by culture look the same. Hence, observing equilibria is not sufficient to identify the mechanism which generates them,' see Przeworski 269

[714] Kathryn Sikkink, *Ideas and Institutions: Developmentalism in Argentina and Brazil* (Cornell University Press 1991) 5. For a similar point put in a more formal manner see Joseph Heath, *Communicative Action and Rational Choice* (MIT Press 2001)

[715] Christian Reus-Smit, 'Politics and International Legal Obligation' 9 EJIR 591, 593

socialized to do.[716] There is no 'acceptance' involved, it is simply a matter of being part of society. As Heath puts it more generally in relation to morality and socialization,

> there is no specific socialization process through which agents acquire moral dispositions. All socialization is moral socialization, because all social interaction is governed by norms that function as deontic constraints. This means that acquiring the competences required to manage routine social interactions amounts to acquiring the dispositions and personality structures that we understand to be the essential elements of moral agency. Thus morality is not optional for us, simply because socialization is not optional for us. Socialization involves acquisition of a set of core human competencies that no one would ever choose to do without.[717]

The general point is that, as soon as we take part in society, we are affected by a series of cultural resources, however vague or contradictory those cultural resources might be. However, this fact does not allow for the leap to legitimacy as a necessity. Just because we engage with society does not necessarily imply that we accept its principles.

There is a further issue to be emphasised in relation to stability. We noted that accounts of legitimacy tend to emphasize that legitimacy is not an on/off property, but that social arrangements can be legitimate to a 'certain degree.' Such accounts argue that, due to the complex character of legitimacy and the presence of other forms of social control such as coercion or self-interest, it is difficult to assess to what extent a social arrangement is legitimate. The fact that scholars simply state that the ascertainment of the degree of legitimacy of a particular social arrangement is a complex matter, understates the extent to which the question represents a rather daunting methodological task. As a practical matter, it should be deemed impossible to ascertain to what extent the different elements of legitimacy, such as legality or morality, interact with each other and how much they contribute to the stability of the social arrangement.

Last but not least, the empirical difficulties associated with studying legitimacy take us back to the underlying assumption of norms as internal attitudes and their internalization. We noted that the literature typically assumes that actors comply with a social arrangement because they have internalized certain norms, rules or values inherent to that arrangement.

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[716] A different way of putting it is that this argument rests on a preconception of the subject as infinite. It is 'unbounded.' But that it is an impossibility as the moment we enter into society we become finite, see Martin, *Thinking through Theory* 48.

[717] Heath, *Communicative Action and Rational Choice* 8

Actors thus 'act out of inclination along lines that are normatively indicated.'[718] Accordingly, a state respects the territorial integrity of another state because it 'wants' to act in accordance with the principles of the UN Charter. It 'believes' that this is the correct thing to do. The idea is that norms constrain the behaviour of actors because they have become part of the actor. I argued that this understanding of norms is inadequate. First, there is evidence that the alleged fixity of norms is a consequence of the particular context rather than the reverse. In particular, the normative orientations that individuals display tend to depend heavily on the particular the situation they are in. Secondly, norms do not determine a particular course of action, so the most one can hope for are examples for guidance: 'every example of a norm both resembles yet differs from every other; every next case resembles yet differs in some way from every previous case.'[719] As a result, norms constrain actors only to an extent. To follow a norm necessarily becomes a collective activity, as only through continuous engagement can the essence of a norm be grasped.

Taken together, the criticisms developed in the course of this dissertation point to the need to reconsider some of the existing tendencies in the literature on legitimacy and international law. All too often legitimacy is treated as an all-encompassing notion, penetrating wide parts of the debate in international law, often without furthering our understanding. In my view, whatever influence legitimacy might have, its importance regarding both normative and positive questions, has been vastly overstated. As Griffiths remarks,

> "legitimacy" is a *possible* kind of effect of casting apolitical decision in legal form, a *possible* kind of importance of law, but that it has usually been exaggerated. Invoking "legitimacy" has usually served to forestall a more painstaking examination of the real factors which explain conforming behavior. It can hardly, as a general matter, be a factor of great explanatory power.[720]

Of course, objections might be made against my particular take on the literature, against my choice of work upon which to focus. Nevertheless, I believe that my larger point, namely that most legitimacy accounts in the literature rest on problematic or contradictory grounds, remains valid. Take the case of Johnstone's book on the importance of

[718] Barnes, *The Nature of Power* 24
[719] Ibid 29
[720] Griffiths 363

deliberation. [721] He presents an insightful overview of the importance of legal argumentation in international politics. He even notes, drawing on Elster, that actors might rely on norms even if they do not believe in them. However, when moving to the relationship between deliberation and legitimacy, he discusses legitimacy in terms of internal motivations and the internalization of norms. This position is inconsistent with the previous one and thus puts his analysis on incoherent grounds.

With my account, presented in Chapter V, I try to take a step towards overcoming some of these difficulties. The turn to legitimation, understood as bounding action, does not necessitate any agreement on the substance of legitimacy. Rather it acknowledges that its meaning is open and ever-changing. Likewise, it does not ask whether a particular social arrangement is legitimate or not but rather highlights that social life proceeds processually in sequences of actions and reactions that are contextually situated. More precisely, legitimation involves a series of claims and counter-claims, employing different normative resources, in order to pursue one course of action over another. By emphasising normative resources, which are publicly available objects, my account moves away from an individualistic understanding of legitimacy to a social one. Likewise, the focus on legitimation allows for a better engagement with the transformations unfolding through society. As Andrew Abbot writes, through the sequences of events,

> many internal boundaries of social life are perpetually changing. Institutions and social groups are not so much fixed beings that can succeed one another that there are lineages of events strung together over time, to which new things are always being bound, and from which old things are being lost.[722]

This quote captures the essence of the transformations international law has undergone. Through the different processes, to which legitimation belongs, international law has accrued new powers, new characteristics, while others are being slowly forgotten.

Some of the arguments that have been developed throughout this dissertation will be contested, as my account undercuts several of the assumptions that have motivated a large part of the field. On the conceptual side, the account puts into doubt the possibility of reaching agreement on what legitimacy is and what it comprises. This undermines the grounds for criticizing international law normatively on the basis of legitimacy. On the

[721] Johnstone
[722] Abbott, 'The Idea of Order in Processual Sociology' 317

explanatory side, the account cautions against the search for 'real' legitimacy within international law. Given my processual view of legitimation as a dynamic process in which different institutions engage, it becomes futile to ask whether the international legal order is legitimate or not. I am aware that these departures are themselves debatable. Nevertheless, I hope that my plea for an alternative understanding of legitimacy within the discipline may point toward more productive routes through which the role of legitimacy can be properly acknowledged and its merits put into perspective.

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