

## Beyond Fuzzy Indeterminacy – Toward a Theory of Legitimacy for International Courts<sup>1</sup>

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### Overview

Since the end of the Cold War states have established a cascade of international and regional courts and tribunals (ICs). They are *inter alia* set up to protect human rights, settle investment disputes between states and foreign nationals, establish the rule of law, promote global trade, and to bring closure to past atrocities. Their increase in number and influence has not fueled general popularity. To the contrary, they endure wide ranging criticisms that they are *illegitimate*. The present chapter considers what we are to make of such objections.

Some scholars of international law warn that the term 'legitimacy' often appears devoid of meaning, a mere emotive venting of distaste:

Increasingly the fuzziness and indeterminacy of "legitimacy-speak" has seemed to allow us to break free from disciplinary constraints and to assert and impose our own moral intuitions, shared or unshared, on various target audiences.<sup>1</sup>

Indeed, some of those discussing the moral permissibility of military intervention in Kosovo or Iraq may use the term 'illegitimacy' for emphasis alone. And some political actors "may call something legitimate or illegitimate ... because they like or do not like it and are grasping for an authoritative way to express that emotion".<sup>2</sup> Indeed, some authors go further, to claim that the term is *intentionally* void of normative substance. Its main function is as a politically suspect instrument of rhetoric manipulation — "to ensure a warm feeling in the audience."<sup>3</sup>

Another, less emotive and rhetorically manipulative analysis of the manifold uses of 'legitimacy' might hold that they are *homonyms* – identical spelled, but with drastically different meanings.

The account sketched here defends a third response – limited to criticisms concerning ICs in particular, and not international law in general, or concerns about

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illegal warfare. Many of these charges of illegitimacy relate to each other in complex ways – differently in fields ranging from human rights to trade. This is not to deny that some talk of the illegitimacy of ICs is inaccurate or wrong. To the contrary. It is possible and indeed valuable to develop a coherent account that connects several various usages, so as to specify better, worse and downright *mistaken* claims concerning the legitimacy of ICs. This response will bring some order and connection among what appears to be isolated usages. It can explain how claims about legitimacy may be *mistaken*, and thereby disproves the first, emotivist account. This account of normatively justifiable ICs may also guide prescriptions for how to increase their legitimacy by changing some institutions, informing some actors' legitimation strategies, and possibly even shaping some 'civilly disobedient' violations of ICs' judgments.

Some point to the lack of *social legitimacy* among important agents who deny the authority of an IC as *rightful*. This lack raises a related concern that states will therefore fail to *comply* – which some fear may in turn reduce the IC's legitimacy further.<sup>4</sup> Other talk of illegitimacy invokes legal considerations, such as concerns the *illegality* of IC's 'dynamic' treaty interpretation, beyond the text originally consented to by states. Other examples of illegitimacy include the lack of *causal effectiveness* or performance in securing the objectives of the treaties. Finally, some critics use 'legitimacy' in a normative sense, holding that that an IC lacks normative *justifiability*: Without a normative justification for the authority of the IC, its subjects have no moral duty to defer to its judgments or interpretations.

I shall argue that *normative legitimacy* provides helpful unity to many of the canvassed forms of legitimacy. The particular substantive normative conception of global justice to be respected and promoted by these institutions is not central to this task. I develop the outline of a theory by drawing on Joseph Raz' 'service conception' of normatively legitimate authority, David Easton's 'systems analysis,' and a cosmopolitan normative theory. The first two of these accounts originally apply to the political authority of the state, so we need to reconsider the arguments with great care when we extrapolate to ICs that have several distinct features.

On this account the central concept of legitimacy for ICs is normative. Each of the other forms of legitimacy often contributes to, and sometimes draws on, the normative justifiability of the international judiciary. But the forms of legitimacy matter in different ways, for the normative justifiability of ICs in various issue areas, be it human rights, trade, investment or international criminal law – in part due to the different functions, objectives, and interconnected roles of each IC, and the problem types they address. The legitimate authority of ICs is a matter of why and when their judgments or recommendations should count as defeasible reasons for other actors deciding what to do.

ICs do not often issue commands, but rather serve several other functions. They typically *adjudicate disputes*, among states but also between states and private parties such as citizens or investors, based on an agreed treaty. ICs also engage in the *interpretation* and *specification* of laws, and – some would argue - even *law making*.

Thus the issue is not only the *judicial* legitimacy of these courts, but also their legitimate role in specifying treaties and shaping other actors' expectations of others' future actions more broadly.

The actors the IC claims authority over may include domestic courts, legislatures, administrations, or civil society bodies, or other states. They must decide not simply whether to obey, but often whether to defer to an IC when they interpret treaties, balance legal norms, shape new pieces of legislation, bring cases or urge reforms.

The ICs interact with other bodies in complex and different ways. The European Court of Human Rights serve subsidiary roles of support and review of the domestic judiciary. WTO panels *replace* domestic dispute resolution bodies. These complexities add to the challenges of answering why defer to ICs' judgments. Importantly, the ICs lack the direct authority to initiate sanctions but must rely on other actors and their perception of the IC's legitimacy.

Section 1 sketches relevant aspects of Raz' account of legitimate authority: the service conception. Section 2 lays out some normative standards relevant for the ICs. The next sections then elaborate why, on the service conception, various legitimacy conceptions matter for normative legitimacy: why legality matters (section 3) including some reasons for the (limited) significance of state consent – even by rogue states. Section 4 starts to explore why and when *actual compliance* is important but not always decisive. Section 5 considers why the performance or effects of an IC matters.

## **1 Raz' Service conception of legitimate authority**

Joseph Raz' 'Service'-account of when *political* authorities are normatively legitimate is a helpful starting point to bring order to the disparate claims about legitimacy about the various ICs.

The puzzle that motivates Raz' account concerns involuntary political authority, typically the state. Why does an agent have an obligation to obey a command that the agent has not consented to? - especially because the obligation is somewhat 'content independent': it holds even when the command is contrary to what the agent otherwise has reasons to do, or the command is unwise or somewhat unjust.

In brief, Raz holds that a legitimate authority *for* an agent is one helps that agent do the right thing, so that the agent acts better according to those reasons the agent has independent of the authority.

The suggestion of the service conception is that the moral question is answered when two conditions are met, and regarding matters with respect to which they are met: First, that the subject would better conform to reasons that apply to him anyway (that is, to reasons other than the directives of the authority) if he intends to be guided by the authority's directives than if he does not (I will refer to it as the normal justification thesis or condition). Second, that the matters regarding which the first condition is met are such that with respect to them it is better to conform to reason than to decide for

oneself, unaided by authority (I will refer to it as the independence condition)<sup>5</sup>

This account of legitimate authority has several helpful features. It asks us to assess an institution in terms of its long-term pattern of decisions and their effects, rather than insist that every particular decision actually helps the agent. An IC can thus be a legitimate authority – and merit deference to its judgments - even though it makes some poor particular judgments. Such an authority is legitimate for an actor only if the pattern or trend of its judgments is likely to yield better outcomes than if the actor tried itself. At the same time, there may be special cases of bad judgments where ‘civil disobedience’ or similar responses may be appropriate.<sup>6</sup> This relationship between the correctness of individual outcomes and the legitimacy of the institution argument is one source of what Easton termed ‘diffuse support’ for an institution:

in every system, part of the readiness to tolerate outputs that are perceived to run contrary to one's wants and demands, flows from a general or diffuse attachment to regime and community.<sup>7</sup>

This diffuse support is a

reservoir of favorable attitudes or good will that help members to accept or tolerate outputs to which they are opposed or the effects of which they see as damaging to their wants.<sup>8</sup>

This service conception insists that an authority's claim to legitimacy as regards any particular agent is only correct if it actually provides this service to that agent – over the long run, if not in every particular instance.

The account also distinguishes between the reasons the agent actually has for acting, and the preferences the agent has:

since the goals people actually have need not be desirable, coordination aimed at securing these goals need not be desirable either. The coordinated schemes of action that political authorities should pursue are those to which people should be committed, or those needed to secure goals that people should have, which are not always the goals which they do have.<sup>9</sup>

This account allows us to discern how and when an IC may be legitimate for some actors and some issues, but not for others.

This account can also guide our judgment in non-ideal situations. It lets us differentiate between the policy preferences a government – or an IC - actually has, and the reasons which state or IC policies *should* pursue. For instance, states may have good reason to respect, protect and promote some interests of individuals who are citizens of other states, though a government may hold that its only obligations are toward own citizens. ICs may thus have to accommodate both sorts of claims.

Furthermore, the service conception can regard legitimacy as scalar rather than either-or, depending on the extent to which an IC provides a service to subjects

– and whether alternative institutions might provide even better services.

This perspective may also shed light on whether and when an IC may be legitimate also when it interacts with deeply unjust states, e.g. insofar as it assists in reducing injustice.

The second condition of the service conception, that of independence, may help frame discussions about the normative case for sovereignty, the reasons for state consent and its limits.

Raz' account only offers a schema or generic framework for more specific arguments concerning any particular institution that claims authority. Among the generic services Raz lists, several may apply to ICs. An authority may be *wiser* than the agent; have *steadier will* because it is less subject to bias or weakness, it may *avoid self-defeating strategies*, *reduce decision-making costs*, or the IC may be *better positioned* to overcome coordination problems.<sup>10</sup> For various ICs the last four are particularly relevant. Note that which services an authority offers must be determined in each case. It is not always easy to determine those services: they may depart from what states intended when they established the IC. And an IC may be discovered to provide several services or perform several functions.

Several ICs may provide states with a '*steadier will*', allowing states to credibly commit themselves in the eyes of other audiences. The Arbitration Panels under the International Centre for Settlement of Investment Disputes (ICSID) provide this service when they adjudicate disputes between a Contracting State and a national of another Contracting State. The International Criminal Court and human rights ICs such as the European and the Inter-American Courts of Human Rights arguably offer similar 'self commitment' services, whereby state governments and legislators can express their commitment to various norms.<sup>11</sup> Legislatures may enhance their own credibility as a rule of law, human rights respecting political system, in the eyes of their own citizens and other states – e.g. within the EU. By submitting to an IC they may also reduce the risk that their successors violate human rights.<sup>12</sup> The ICs offer such services by considering allegations of violations and by reviewing whether national laws and practices are consistent with the relevant conventions.

Several ICs are authorized to make them *better placed* than the state to address collective action problems. ICs can reduce the likelihood that states will engage in free-riding which risks unravelling of the collaboration. The WTO dispute settlement system for trade, and the Court of Justice of the European Union (CJEU) help states secure "collective action over some set of policies among a set of states."<sup>13</sup> They monitor compliance, review whether administrative authorities have implemented rules correctly and may adjudicate disputes in a more impartial manner than states could themselves. The ICs thereby reduce the free-rider problems that might prevent the trade regimes every state would prefer. Similarly, one reason many states originally agreed to the European Convention on Human Rights may have been to address other collective action problem: to prevent future governments from violating human rights.

Another role of many ICs is to specify and make law, and thus stabilize the

expectations of various parties. Many argue that these ICs then in effect not only interpret and apply, but *make* international law. This law-making function creates further legitimacy challenges.<sup>14</sup> This function may be more pronounced and influential for those ICs whose judgments actually set precedents, and for those ICs that provide public justifications which enable predictions about future judgments. On the other hand, the law making role may be less prominent for investment dispute tribunals insofar as they actually interpret their treaties as 'self-contained' and honour the parties' autonomy - without drawing on e.g. human rights or environmental treaties – though whether the tribunals actually do this is contested.<sup>15</sup> Other ICs engage in 'systemic interpretation,' drawing on other treaties. They may thereby reduce the alleged 'fragmentation' of international law. A central challenge is that there are several ways to bring order and reduce the potential conflicts, thus raising the issue of which extra-legal norms and values judges should draw on.<sup>16</sup>

Such interpretation and law-making may combine several of the five services. States are often unable or unwilling to specify treaties fully, preferring to agree to 'deliberately incomplete contracts,' the gaps of which the judges must be understood to have a mandate to fill.<sup>17</sup> Examples of such vague phrases are the exceptions to trade agreements on the basis of states' claims about "Public Morals" or as "necessary to protect human, animal or plant life or health."<sup>18</sup> States *reduce their decision-making costs* when they use such terms and delegate the remaining lawmaking task to an IC which is sufficiently impartial among the parties to a particular conflict.

These outlines of argument types do of course not show that any particular IC exercises legitimate authority. The sketches only indicate premises that must be substantiated, if an IC's claims to authority is to be normatively correct.

Several conditions must be satisfied to some extent for the service conception to support such claims.

The patterns of judgments and interpretations that an IC issues should help actors act better according to the reasons they really have. A central concern is whether an IC will indeed provide such services, and if so, the likelihood thereof. The treaty must be sufficiently in accordance with the reasons states have to act. The IC may sometimes make mistakes, so we must look at the general trends of the ICs' judgments. Several features of the institution are relevant to determine how robust such claims to service are. The states must succeed in setting up and maintaining the IC sufficiently impartial among the parties to secure the services. There must be sufficient checks and accountability mechanisms to trust the IC to not abuse its independence, but instead interpret in light of the "object and purpose of the treaty,"<sup>19</sup> and the IC must be better positioned or has a steadier will than the states engage in the dispute, or involved in development of the law, etc. So how are the judges selected to ensure impartial will and independence? Which procedures do they abide by to reduce the risks that the judges will abuse their authority? If there are no mechanisms to ensure that the "cosmopolitan-minded lawyers"<sup>20</sup> remain just that, the service arguments for the legitimacy of ICs will not hold.

The following sections indicate how the service conception brings some unity to various illegitimacy objections by considering why legality of the IC and compliance with IC judgments matter for their normative legitimacy. Before that, a brief sketch of the normative premises that inform the present account is helpful, to indicate which reasons the various actors have for acting.

## 2 Some Cosmopolitan Normative Standards

One reason why this service account can help structure the perplexing legitimacy discussions is that it provides a fairly open schema for arguments. It allows a variety of actors, and is agnostic concerning which ultimate reasons they have for action. For this brief overview the main focus is on states as actors, but recall that ICs must simultaneously handle potentially conflicting expectations from other actors, both *within* states such as the domestic judiciaries, and *outside* states such as NGOs and other international organizations.

Some comments are required as regard the reasons these actors have, in particular states. To fix ideas, we draw on normative premises from the tradition of normative cosmopolitanism. Fellow travelers of this broadly Kantian tradition might include Brian Barry, Simon Caney, Martha Nussbaum, John Rawls, and Jeremy Waldron.<sup>21</sup> These premises are of course open to challenge, but not simply on the grounds that they constitute normative claims, or that some parties may disagree with them. More salient objections might be that *other* sets of normative premises are more defensible, i.e. in that they match a more credible set of moral judgments overall, in reflective equilibrium.<sup>22</sup>

I here posit four interests of individuals that the set of domestic, regional and international institutions as a whole should protect and promote. This is not meant as an exhaustive list, and alternative normative theories may accept somewhat different lists. Moreover, each of the institutions need not satisfy and promote the four standards listed; rather, the institutions as a whole must do so.

These norms are familiar from various *cosmopolitan* normative theories. Such normative cosmopolitanism should not be confused with versions of cosmopolitanism that require many globally shared institutions and centralized world government.<sup>23</sup> Rather, the central point concerns to whom justification is owed: the set of institutions as a whole must be justifiable to all individuals who are its subjects, as political equals. The institutions should be arranged so as to respect, protect and further the interests of individuals globally.

The first interest is to be able to satisfy one's vital needs necessary for physical survival and basic well-being, such as not to be tortured.

Secondly, to be protected from the arbitrary use of political authority and coercive power, be it from domestic rulers, private actors, or international institutions. This interest in 'nondomination' has found expression in a wide range of Western and other writings. Legal mechanisms that provide such protection include requirements of legality, checks and balances to ensure accountability, and

respect for the rule of law – to ensure that authority is exercised only within certain domains. Our interest in non-domination also supports the interest of our states in impartial, rule-guided dispute resolution by peaceful means. ICs can help provide such non-domination, both in protecting individuals against human rights abuses by their own government, and in securing that powerful states abide by treaties that benefit other parties. However, ICs can themselves also become new sources of domination unless they are checked and constrained by formal means as well as professional norms.

A third interest is the ability to make longer term plans with some expectation of success – including to be able to rely on general compliance with legal rules. This interest supports similar requirements as the interest in nondomination, such as legality, the rule of law and non-retroactivity.

A fourth interest is to have actual influence over the institutions and rules that affect individuals' opportunities, aspirations and life plans. This has several aspects. One is due to the interest in having valuable outcomes brought about. A second concern is to have a public expression that all adults are treated as equals. This interest justifies some procedures that give all affected adults levers of democratic decision making.

The following reflections assume that respect for and promotion of these and other interests of individuals are the ultimate relevant reasons for assessing claims to legitimate political and legal authority – including both of states and of ICs.

According to the service conception, the legitimacy of institutions such as an IC for a state is a question of the legitimate authority of the IC over that state. This in turn is a matter of whether the IC helps this actor act better in accordance with the reasons the state already has, ultimately based on the concern to respect and promote these interests of individuals. Whether in fact such arguments hold for any particular ICs remain to be argued.

Note that from this normative perspective, there is no fundamental assumption that states' reasons to act are limited to only respect and promote the interests of their own citizens. Given the opportunities and benefits that a state system establishes, a defensible delineation of sovereignty would arguably include among the objectives of states to protect respect and promote foreigners' interests - to some extent. The salient issue from this perspective is not whether to temper states' priority toward own citizens with some duties to mankind in general, but the scope and form of the latter.<sup>24</sup>

The following sections indicate how this conception of normative legitimacy provides some unity among the various other forms of legitimacy. The normative legitimacy of ICs often depends on the *legality* of ICs and *general compliance* with their judgments and interpretations – but to different extents and in different ways depending on the IC. Some of these relations will depend on accepting most of or parts of the general normative account sketched above, such as the interest in non-domination, while other relations may hold across a broader range of normative theories.

### 3 Why Legality and state consent matters for normative justifiability

Several authors note that central requirements of legitimacy for ICs is that they must act according to their legal mandate as agreed in the relevant treaty by the state parties, and that they must adjudicate according to standards of legal validity.<sup>25</sup>

This account agrees that there are often good reasons to value state consent and legality. An IC that exceeds its mandate delineated by state consent, that violates standard legal methods decision procedures, or overrides institutional checks, may foster suspicion that it is unlikely to reliably provide the requisite service of impartial dispute resolution according to legal method.<sup>26</sup> Thus compliance with norms of legality and the rule of law are generally necessary for ICs to be legitimate according to the service conception. It is when ICs remain loyal to their mandate and follow agreed criteria for treaty interpretation that they can provide a steadier will than states can on their own, and help address coordination problems. And it is when the ICs abide by these norms that they protect against state domination over citizens and bolster parties' mutual expectations that states will honor their commitments.

It is also important that ICs themselves abide by rule of law standards lest they themselves become new sources of domination. This fear of discretionary 'rule of lawyers' is one reason for several scholars' concern about domestic judicial review in general.<sup>27</sup> Some worry that these risks familiar from domestic settings are even greater for ICs. They are not curbed by an established, carefully crafted and fine tuned system of checks and balances from a comprehensive perspective in anything like a global constitutional convention. Instead, each IC is typically agreed to address one kind of concern, often without attention to systemic issues.

Several authors have come to question the general normative justifications for this role of state consent in international law.<sup>28</sup> State consent is an important feature of much of international law, but is not a necessary condition for all obligations of states: The Statute of the International Court of Justice also recognizes other sources of international law, include customary state practice, general principles of law common to many countries, domestic judicial decisions, and legal scholarship.<sup>29</sup> Yet, for discussions of the legitimacy of ICs, state consent arises in several ways which require some more attention to the normative significance of such consent. For instance, should judges of ICs adjudicate at odds with the explicit mandate that states have given them, and rather be guided by the objectives states *should* have? Should ICs interpret treaties in light of other treaties some of the state parties have not agreed to – if the states ought to have consented to these?

One important topic where the normative role of state consent is challenged concern the ICs' practice of 'dynamic' or 'evolutive' interpretations of treaties, clearly beyond what states agreed. Several factors mitigate this apparent conflict. Some dynamic interpretation may be required if the IC is to promote the objectives the states have agreed to pursue, under new circumstances. Such interpretations may be unavoidable – and foreseeable by states, especially when the states have insisted that

formal treaty change would require unanimity and hence be very cumbersome. In contrast, some treaties such as the EU's Lisbon treaty allows treaty changes and secondary law making in some issue areas e.g. by means of complex qualified majority voting.<sup>30</sup> Furthermore, interpretation of a treaty 'in light of its object and purpose' is explicitly sanctioned by the Vienna Convention on the Law of Treaties.<sup>31</sup> States therefore authorized the IC to interpret its treaty thus when they agreed the treaty as a drastically incomplete contract.

These factors reduce but do not remove the charge that ICs sometimes go beyond the mandate states consented to when they interpret or make law. They may for instance be guided by interpretations of other treaties which some of the states have not consented to. What are we to make of this?

One reason to favour such interpretive practice by an IC is that a legitimate IC must be checked and guided so as to both reduce the risk of domination by the IC itself, and to ensure that their interpretations and law making respect and promote the best interests of the individuals ultimately subject to the rules. Domestically, democratic control and judicial review are important guides and checks to promote these reasons. There must be institutional mechanisms with similar effects in place for ICs for their law making to be legitimate. When judges of an IC seek to draw on other treaties, they arguably show that they limit their discretion thus reduce the risk of domination by that IC itself.

Furthermore, while some norms should only bind states who have consented, others may be of the sort that states should consent to.<sup>32</sup> The former may include situations where states have some obligations toward their own citizens and foreigners which they should be free to negotiate the details of as concerns the division of benefits and burdens. But other obligations may hold regardless of consent. I submit that the latter includes some human rights requirements insofar as they provide effective protection,<sup>33</sup> or consenting to the Rome Statute and thus be subject to the jurisdiction of the International Criminal Court (ICC) for genocide, crimes against humanity, and war crimes. If the ICC in fact does deter such crimes,<sup>34</sup> all states should consent to such normatively obligatory limitations to sovereignty. Interpretations done by such normatively obligatory courts would arguably be appropriate for judges of other ICs to rely on when adjudicating disputes, even where one state has not agreed to the former IC.

## **4 Why general compliance may matter for the normative legitimacy of ICs**

We now move to consider why *compliance* with IC judgments by states is often but not always relevant for the normative legitimacy of some ICs. Several authors note that "legitimacy enhances compliance and compliance enhances legitimacy."<sup>35</sup> Consider how this may apply to some - but not all - ICs.

Several ICs actually provide the proclaimed service only under conditions of close to general compliance by the relevant subjects. This holds most obviously for

the ICs that serve to reduce the risks of "free rider" or "prisoners' dilemma" collective action problems. ICs may monitor parties' compliance, and issue statements concerning whether they do in fact comply. For the WTO, the Dispute Settlement Mechanism may also authorize retaliation by other states against violators.<sup>36</sup> An IC that are set up to address such problems can only provide such service if it *in fact* command general compliance. Otherwise actors do not have reasons grounded in the service conception to defer to the IC. Note that states may still have reasons to comply, e.g. to honour several other actors' good faith expectations - but these reasons are not due to the authority of the IC. So persistent free riding among state signatories, especially if it shifts excessive burdens onto compliers, challenge the normative legitimacy of this kind of IC.

For other ICs general compliance does not appear so directly crucial for their normative legitimacy. Consider regional human rights courts such as the ECtHR. It arguably provides two services. Firstly, it helps states give other parties such as citizens and other states - assurance of their commitment to human rights and the rule of law. Secondly, it helps states bolster human rights in other states in the region, thus contributing to states' obligations to protect and promote the four interests of those who live outside that state.

These services by human rights IC are less vulnerable to partial non-compliance. Thus even if some states fail to honour judgments against them these ICs may be normative legitimate. For instance, the systemic failures of a few European states in their human rights obligations do not directly affect the legitimacy of the European Court of Human Rights. To the contrary, single instances of blatant non-compliance often hurt the reputation of the country as a rule of law, human rights complying state. Thus the large backlog of the ECtHR - 67,000 applications pending before a judicial formation in March 2016 – is arguably mainly a challenge to the legitimacy of the five states accused in two thirds of these cases: the Ukraine, Russia, Turkey, Italy and Hungary.<sup>37</sup> Their reputation as rule of law respecting states is at risk. This may arguably also be the consequence of the UK's refusal to comply with the ECtHR's ruling to reconsider a blanket ban against prisoners' right to vote.<sup>38</sup>

However, if noncompliance becomes sufficiently wide spread, or if the IC's reputation is less secure, the ICs' normative legitimacy may also be challenged. If Venezuela fails to defer to the Inter-American Court of Human Rights – and even exits the American Convention on Human Rights – both the state and that Court may suffer in terms of normative legitimacy. Indeed, "a noisy act of noncompliance by a powerful state that occurs early in a tribunal's life may devastate its legitimacy."<sup>39</sup> Another challenge to the ECtHR arises as more states including Russia refers to the UK's refusal in justification of their own noncompliance with the ECtHR. This may threaten the European human rights protection system as a whole – thus challenging both of the services the ECtHR provides.<sup>40</sup> The legitimacy of the ECtHR would then unravel: It neither serves to credibly commit the states, nor does it promote human rights compliance - though the substantive norms the Court applies are normatively sound, and the Court satisfies all legality requirements. While continued political

opposition by only one or a few states may not prevent the human rights IC from providing its service, *widespread* noncompliance may thus render the IC illegitimate on the service conception.

The upshot of the discussions of legality and general compliance is that the service account helps explain why and when conceptions of legitimacy as legality and as general compliance also matter for the normative legitimacy of ICs: In order to provide the requisite services, they must act according to standards of legality, and several of them must also enjoy sufficient compliance by states. Note also that some of the services are more vulnerable to partial noncompliance than others, thus requiring case-specific arguments concerning the various services each IC provides. We finally move to consider why and how the performance of the IC also matters for its normative legitimacy.

## **5 Conclusion: Is Normative legitimacy Fuzzy and Indeterminate?**

The upshot of this argument is that there are several ways to reduce the apparent diffuse and conflicting claims about the legitimacy of ICs, based on the service conception and normative cosmopolitanism. Several of the concepts of legitimacy canvassed – legality, social acceptance, compliance and performance – are relevant for normative legitimacy. The apparent confusion in usage is partly due to the complex relationships between these aspects, different among the various ICs. Some ICs – e.g. in trade - promote their laudable objectives only if most states comply. Others – such as human rights ICs – may bring important benefits even if several states fail to comply. Another source of confusion is due to the complex interdependence between the ICs and other actors, such as states, that affect the impact of ICs. These complexities caution us against drawing general conclusions about necessary or sufficient conditions for rendering an IC more normatively legitimate, or what to make of an IC which fulfils some but not all of these aspects. Some ICs may gain in normative legitimacy if they are complied with more, but this is not necessary. ICs may improve their normative legitimacy if they help secure desired outcomes on the ground – but only if those outcomes are justifiable.

Many of these discussions about the legitimacy of international courts and tribunals and the lack thereof should thus not be dismissed as unhelpful, unscientific or mere manipulation by new rhetorical means.

This is not to say that all claims about the illegitimacy of ICs are sound. That would indeed be surprising, given that those who lose cases decided by ICs are likely to protest – and may want to use ‘illegitimacy’ only as an emotive sense.

I submit that the account sketched above helps assess such opposition to ICs, by throwing light on the relevant claims: is the concern that the treaty is imposed by force rather than by consent? Or that the legal reasoning is flawed, or that the

intended outcomes don't arise? Some of these claims may have to be substantiated by empirical, legal or normative premises. This account may thus lead us to reject some such claims of illegitimacy as *mistaken* rather than mere venting of displeasure. – a conclusion which also challenges the dismissal of 'legitimacy talk' as mere emotivism.

I submit that this framework, drawing on the service conception may allow a more constructive approach: to foster more reasoned assessment of the ICs and of the multiple, partially conflicting proposals for their reform.



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- <sup>1</sup> James Crawford, "The Problems of Legitimacy-Speak," *ASIL Proceedings* 98(2004): 271-73, 271. I owe this reference to Christopher A. Thomas, "The Uses and Abuses of Legitimacy in International Law " *Oxford Journal of Legal Studies* 34, no. 4 (2014): 729-58.
- <sup>2</sup> *ibid.*, "The Uses and Abuses of Legitimacy in International Law " 729-58, 3.
- <sup>3</sup> Martti Koskenniemi, "Miserable Comforters: International Relations as New Natural Law," *European journal of international relations* 15, no. 3 (2009): 395-422, 409-10; cf *ibid.*, "Human Rights and Cultural Diversity: A Study on the Politics of Human Rights in International Institutions," in Gayim et al, ed. *Human Rights and Institutional Politics: The Eu, Un and Other International Institutions* (Helsinki: The Erik Castrén Institute of Human Rights and International Law, 2005),1-9.
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