

THE INTERNATIONAL CRIMINAL COURT IS LEGITIMATE ENOUGH TO DESERVE SUPPORT

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I. INTRODUCTION

Allen Buchanan begins his essay by asserting that “most legal scholars and political theorists who address the issue” probably believe the International Criminal Court (ICC) suffers from a legitimacy deficit.¹ Yet many of the scholars he cites, including one of the present authors, are quite supportive of the Court’s work.² How can this be? As Buchanan rightly observes, claims about legitimacy can be either scalar—statements about the extent of an institution’s legitimacy—or binary—statements about whether an institution deserves any support at all.³ Although Buchanan frames his discussion of the ICC as a case-study of the epistemological uncertainties surrounding legitimacy claims, his essay suggests the ICC’s legitimacy is very weak—perhaps so weak that it deserves no support at all. We disagree, as do many of the scholars who have considered the question.⁴

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1. Allen Buchanan, *The Complex Epistemology of Institutional Legitimacy Assessments*, 33 TEMP. INT’L & COMP. L. J. 323, 323 (2019).

2. See, e.g., Alison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT’L L. 510, 511 (2003) (discussing how the ICC Prosecutor can claim to be legitimate and accountable); Margaret M. deGuzman, *The I.C.C. Deserves Our Full Support*, N.Y. TIMES (Dec. 11, 2014), <https://www.nytimes.com/roomfordebate/2014/12/11/do-we-need-the-international-criminal-court/the-icc-deserves-our-full-support>; Mariana Pena & Gaelle Carayon, *Is the ICC Making the Most of Victim Participation?*, 7 INT’L J. TRANSNAT’L JUST. 518, 535 (2013) (discussing the ICC’s ability to empower victims).

3. Buchanan, *supra* note 1, at 324.

4. E.g., M. Kamari Clarke, *Justice Can’t Prevail in a Vacuum*, N.Y. TIMES (Dec. 11, 2014,

Buchanan underestimates the ICC's legitimacy by misconstruing the institution's chief justifying function and under-valuing the benefits the institution can provide. Unlike domestic courts, the ICC's main function is not to uphold the rule of law by deterring crimes, but rather to express global norms in the hopes that over time those norms will permeate the fabric of global society. Moreover, given its structural and resource constraints, the ICC should not be expected to adhere to the same kinds of equality norms that are generally required of domestic courts. Indeed, those who established the Court knew it could not do so.

Although the ICC does not yet enjoy strong legitimacy, its legitimacy is sufficient, even employing Buchanan's criteria, to justify giving it support—at least enough support to allow it to prove itself on the global stage. Given the complexity of the ICC's mandate, the controversies surrounding its establishment, and the limited resources it enjoys, it is unsurprising that the ICC has faced challenges to its legitimacy in its early years. But we must remember that these are the early years. At seventeen, the ICC is an adolescent, or perhaps even a child; it needs time to demonstrate that it can contribute productively to global justice. And there are good reasons to be optimistic.

Below we begin by explaining why we believe legitimacy to be a useful concept despite the epistemological uncertainties Buchanan correctly identifies, before seeking to rehabilitate the ICC's legitimacy—at least to the minimum threshold required to justify giving it support.

II. LEGITIMACY'S EPISTEMOLOGICAL UNCERTAINTIES DO NOT RENDER THE CONCEPT USELESS

Buchanan correctly identifies several epistemological uncertainties in current legitimacy theory including what he calls the weighting and threshold specification problems. Assuming appropriate criteria for evaluating institutional legitimacy can be identified, there is no theory suggesting how much weight should be given to each when some criteria point toward legitimacy and others toward illegitimacy.⁵ Additionally, with respect to binary legitimacy judgements—determinations of whether an institution is legitimate and deserves some support—no theory specifies where the line should be drawn.⁶

To these uncertainties we would add that no theory has definitively resolved which criteria ought to be applied in assessing institutional legitimacy. Although Buchanan and Keohane make a strong case for various criteria in *The Legitimacy of Global Governance Institutions*,⁷ other ways of conceiving criteria also have merit.

6:06 PM), <https://www.nytimes.com/roomfordebate/2014/12/11/do-we-need-the-international-criminal-court/justice-cant-prevail-in-a-vacuum>; Caleb H. Wheeler, *The Legitimacy of the International Criminal Court*, INT'L LAW BLOG (Oct. 22, 2018), <https://aninternationallawblog.wordpress.com/2018/10/22/in-the-spotlight-the-legitimacy-of-the-international-criminal-court/>; Leila Nadya Sadat, *A Rawlsian Approach to International Criminal Justice and the International Criminal Court*, 19 TUL. J. INT'L & COMP. L. 261, 272, 278 (2010).

5. Buchanan, *supra* note 1, at 324–30.

6. *Id.* at 331.

7. Allen Buchanan & Robert O. Keohane, *The Legitimacy of Global Governance Institutions*,

In particular, some scholars have emphasized effectiveness as an important aspect of institutional legitimacy.⁸ We do not expect definitive resolution of the criteria, weighting, or threshold questions in the near future; indeed, they may not be susceptible to resolution.

Nonetheless, we do not share Buchanan's concern that these uncertainties render legitimacy useless as an analytic or advocacy tool.⁹ Legitimacy discourse remains a fruitful way of determining whether to support an institution and, if so, how much. Indeed, like other contested concepts,¹⁰ legitimacy's very contestedness promotes "a more sophisticated, more intellectually and morally advanced understanding of one's arguments and opponents."¹¹ Through contestation and dialogue about institutional legitimacy, various audiences can help to hone an institution's mandate, develop its procedures, and identify its most desirable outputs. Although it may not provide definitive answers—except, perhaps in cases that are intuitively clear to all or most people—legitimacy discourse helps to resolve questions about support by encouraging discussion of relevant community values and goals.¹² Below, we seek to contribute to this process for the ICC.

III. THE ICC DESERVES SUPPORT

Buchanan limits his analysis of the ICC's legitimacy to two of the five institutional legitimacy criteria he and Keohane identified: institutional integrity and comparative benefit. For present purposes, we assume the appropriateness of these criteria. We show that Buchanan misapplies these criteria, which in fact militate in favor of supporting the ICC—at least enough to allow it a chance to establish itself on the world stage.

According to Buchanan, the criterion of institutional integrity means that an institution's legitimacy suffers when it consistently fails to operate in accordance with its policies, procedures, or goals, in particular when its actions run counter to its chief justifying function.¹³ Buchanan asserts that the chief justifying function of courts, including the ICC, is to uphold the rule of law; and an important aspect of the rule of law is the principle of equality before the law.¹⁴ By upholding rule of law principles, including that of equality before the law, courts encourage law-

20 ETHICS & INT'L AFF. 405 (2006).

8. *E.g.*, Yuval Shany, *Assessing the Effectiveness of International Courts: A Goal-Based Approach*, 106 AM. J. INT'L L. 225, 267 (2012).

9. *See* Buchanan, *supra* note 1, at 324, 337–38 (noting that due to such uncertainties, analyses of legitimacy would be rendered inconclusive).

10. W.B. Gallie, *Essentially Contested Concepts*, 56 PROC. ARISTOTELIAN SOC'Y 167, 169 (1956) (defining "essentially contested concepts" as "concepts the proper use of which inevitably involves endless disputes about their proper uses on the part of their users").

11. Eugene Garver, *Essentially Contested Concepts: The Ethics and Tactics of Argument*, 23 PHIL. & RHETORIC 251, 264 (1990).

12. J. H. H. Weiler, *Bread and Circus: The State of European Union*, 4 COLUM. J. EUR. L. 223, 234–35 (1998).

13. *See* Buchanan, *supra* note 1, at 332–33.

14. *Id.*

abidingness and thus garner support. The principle of equality before the law requires that like cases are treated alike and that no one is above the law.¹⁵

Buchanan asserts that the ICC “appears to score very low on the criterion of Institutional Integrity”¹⁶ for two reasons: (1) it engages in a pattern of invidiously selective prosecution and any benefits it provides are unlikely to outweigh this deficit; and (2) its jurisdiction is arbitrarily circumscribed because major powers are outside its reach.¹⁷ We refute each charge in turn.

A. The ICC Does Not Engage in Invidious Selectivity and Provides Substantial Benefits

Buchanan argues that the ICC engages in invidiously selective prosecutions because it does not prosecute nationals of powerful states and “has tended” to pursue non-state actors even when state actors have committed equally egregious crimes.¹⁸ He asserts that “most scholars of the Court’s prosecutions would agree” with this charge.¹⁹ We disagree, both with the charge and with the claim that most scholars endorse it.²⁰

As Buchanan notes, “[a]ll courts must be selective in choosing which cases to prosecute, because their resources are limited.”²¹ While it is true that in some situations the ICC has prosecuted only non-state actors even though state actors are believed to have committed equally serious crimes, there are non-invidious reasons for those selection decisions. In particular, several of the situations in question were referred to the Court by the states on whose territories the crimes occurred. The Court was able to obtain evidence against non-state actors largely due to the cooperation of the relevant governments. Had the ICC brought cases against government actors, such cooperation would almost certainly have ceased. It may be debatable whether prosecuting only perpetrators on one side of these conflicts is preferable to prosecuting no one at all, but it is not fair to characterize as invidious the decision to proceed against the parties for whom evidence was obtainable.

The suspected government perpetrators in these situations are not being treated as “above the law” in violation of the principle of equality. When President Museveni of Uganda attempted to refer to the ICC “the case of the Lord’s Resistance Army,” the prosecutor responded that he would interpret the referral to encompass all potential perpetrators in the situation, including government perpetrators.²² The

15. *Id.*

16. *Id.* at 333.

17. *Id.*

18. *Id.*

19. Buchanan, *supra* note 1, at 333.

20. *See, e.g.,* Danner, *supra* note 2, at 510–11 (arguing that the ICC Prosecutor can “lay a valid claim to be both accountable and legitimate”); *see also* Jonathan Hafetz, *Fairness, Legitimacy, and Selection Decisions in International Criminal Law*, 50 VAND. J. TRANSNAT’L L. 1133, 1145–46 (2017) (indicating that most situations in Africa that the ICC has investigated have been self-referrals by the respective governments themselves).

21. Buchanan, *supra* note 1, at 333.

22. Luis Moreno-Ocampo, Int’l Crim. Ct. [ICC], *Statement by the Chief Prosecutor on the Uganda Arrest Warrants*, at 2 (Oct. 14, 2005), <https://www.icc-cpi.int/nr/rdonlyres/3255817D->

ICC's ongoing investigations in that and other situations likely include suspected government perpetrators, who may yet be brought to justice, particularly if they lose their political power.²³ Finally, the ICC has pursued government perpetrators in several situations, causing significant angst in some African capitals.²⁴

Likewise, the ICC's failure to prosecute defendants from the United States or other major powers is not evidence of invidiously selective prosecution. Even assuming the absence of defendants from powerful states reflects a fear that such prosecutions would destroy the Court, the decisions are not invidious. Again, the question is whether some global prosecutions are better than none. Unlike at the national level where a court's failure to prosecute some people or groups likely reflects a bias in their favor, at the international level it may simply represent a recognition of the reality that the entire system of global justice may not survive a power struggle with certain states. And the ICC is becoming more courageous in this regard; it is currently investigating situations involving potential defendants from the United States, United Kingdom, Russia, and Israel.²⁵

Although we might wish for an even more courageous Court, the Court we have is not illegitimate. The ICC contributes to the rule of law through pragmatic case selection. Like the prosecutorial practice of plea bargaining in the United States, the ICC's prosecutions, while sometimes one-sided, uphold the rule of law by providing some global justice when the alternative is none.

Buchanan's belief that the ICC engages in invidiously selective prosecution leads him to posit (at least for the sake of argument) that the Court may be illegitimate "*tout court*."²⁶ He suggests that such illegitimacy may be overcome if the institution provides sufficiently important benefits, and asserts that defenders of the Court cite three such benefits: (1) deterrence; (2) eliciting of evidence that witnesses might not otherwise have provided; and (3) providing a model for doctrinal and procedural improvements in national systems.²⁷ Buchanan does not evaluate the strength of these benefits in depth, but simply notes that the question is controversial and reiterates that there is currently no principled way to locate the

fd00-4072-9F58-fdb869F9B7cf/143834/lmo_20051014_English1.pdf.

23. See, e.g., Prosecutor v. Bemba Gombo, et. al., ICC-CPI-20161019-PR1245, Press Release (Int'l Crim. Ct. Oct. 19, 2016), <https://www.icc-cpi.int/pages/item.aspx?name=pr1245>; Prosecutor v. Yekatom, ICC-01/14-01/18, Pre-Trial Chamber II Warrant of Arrest (Int'l Crim. Ct. Nov. 11, 2018), https://www.icc-cpi.int/CourtRecords/CR2018_05412.pdf; Uganda, COALITION FOR THE INT'L CRIM. CT., www.coalitionfortheicc.org/country/uganda (last visited Mar. 22, 2019) ("Both sides [in the Uganda situation] are suspected of committing war crimes . . .").

24. Michael Birnbaum, *African Leaders Complain of Bias at ICC as Kenya Trials Get Underway*, WASH. POST (Dec. 5, 2013), https://www.washingtonpost.com/world/europe/african-leaders-complain-of-bias-at-icc-as-kenya-trials-are-underway/2013/12/05/0c52fc7a-56cb-11e3-bdbf-097ab2a3dc2b_story.html?noredirect=on&utm_term=.22ae1da15248.

25. Report on Preliminary Examination Activities, INT'L CRIM. CT. OFFICE OF THE PROSECUTOR (December 4, 2017), https://www.icc-cpi.int/itemsDocuments/2017-PE-rep/2017-otp-rep-PE_ENG.pdf.

26. Buchanan, *supra* note 1, at 324.

27. *Id.* at 334.

threshold for legitimacy.²⁸

Yet evidence is emerging that the ICC provides significant benefits, and it has the potential to provide even more. Of the benefits Buchanan identifies, two are particularly important: deterring international crimes and providing a model for national courts. In evaluating the ICC's benefit in terms of deterrence we must again remember the youth of the institution. We should not expect strong evidence of deterrence from a global institution to emerge quickly. Nonetheless, some such evidence has already come to light.²⁹ Moreover, national systems have begun to amend their laws³⁰ and some states have created domestic courts to address crimes within the Court's jurisdiction.³¹ Like the Nuremberg Tribunal, which suffered heavy criticism in its youth and was later substantially redeemed, appreciation for the ICC's benefits may be expected to grow with time.

More importantly, the benefits Buchanan identifies are not the most important benefits the ICC can be expected to provide in the long-term. Although the ICC has the potential to deter some crimes—by convincing particular people not to engage in conduct they might otherwise have engaged in—its very limited resources make such deterrence unlikely in many cases. Instead, the Court's most important function is to prevent international crimes through norm expression. The ICC has a unique capacity in this regard: with 123 states parties and many supporters among civil societies around the world, the ICC speaks on behalf of the global community. The ICC thus contributes to the rule of law primarily by expressing global norms that percolate down to national communities, contributing to general crime prevention over time. The ICC can accomplish this goal despite its limited resources by engaging in a limited number of exemplary prosecutions.

Finally, it is important to bear in mind that Buchanan and Keohane's comparative benefit criterion does not measure the benefits an institution provides in the abstract, but relative to the alternative.³² In the ICC's case, the alternative is often impunity for, in the words of the Rome Statute, "the most serious crimes of concern to the international community as a whole."³³ The ICC operates according to the principle of complementarity, which stipulates that the Court may adjudicate only in situations where the states most directly connected with the crimes at issue

28. *Id.* at 331.

29. See Hyeran Jo & Beth Simmons, *Can the International Criminal Court Deter Atrocity?*, 70 INT'L ORG. 443, 469 (2016) (concluding that in the first twelve years of its existence the ICC has had a significant and empirically measurable deterrent effect).

30. See Robert D. Sloane, *The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law*, 43 STAN. J. INT'L L. 39, 93 (2007) ("The adoption of the Rome Statute itself prompted a number of states 'to incorporate prohibitions on genocide, war crimes, and crimes against humanity into their criminal statutes'"); Jo & Simmons, *supra* note 29, at 4.

31. See, e.g., Patryk I. Labuda, *The Special Criminal Court in the Central African Republic*, AM. SOC. OF INT'L LAW (Jan. 22, 2018), <https://www.asil.org/insights/volume/22/issue/2/special-criminal-court-central-african-republic>.

32. Buchanan, *supra* note 1, at 327–28.

33. Rome Statute of the International Criminal Court art. 5, July 17, 1998, 2187 U.N.T.S. 3.

are inactive, unable, or unwilling to genuinely investigate and prosecute.³⁴ For this reason, the comparative benefit criterion is relatively easy to meet in the case of the ICC: all other things being equal, some accountability is almost always better than complete impunity.

B. The Limits on the ICC's Jurisdiction Do Not Render It Unworthy of Support

Buchanan's "second major complaint about the legitimacy of the ICC" is that its "jurisdiction is arbitrarily circumscribed"³⁵ because the United States, China, and Russia have not ratified the Rome Statute, and thus "[t]he most powerful states can commit crimes for which other states would be prosecuted but go scot-free."³⁶ Buchanan worries that this too may violate the principle of equality before the law. Although he notes that the ICC can prosecute nationals of these states if they commit crimes on the territories of states parties, he views this as a rather low probability, at least for very powerful states like the United States.

Buchanan expresses uncertainty about whether this limit on the ICC's jurisdiction "represents a legitimacy deficit *of the ICC*," or rather "a flaw in the larger system of international law in which institutions are created by treaties and states have the freedom to refrain from ratifying them."³⁷ Here he highlights what he calls the "boundary drawing" problem, noting that no legitimacy theory explains where the boundaries of an institution begin and end.³⁸

We agree with Buchanan's broad point about the difficulty of making judgments about institutional legitimacy without a theory that delineates the institution; and we agree that without a solution to this problem "institutional legitimacy assessments will remain inconclusive."³⁹ But, as we argued above, legitimacy assessments do not have to be conclusive to be useful; and, with respect to the ICC's legitimacy, the important point is that deficits in the international legal order stemming from the realities of power politics cannot be attributed to the institution. Again, the question is whether it is better to have an ICC despite the reality that some major powers are unlikely to join anytime soon, or to have no ICC at all. The 123 states parties that have joined the Court are aware of its jurisdictional limitations and clearly believe that a Court that must operate within a flawed international system is better than no Court. Moreover, as Buchanan acknowledges, structural issues over which an institution has no control should not be attributed to the institution for purposes of legitimacy analysis; and the ICC clearly has no control over whether or not the United States, China, and Russia ratify the Rome Statute.

34. *Id.* arts. 17–19.

35. Buchanan, *supra* note 1, at 333.

36. *Id.*

37. *Id.* at 335.

38. *Id.* at 338.

39. *Id.* at 337.

IV. CONCLUSION: THE ICC'S POTENTIAL MAKES IT WORTHY OF SUPPORT

Buchanan's article insightfully identifies weaknesses in institutional legitimacy theory, none of which are susceptible to easy resolution. Yet we do not share his concern that absent such resolution, disputes about institutional legitimacy will remain "brute clash[es] of ungrounded intuitions."⁴⁰ Legitimacy—an essentially contested concept—may nonetheless contribute to fruitful debate about whether, and how much, to support institutions. Legitimacy discourse provides a useful way to surface divergent perspectives, values, and goals. It can promote consensus as actors in the global systems share their views and persuade one another of their perspectives.

This essay has sought to engage in such discourse regarding the legitimacy of the ICC. Although Buchanan does not reach conclusions about the ICC's legitimacy, his article raises serious questions on the issue. In particular, it highlights claims that the ICC violates the principle of equality by engaging in invidiously selective prosecutions and by virtue of its jurisdictional limits. As we have tried to demonstrate, these charges lack foundation. The charge of invidiously selective prosecution rests on a misunderstanding of the ICC's central purpose. Unlike domestic courts, the ICC is not intended or able to promote the rule of law through broadly applicable fear of punishment. The institution's global mandate and limited resources make such a role impracticable. Instead, the ICC's central purpose is to express global norms, thus affecting the moral foundations upon which actors around the world make decisions. The second critique—that the ICC's jurisdiction is arbitrarily circumscribed—relies on an implausible attribution to the ICC of systemic flaws in the international system.

We have not argued that the ICC enjoys strong legitimacy; indeed, we agree that the structural flaws Buchanan identifies, albeit not attributable to the Court, bear upon the ICC's legitimacy insofar as they affect the institution's ability to effectuate its mandate. Ultimately, however, we agree with the vast majority of the world's states that a flawed ICC is better than no ICC. Moreover, all discussions of the ICC's legitimacy—in particular, those related to whether it deserves any support at all—must keep in mind the institution's youth. Even if an empirical study were to reveal that the ICC has thus far brought the world only minimal benefits, it still deserves at least enough support to afford it a reasonable time to prove its worth. Building the world's first global criminal court is no easy or quick task. The promise of an institution that can help reduce global suffering by changing norms about violence is one that we should all support—at least until its illegitimacy is conclusively established.

40. *Id.* at 338.