THE COMPLEX EPISTEMOLOGY OF INSTITUTIONAL LEGITIMACY ASSESSMENTS, AS ILLUSTRATED BY THE CASE OF THE INTERNATIONAL CRIMINAL COURT

*Allen Buchanan**

TABLE OF CONTENTS

It is often said that the International Criminal Court (ICC) suffers a legitimacy deficit.[1] It is probably accurate to say that most legal scholars and political

*Allen Buchanan is Professor of Philosophy in the Department of Philosophy and Freedom Center, University of Arizona. His research is mainly in Political Philosophy, Philosophy of International Law, Bioethics, and, most recently, on the implications of evolutionary explanations of the origins of human morality for the possibilities of moral progress. His latest books are THE EVOLUTION OF MORAL PROGRESS: A BIOCULTURAL THEORY, co-authored with Russell Powell (Oxford University Press, 2018) and OUR MORAL FATE: EVOLUTION AND THE ESCAPE FROM TRIBALISM, forthcoming MIT press, 2020.

1. *See, e.g.*, Madeline Morris, *The Democratic Dilemma of the International Criminal Court*, 5 BUFF. CRIM. L. REV. 591 (2002); Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT'L L. 510 (2003); Jack Goldsmith, *The Self-Defeating International Criminal Court*, 70 U. CHI. L. REV. 89 (2003); Steven Glickman, *Victims' Justice: Legitimizing the Sentencing Regime of the International Criminal Court*, 43 COLUM. J. TRANSNAT'L L. 229 (2004); JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS (2005); Adam Branch, *Uganda's Civil War and the Politics of ICC Intervention*, 21 ETHICS AND INT'L AFFAIRS (2007); Helena Cobban, *International Courts*, 153 FOREIGN POL'Y 22 (2006); Margaret M. deGuzman, *Gravity and the Legitimacy of the International Criminal Court*, 32 FORDHAM INT'L L. J. 1400 (2009) [hereinafter deGuzman, *Gravity*]; MAHMOOD MAMDANI, SAVIORS AND SURVIVORS: DARFUR, POLITICS AND THE WAR ON TERROR (2009); James A. Goldston, *More Candour about Criteria: The Exercise of Discretion by the Prosecutor of the International Criminal Court*, 8 J. INT'L CRIM. JUST. 383 (2010); Margaret M. deGuzman, *Choosing to Prosecute: Expressive Selection at the International Criminal Court*, 33 MICH. J. INT'L L. 265 (2012) [hereinafter deGuzman, *Choosing to Prosecute*]; Mark Findlay & Sylvia Ngane, *Sham of the Moral Court? Testimony Sold as the Spoils of War*, 1 GLOBAL J. COMP. L. 73 (2012); Vesselin Popovski, *Legality and*

theorists who address the issue believe that the Court is defective from the standpoint of legitimacy. The two most frequently alleged legitimacy-damaging defects of the Court are (1) that it engages in a pattern of invidiously selective prosecution, and (2) that its jurisdiction is arbitrarily circumscribed.[2]

Yet both criticisms and defenses of the legitimacy of the ICC are incomplete: they lack a grounding in a cogent theory of institutional legitimacy and also frequently rely on disputable empirical claims about the operations of the Court and their consequences. Critics of the Court are also sometimes unclear as to whether their claim is that the ICC is merely defective in some way from the standpoint of legitimacy, but nonetheless legitimate all-things-considered; or whether the supposed defects are so serious as to render it illegitimate *tout court*. The ambiguity here may be the result of confusion about whether legitimacy is a binary or a scalar concept. Or, if it is both, disagreement about when it is appropriate to make binary legitimacy assessments and when it is appropriate to make scalar assessments. Neither kind of assessment can be rejected out of hand, because ordinary usage exhibits both: sometimes we speak as if the issue is whether an institution is illegitimate or not; sometimes as if it can be more or less legitimate.

In this essay, I make the case that the task of assessing the legitimacy of the ICC is much more complex and demanding than either defenders or critics of the Court have understood. To do this, I argue for two main conclusions.

1. Assessments of the legitimacy of the ICC will remain inconclusive so long

Legitimacy of International Criminal Tribunals, *in* LEGITIMACY OF GLOBAL AFFAIRS 388, 402–407 (Richard Falk et al. eds., 2012); Nienke Grossman, *The Normative Legitimacy of International Courts*, 86 TEMP. L. REV. 61 (2013); Mariana Pena & Gaelle Carayon, *Is the ICC Making the Most of Victim Participation?*, 7 INT'L J. TRANSITIONAL JUST. 518 (2013); William Schabas, *The Banality of International Justice*, 11 J. INT'L CRIM. JUST. 545 (2013); DAVID BOSCO, ROUGH JUSTICE: THE INTERNATIONAL CRIMINAL COURT IN A WORLD OF POWER POLITICS (2014); Thomas Christiano, The Problem of Selective Prosecution and the Legitimacy of the ICC (Mar. 14, 2015) (unpublished manuscript) (on file with author) [hereinafter Christiano, Problem of Selective Prosecution]; Asad Kiyani, *The Antinomies of Legitimacy: On the (Im)possibility of a Legitimate International Criminal Court*, 8 AFR. J. LEGAL STUD. 1 (2015); Margaret M. deGuzman, *The Global-Local Dilemma and the ICC's Legitimacy*, LEGITIMACY AND INTERNATIONAL COURTS (Harlan Grant Cohen et al. eds., 2017), https://ssrn.com/abstract=3078123; Sergey Vasiliev, *Between International Criminal Justice and Injustice: Theorising Legitimacy*, *in* THE LEGITIMACY OF INTERNATIONAL CRIMINAL TRIBUNALS 66 (Nabuo Hayashi & Cecilia M Bailliet eds., 2017); Thomas Christiano, *The Arbitrary Circumscription of the Jurisdiction of the International Criminal Court*, CRITICAL REV. OF INT'L SOC. & POL. PHIL. (Jan. 14, 2019), https://www.tandfonline.com/doi/full/10.1080/13698230.2019.1565715 [hereinafter Christiano, *Arbitrary Circumscription*]. See Aaron Fichtelberg *Democratic Legitimacy and the International Criminal Court*, 4 J. OF INT'L. CRIM. JUST. 765 (2006), 765–85 for a defense of the legitimacy of the ICC—specifically, the suggestion that such legitimacy should not depend upon whether or not its origins are democratic. David Luban, *Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law*, *in* THE PHILOSOPHY OF INTERNATIONAL LAW 569 (Samantha Besson & John Tasioulas eds., 2010); Marlies Glasius, *Do International Criminal Courts Require Democratic Legitimacy?*, 23 EUR. J. INT'L L. 43 (2012).

2. *See, e.g.*, Christiano, *Arbitrary Circumscription*, *supra* note 1; Christiano, Problem of Selective Prosecution, *supra* note 1.

as certain normative, factual, and conceptual uncertainties remain unresolved. The *normative uncertainty* is two-fold: (i) given that any plausible theory of institutional legitimacy will include several criteria for legitimacy, what is needed, but currently lacking, is a principled method of weighting different criteria when an institution scores high on some and low on others, so as to be able to make an all-things-considered assessment; and (ii) a binary legitimacy assessment—that an institution is legitimate or illegitimate *tout court*—presupposes the specification of a non-arbitrary threshold, a sufficient "legitimacy score," but existing theories of institutional legitimacy do not provide the needed specification. The *factual uncertainties* involve the determination of how great the alleged benefits of having the ICC are, which one must know in order to ascertain whether, as many have claimed, these benefits compensate for the Court's legitimacy deficits. These alleged benefits include (a) deterrence, (b) incentivizing individuals to provide testimony about violence that would not be forthcoming were it not for the prospect of prosecution, and (c) providing a model for the development of better doctrine and procedures in some domestic criminal justice systems. The *conceptual uncertainty* pertains to how to draw the boundaries of an institution or, to put the same point differently, how to formulate cogent criteria for institutional identity for purposes of making legitimacy assessments. Such boundary drawing is necessary, if one is to be able to determine whether a particular legitimacy deficit is to be ascribed to the ICC or instead is a flaw of the larger international system of which the ICC is part and within whose constraints it must operate.

2. No existing theory of institutional legitimacy is capable of resolving the normative and conceptual uncertainties. So, even if further empirical research were to resolve the factual uncertainties, neither the assessment that the Court's legitimacy deficits are especially serious nor the conclusion that the Court is illegitimate *tout court* would be adequately justified.

Although my focus is on the ICC, these two conclusions can be extended to many, perhaps most, institutions about which there are serious legitimacy concerns: generally speaking, the epistemology of institutional legitimacy assessments is more complex and difficult than standard discourse about legitimacy acknowledges. My larger goal, then, is to show just how epistemically underfunded contemporary disputes about institutional legitimacy are. The aim, however, is not purely negative. Instead, it is also to help gain a better grasp of what a theory of institutional legitimacy would have to encompass and what sort of empirical inquiries would have to be completed to resolve real-world disputes about institutional legitimacy.

Part I of this essay argues that any plausible theory of institutional legitimacy must include a plurality of criteria for legitimacy and, more specifically, criteria that focus respectively on: (1) the processes by which the institution came to be; (2) the match or lack thereof between the key functions that figure in the justification of the institution, on the one hand, and the institution's actual performance, on the other; and (3) the benefits the institution provides relative to the noninstitutional alternative (or relative to the benefits provided by a rival institution that purports to perform the same functions). I then go on to show that

no existing theory has the resources for weighting the general criteria in a way that would allow a well-grounded judgment as to whether the fact that a particular institution scores high on one criterion would offset the legitimacy deficit that results from its scoring low on another criterion. This Part therefore characterizes the first normative uncertainty that afflicts efforts to make institutional legitimacy assessments: uncertainty as to the overall assessment of the institution in conditions in which there is a mixed record regarding the satisfaction of two or more criteria for legitimacy.

Part II begins by exploring the distinction between scalar and binary institutional legitimacy assessments and offers an account of when each type of assessment is appropriate. I then show that binary assessments depend on the ability to make a justified evaluation as to whether or not an institution has reached or exceeded an appropriate threshold of legitimacy-making characteristics, but that no current theory of institutional legitimacy has the resources to identify an appropriate threshold. Part II, then, establishes the second type of normative uncertainty that would have to be resolved in order to make well-grounded institutional legitimacy assessments: uncertainty as to how to set the threshold that binary assessments presuppose.

Part III elaborates the two major complaints advanced by those who hold that the ICC is either illegitimate *tout court* or at the very least has especially serious legitimacy deficits. The first is that the Court has engaged since its beginning in a pattern of invidiously selective prosecution;[3] the second is that the Court's jurisdiction is arbitrarily circumscribed because it does not encompass the world's three greatest military powers (Russia, China, and the United States), due to the fact that they have not ratified the ICC Treaty and because the United Nations Security Council (in which all three of these states are Permanent Members and therefore wield a veto) is overwhelmingly unlikely to extend the Court's jurisdiction to any of the three.[4]

Next, I argue that the two complaints on their face are quite serious, given a plausible understanding of the most important distinctive justifying function of courts, namely, to uphold the rule of law, including one of its most important elements, the principle of equality before the law, where this includes the requirements that no one is to be above the law and that like cases are to be treated alike.

I then consider the claim, frequently made by defenders of the Court, that the benefits that accrue due to its existence outweigh or at least seriously offset these legitimacy deficits. Proponents of this "benefits defense" might well assert that, if it succeeds, it shows that the Court is legitimate in spite of the fact that it violates the principle of equality before the law. I then go on to show, however, that at present this defense is less than compelling for two reasons: first, there is factual

3. *See, e.g.*, Christiano, Problem of Selective Prosecution, *supra* note 1; Danner, *supra* note 1; deGuzman, *Choosing to Prosecute*, *supra* note 1; deGuzman, *Gravity*, *supra* note 1; Goldston, *supra* note 1.

4. Rome Statute of the International Criminal Court arts. 12–15, July 17, 1998, 2187 U.N.T.S. 90.

uncertainty as to just how robust the alleged benefits are (or in some cases whether they exist at all); and second, even if these empirical uncertainties were resolved, the two normative uncertainties identified in Part III would remain, thus rendering the "benefits defense" inconclusive. Without a cogent way of weighting the various criteria for legitimacy, one cannot determine how serious an institution's legitimacy deficits are all-things-considered in cases where the institution's performance is mixed regarding a plurality of legitimacy criteria and hence whether they are offset by the benefits it produces. And without the specification of a threshold for legitimacy, one cannot determine whether the legitimacy deficit offsetting effects of the institution's benefits bring it up to the threshold it must reach or exceed to be considered legitimate.

PART I: GENERAL CRITERIA FOR INSTITUTIONAL LEGITIMACY

Keohane and I, in a widely-cited article, provide a grounding for the commonsense intuition that there is a plurality of criteria for institutional legitimacy, some focusing on the institution's origins, some on its procedures, some on the benefits.[5] Based on our understanding of the distinctive practical function of the concept of legitimacy, we propose the following as general criteria—what we call The Complex Standard—for assessing institutional legitimacy, criteria that we claim apply to a wide range of different types of institutions.

(i) *Comparative Benefit*: the institution provides significant benefits relative to the non-institutional status quo (or, if the context of the legitimacy assessment is one in which there is dispute about which of two or more institutions ought to be regarded as authoritative in a certain domain of action, the institution provides significantly greater benefits than its rival(s)).

(ii) *Institutional Integrity*: the institution does not persist in operating in ways that are inconsistent with its more significant official procedures and announced policies and goals; above all, the actual operations of the institution are not at cross-purposes with the successful performance of the functions that are central to the most basic public justification for having the institution.

(iii) *Minimal Moral Acceptability*: the institution does not engage in serious violations of the most basic rights or violate other important moral norms.

(iv) *Acceptable Origination*: the processes by which the institution came to exist did not involve major injustices (for example, it did not violently or illegally displace a legitimate institution).

(v) *Nondiscrimination*: the institution's most important procedures and processes do not exhibit systematic unfairness toward any individuals, organizations, or groups.

Keohane and I emphasize that none of these five criteria is a strictly necessary

5. Allen Buchanan & Robert O. Keohane, *The Legitimacy of Global Governance Institutions*, 20 ETHICS AND INT'L AFF. 405 (2006).

condition for institutional legitimacy.[6] The criteria are, rather, what Rawls calls "counting principles"—the more of them are satisfied and the more fully each is satisfied, the stronger the case for concluding that an institution is legitimate. For example, failure to satisfy criterion (iv), Acceptable Origination, may be a very serious deficiency in a new institution, but in an old institution (including most existing States), it may be of less consequence if the institution has undergone many admirable changes since its soiled beginnings and if no legitimacy-conferring institutions or procedures were available at the time of its creation.

A. Mixed Legitimacy Assessments: The Weighting Problem

The key point to note at this juncture is that an institution might score high on one of the general criteria Keohane and I offer, but low on another. The question would then arise as to how the various criteria are to be weighted in order to allow for the making of an all-things-considered judgment about how serious an institution's legitimacy deficit is. In particular, one needs to know whether the benefits the institution creates are important enough and robust enough to offset a failure to satisfy what intuitively appears to be an especially important criterion, that of Institutional Integrity.

It is beyond the scope of the present investigation to develop and defend a theory of institutional legitimacy. Instead, I have stated the general criteria Keohane and I offer for purposes of illustration only. I am not assuming that our view is correct; nor need I do so. Instead, I am merely making what I take to be a fairly weak assumption, namely, that any plausible theory of institutional legitimacy will include more than one substantive criterion of assessment and that the criteria will be sufficiently distinct and independent that an institution may do well on one criterion but poorly on another. Further, I will also assume that at least two of The Complex Standard's general criteria, Comparative Benefit and Institutional Integrity, are relevant for assessing the legitimacy of the ICC. This latter assumption also seems to me to be sufficiently weak and not likely to be incompatible with any plausible theory of institutional legitimacy. It is worth noting that the weighting problem is not unique to conceptions of institutional legitimacy: any complex evaluative conception must address it, if it is to be capable of yielding an all-things-considered judgment.

I believe it is fair to say that the most prominent accounts of institutional legitimacy currently in play, at least in the literature of broadly analytic Political Philosophy, are those of Keohane and myself, the Razian "service" view, and John Simmons's required consent view. I will now argue that none of these accounts currently possess the resources needed to resolve the normative uncertainty I have identified. Each of the three accounts will be considered in turn.

The Buchanan and Keohane view is clearly incomplete: it does not include weighting principles or procedures for its five general criteria for institutional legitimacy. Hence, The Complex Standard does not yield a determinate conclusion

6. Allen Buchanan, *Institutional Legitimacy*, *in* OXFORD STUDIES IN POLITICAL PHILOSOPHY 53 (David Sobel et al. eds., 4th ed. 2018).

in cases in which an institution scores high on some criteria and low on another, except perhaps in extreme cases.

The Razian service account of authority, deployed as an account of institutional legitimacy, fares no better. On the service account, an institution is legitimate if and only if, by taking the institution's rules as content independent, exclusionary reasons for acting or refraining, individuals do better, according to the reasons that apply to them, than they otherwise would do.[7]

The service account has been subject to a number of criticisms.[8] Perhaps the most serious is that the service account is uninformative, if not to say vacuous, absent a specification of the reasons that "apply" to individuals when they are attempting to make institutional legitimacy assessments.[9] The problem here takes the form of a dilemma: either the Razian account remains silent as to which sorts of reasons are relevant to institutional legitimacy assessments and how they are to be weighed when they conflict, in which case the account is uninformative; or, it is supplemented by drawing on intuitions about which sorts of reasons are relevant—presumably those regarding origins, procedures, and outcomes—in which case it owes us a procedure or principle for weighting in cases of conflict. There is the further difficulty that if the set of relevant reasons is spelled out by drawing on intuitions about criteria for institutional legitimacy that are accessible without recourse to the Razian notion of legitimacy, appeal to the latter does not work and is otiose. Be that as it may, even if the Razian account could be made informative by specifying the relevant reasons, the weighting problems would still remain, because of the possibility of conflicts among the reasons.

Simmons does not offer a general theory of institutional legitimacy.[10] Instead he argues for the more limited conclusion that, for the state (or perhaps for state-like institutions, where this means institutions that wield coercion to enforce rules), consent of all those subject to the institution's rules is a *necessary* condition for legitimacy. It is crucial to note that Simmons is operating with a very specific and extremely demanding understanding of what legitimacy is: for him the state (or a

7. *See* John Tasioulas, *The Legitimacy of International Law*, *in* THE PHILOSOPHY OF INTERNATIONAL LAW 97, 97–98 (Samantha Besson & John Tasioulas eds., 2010) (contrasting the Razian unitary understanding of legitimacy with Buchanan's dualist view).

8. *See* Buchanan, *supra* note 6 (explaining that legitimacy does not depend on an institution acting in the interest of those it governs); Allen Buchanan, *The Legitimacy of International Law*, *in* THE PHILOSOPHY OF INTERNATIONAL LAW 79 (Samantha Besson & John Tasioulas eds., 2010) (explaining that institutions are only normatively legitimate if they have a right to rule, but there are rival theories about what the right to rule is and how the right to rule is satisfied); Bas van der Vossen, *On Legitimacy and Authority: A Response to Krehoff*, 14 RES PUBLICA 299 (2008) (arguing Razian authority should not be used to answer questions regarding the legitimacy of political institutions).

9. *See* Buchanan, *supra* note 6, at 71 (explaining that other than stating that a legitimate institution should be governed with advice from experts, the Razian view does not explain what characteristics a legitimate institution would have).

10. A. JOHN SIMMONS, JUSTIFICATION AND LEGITIMACY: ESSAYS ON RIGHTS AND OBLIGATIONS (2001); A. John Simmons, *Tacit Consent and Political Obligation*, 5 PHIL. AND PUB. AFF. 274 (1976).

state-like institution) is legitimate only if those to whom it addresses its rules or directives have a moral duty to comply with them as such, that is, simply by virtue of the institution issuing them.[11] Simmons does not provide an account of other necessary conditions for legitimacy, though he acknowledges that consent is necessary, but not sufficient.

My suggestion is that if Simmons's account were to be filled out in a plausible manner, this would require acknowledging a plurality of other necessary conditions for legitimacy. Presumably, Simmons would agree that even if an institution enjoyed universal consent, it would not be legitimate—no one would have a moral duty to comply with its rules as such—if its origins were sufficiently tainted (e.g., it came to be by violently overthrowing a legitimate institution) or if it operated in such a way as to violate basic principles of morality. The key point is that Simmons neither provides a principled account of what the other necessary conditions are, nor a suggestion for how to make all-things-considered legitimacy assessments when an institution scores well on some of the other necessary conditions but poorly on others. In focusing only on one necessary condition—consent—he does not address the weighting problem. Nor is it clear how what he does say about consent and about the nature of legitimacy provides resources for solving the weighting problem.

The Buchanan and Keohane Complex Standard is not idiosyncratic, then, in its assumption that there is a plurality of potentially conflicting criteria for assessing institutional legitimacy. Nor is it unique in failing to provide an account of how different criteria are to be weighed relative to one another: the Razian "service" view and Simmons's required consent view on their most plausible construals include the same assumption.

To summarize: the three leading theories of institutional legitimacy do not currently contain the resources for resolving the first normative uncertainty that must be resolved if institutional legitimacy assessments (in any but the most extreme cases) are to be well-grounded. To my knowledge, no existing account of institutional legitimacy provides principled guidance for how to weight a plurality of criteria when an institution scores high on some and low on others. To that extent, all such theories are afflicted by serious normative uncertainty—uncertainty that renders problematic the legitimacy assessments the theories are supposed to ground.

PART II: BINARY VERSUS SCALAR LEGITIMACY ASSESSMENTS

Scalar legitimacy assessments are at home in three distinct contexts. The first is where the assumption is that two rival institutions have both reached the threshold for legitimacy but determining which most exceeds the threshold is relevant to ascertaining which one we ought to support. Thus we might say that although both institutions are legitimate, one is more legitimate than the others. The second is where we are concerned to know whether an institution that exceeds the threshold but is nonetheless deficient from the standpoint of legitimacy is

11. SIMMONS, *supra* note 10.

moving in the direction of remedying its deficiency. Here, for example, we might say that an institution that is legitimate is becoming more legitimate. The third is where an institution has not reached the threshold, but we are attempting to judge whether it is moving toward the threshold. In this sort of case, saying that the institution is becoming more legitimate simply means it is moving toward the threshold. In all of these three situations, it can make sense to think of legitimacy as a matter of more or less.

A. The Threshold Specification Problem

Binary judgments presuppose the specification of a threshold: a minimum "legitimacy score" below which the institution's defects are so grave as to make it illegitimate *tout court* and above which it has sufficient virtues, from the standpoint of legitimacy, to warrant the claim that it is legitimate *tout court* (while still leaving open the possibility that it still suffers legitimacy deficits, perhaps more serious than some other institutions that meet the threshold). The difficulty is that at present, any specification of the threshold will be arbitrary, because there is currently no principled account of how to set it. This second normative uncertainty would remain, even if the first normative uncertainty (the problem of how to weight the criteria for legitimacy) were resolved and even if all factual uncertainties concerning the existence and robustness of the beneficial consequences of the institution were cleared up by sound empirical research.

Of course, there are extreme cases where one might be confident in making binary judgments—cases where an institution either scores uniformly high or uniformly low on all the relevant criteria of legitimacy. In the former case one could confidently say "whatever the proper specification of the threshold is, this institution meets or exceeds it." In the latter case—if an institution scored very badly on all of the relevant criteria—one could confidently conclude "this institution fails to meet any reasonable threshold." But there will be many cases—indeed precisely the cases in which legitimacy is most hotly disputed and we are most in need of guidance from theory—in which a principled account of the threshold is required.

In less extreme cases, the first normative uncertainty, the lack of a principled weighting algorithm, makes binary legitimacy assessments problematic if one takes seriously the possibility that legitimacy deficits that would otherwise be so serious as to prevent an institution from reaching the threshold (however specified) can be sufficiently offset by the benefits the institution provides. Neither the Buchanan and Keohane view, nor the Razian service view, nor Simmons's required consent view provides a principled specification of the threshold. Indeed, since they all lack the resources for solving the weighting problem, it is hard to see how they could do so. Determining that an institution meets or exceeds the threshold of legitimacy-making qualities means ascertaining whether its overall "legitimacy score" is sufficiently high, but that in turn requires knowing how to weight the various criteria for legitimacy.

PART III: THE DISTINCTIVE LEGITIMACY DEFICITS OF THE ICC

For different types of institutions, more specialized criteria of legitimacy are required, or at least there is a need to specify some of the general criteria in the light of the distinctive character of the institution. This is most clearly true in the case of criterion (ii), Institutional Integrity. Different types of institutions have different functions and may require different kinds of support (and non-interference) from various parties. Such differences should be reflected in the criteria for assessing legitimacy. But if any institution persists in operating in ways that are inconsistent with its policies or official procedures or goals, that diminishes its legitimacy, other things being equal.

A. The Importance of an Institution's Chief Justifying Functions

Not all of an institution's functions are of equal importance; some may be rather peripheral to its chief justifying functions—the functions that are invoked in the most basic public justification for having the institution. If the institution's behavior is only at odds with such less important goals or functions, the consequences for legitimacy may not be significant. But if there is a serious and persisting discrepancy between an institution's behavior and its most important justifying functions, that is an especially serious legitimacy deficit. For example, if an institution's most important public justifying function is to protect human rights, then it counts very heavily against the legitimacy of that institution if it persists in committing serious human rights violations. Merely not violating human rights (satisfying criterion (iii)), is not sufficient. In fact, one might conclude that if protecting human rights is among an institution's most important justifying functions, then the institution's persisting in committing serious human rights violations does not merely render it less than fully legitimate; rather, this behavior renders it illegitimate *tout court*. For example, if the United Nation's Human Rights Council regularly engaged in extensive human rights violations, it would be an egregious understatement to say that it had a legitimacy deficit; rather it would be illegitimate *tout court*.

B. Courts and the Rule of Law

The most important justifying function of courts as courts is to apply a specified body of law in such manner as to protect and promote the rule of law, and to embody the principles of the rule of law in their own operations. Among the most important principles of the rule of law is that of equality before the law: the law is to be applied impartially, where this includes the requirements that like cases are to be treated alike and that no one is to be above the law. Drawing on an important article by Edmundson on the virtue of law-abidingness,[12] I have argued that by performing this justifying function, courts provide a unique and highly valuable service: they aid individuals in the exercise of the virtue of law-abidingness, by rendering authoritative judgments about which norms are laws and

12. William A. Edmundson, *The Virtue of Law-Abidance*, 6 PHILOSOPHERS' IMPRINT 1 (2006).

by assuring them that the law is being applied in accordance with the principle of equality before the law and other rule of law principles.[13] Generally speaking, unless the virtue of law-abidingness is fairly widespread, institutions that create or operate according to legal rules will be unlikely to garner the support they need if they are to function successfully and do so without excessive reliance on either dangerous levels of coercion or an improbable, thorough-going coincidence of individuals' self-interest and what the institution demands of them. By providing individuals with a reasonable assurance that institutions are operating in accordance with rule of law principles, courts can engage the virtue of law-abidingness and this in turn can help provide institutions with the non-coerced, disinterested support they need if they are to operate successfully.

C. The Two Major Legitimacy Deficits of the ICC

The complaints that the ICC engages in invidiously selective prosecution and that its jurisdiction is arbitrarily circumscribed can both be framed as the charge that it violates the principle of equality before the law, thus failing to perform its most important justifying function *qua* court. Consider first the complaint that the Court engages in invidiously selective prosecution.

All courts must be selective in choosing which cases to prosecute, because their resources are limited, and some crimes are more serious than others. But in the case of the ICC, the complaint is that prosecution has been *invidiously* selective in that the Court has refrained from prosecuting agents of strong states or states with which the United States has friendly relations. Further, the Court has tended to prosecute only non-state agents in intra-state conflicts in which state agents have apparently committed equally serious offenses. Such a pattern of prosecutions violates a key element of the rule of law, the principle of equality before the law: some agents are in effect treated as being above the law and like cases are not treated alike. If, as I have suggested, the chief distinctive justifying function of courts *qua* courts is to uphold the rule of law and exemplify the rule of law in their own operations, then the ICC appears to score very low on the criterion of Institutional Integrity: there is a pronounced and persisting discrepancy between the institution's behavior and its chief justifying function.

For purposes of the current discussion, I will assume that this first complaint accurately characterizes the Court's record on prosecutions. In fact, I think it is fair to say that most scholars of the Court's prosecutions would agree that it is accurate. My aim is to show that even if the complaint is valid, its implications for an overall assessment of the Court's legitimacy are unclear.

D. Do the Benefits Offset the Two Legitimacy Deficits?

Let us suppose, for the sake of argument, that we should construe the complaint of invidiously selective prosecution as being so serious that it renders

13. ALLEN BUCHANAN, JUSTICE, LEGITIMACY, AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW 273 (2003).

the Court not just significantly deficient so far as legitimacy is concerned, but presumptively illegitimate *tout court*. The qualifier "presumptively" is important, because one cannot rule out the possibility that even a deficit that would otherwise be sufficient to render an institution illegitimate *tout court* could be offset by some extraordinarily valuable benefits that the institution provides.

Here it is worth distinguishing two ways in which the appeal to benefits might function in response to allegations of institutional legitimacy deficits. On the one hand, if, as Keohane and I assume, Comparative Benefit is among the general criteria for institutional legitimacy, one could argue that if an institution scores high enough on this criterion, that can offset its low score on some other criterion, including Institutional Integrity. On the other hand, one could acknowledge that an extremely low score on Institutional Integrity renders the institution illegitimate but argue that the benefits it provides are so significant that it is appropriate to supporting the institution nonetheless—to accord it a kind of limited deference, simply as a *modus vivendi*. To spell out the difference between these two benefit defenses would require something I cannot provide here: an account of exactly how recognizing an institution as legitimate differs from simply viewing it as instrumentally valuable for the provision of certain important benefits. I need not do so, however, to make the central point: in either case, one must have some way of weighting the importance of the benefits relative to some other *desiderata*, in the former case, other criteria for legitimacy, in the latter case, the normative importance to be attached to legitimacy itself. In what follows, I will focus on the idea that if the benefits of an institution are greater enough, in comparison to the non-institutional alternative or some rival institution, then a high score on this criterion for legitimacy can defeat a presumption that the institution is illegitimate because it scores so badly on the criterion of institutional legitimacy.

Defenders of the Court in the face of challenges to its legitimacy have cited three distinct benefits: (1) deterrence of the crimes the Court is authorized to prosecute, (2) the eliciting of evidence of crimes that witnesses would not have been willing to provide were it not for the prospect of prosecution, and (3) the Court's providing a valuable model that has led to doctrinal and procedural improvements in some domestic criminal justice systems. At this point, factual uncertainties loom large. There is disagreement among empirical investigators of the Court as to whether these benefits exist and, if so, how robust they are.[14] But

14. *See* Hyeran Jo & Beth A. Simmons, *Can the International Criminal Court Deter Atrocity?*, 70 INT'L ORG. 443 (2016) (concluding that the ICC does promote deterrence in some instances); Jack Goldsmith & Stephen D. Krasner, *The Limits of Idealism*, 132 DAEDALUS 47 (2003) (predicting adverse consequences of universal jurisdiction); Julian Ku & Jide Nzelibe, *Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?*, 84 WASH. U. L. REV. 777 (2006) (finding that prosecution is not likely to deter crimes against humanity); Kate Cronin-Furman, *Managing Expectations: International Criminal Trials and the Prospects for Deterrence of Mass Atrocity*, 7 INT'L J. TRANSITIONAL JUST. 434 (2013) (considering the deterrence effect of international courts to be unproven); Eric S. Fish, *Peace Through Complementarity: Solving the Ex Post Problem in International Criminal Court Prosecutions*, 119 YALE L. J. 1703 (2010) (classifying the deterrence value of the ICC as weak); Kirsten Ainley, *The International Criminal Court on Trial*, 24 CAMBRIDGE REV. INT'L AFF. 309 (2011) (evaluating both the merits and the drawbacks of the ICC's existence and operation).

there is also normative uncertainty: we need, but lack, a principled account of how robust the various benefits would have to be in order to mitigate the legitimacy deficit produced by invidiously selective prosecution to the point where the presumption that this deficit renders the institution illegitimate is defeated. The deeper normative uncertainty, as I have already suggested, is that we have no principled way to set the threshold in the first place.

E. A Conceptual Uncertainty with Normative Implications

The second major complaint about the legitimacy of the ICC, the charge that its jurisdiction is arbitrarily circumscribed, must be carefully distinguished from the allegation of invidiously selective prosecution. The latter is the allegation that the Court does not honor the principle of equality before the law in matters *over which it has jurisdiction*. The charge of arbitrarily circumscribed jurisdiction is that although the Court is an international criminal court, its jurisdiction is limited in a morally unjustifiable way: states that have not ratified the ICC Treaty—including the world's three strongest military powers—are not subject to prosecution by the Court (unless their agents have committed crimes in states that are ratifiers). This, too, is said to be an affront to the principle of equality before the law: the most powerful states can commit crimes for which other states would be prosecuted but go scot-free. The gravity of this complaint is mitigated to some degree by the fact that the Court can prosecute crimes committed in the territory of a state party that are committed by agents of states that are not state parties. Yet the effectiveness of any such effort may depend upon the voluntary cooperation of the state whose agents are alleged to have committed the crimes and/or of the U.N. Security Council. If the state in question is extremely powerful and also is a permanent member of the Security Council—as is the case with the United States—then the probability that its agents will be prosecuted by the Court may be rather low.

It is clear that the Court's jurisdiction is circumscribed and that its being circumscribed in the way it is results in some states not being subject to prosecution even when they commit crimes that are as serious or more serious than those committed by parties that are subject to prosecution. But it is not clear that this situation represents a legitimacy deficit *of the ICC*, rather than 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. Were the ICC to attempt to impose its authority on states that are not subject to its treaty-based jurisdiction, it would act illegally under international law. What is more, it would thereby unilaterally repudiate a fundamental constitutional principle of the international legal system, the principle of state consent. To lay the problem of arbitrarily circumscribed jurisdiction at the Court's door is to beg a deep and difficult question: for purposes of legitimacy assessments, how are the boundaries of an institution to be drawn—what is encompassed by the institution and what is not?

Consider two extremes with regard to how the boundaries of the Court might be drawn. On the one hand, one might draw the boundaries very narrowly, so as to encompass only the roles of the judges themselves and the Prosecutor (along with their supporting staff) and the norms they follow as they exercise their official

duties in "open court." On the other hand, one might draw the boundaries in a much broader, functional way, so as to encompass the whole set of agents and institutions that are significantly involved in the legal process that begins with a "matter" being brought to the Court's attention and concludes with not just a judgment of guilt, innocence, or acquittal, but also enforcement of a verdict. As a matter of fact, the ICC is massively dependent on the cooperation of many other agents, some institutional and some private, at various points in this complex, temporally-extended process. The Court depends on the cooperation of states that have ratified the Court's Treaty and on the U.N. Security Council for various types of resources without which it could not operate. It also depends on various human rights NGOs, especially for their fact-finding services.

In fact, the boundary-drawing issue can arise at another level: if the complaint is that the Prosecutor has failed to pursue with vigor allegations that the agents of certain states have committed crimes falling under the Court's jurisdiction, one might conclude that this impugns the legitimacy of the Prosecutor (or his or her actions), rather than the Court. In other words, an adequate theory of institutional legitimacy would have to include guidance for determining when the components of an institution should be disaggregated for the purpose of making legitimacy judgments.

My aim here is not to endorse any particular characterization of the boundaries of the Court as an institution. The point, rather, is that there are quite different ways to draw the boundaries (or characterize the identity) of an institution and that these will have different implications for how one assesses the institution's legitimacy.

A distinctive characteristic shared by most international institutions further complicates the boundary-drawing problem. Not just the ICC, but international institutions generally depend on "private enforcement" of their norms, that is, upon states taking it upon themselves to play the role of enforcer, if not by wielding coercion against noncompliers, at least by imposing some sort of cost on them. This is true, for example, of the World Trade Organization (WTO). That organization possesses no military or police force of its own. The WTO's Dispute Resolution Panel pronounces judgments in particular cases and in effect issues "retaliation permits" to the aggrieved state, allowing it to enforce the judgment by engaging in behavior toward the guilty party that would otherwise be prohibited by the organization's rules. This private enforcement mechanism has its problems; in particular, the ability of economically weak countries to "enforce" judgments against more powerful states is quite limited. Some have argued that this unfairness deprives the WTO of legitimacy. In doing so, they have implicitly made—and failed to justify—a particular understanding of how the boundaries of the institution ought to be drawn for purposes of legitimacy assessments.

If one draws the boundaries of the WTO in a broadly functional way, so as to encompass enforcement of the Dispute Resolution Panel's judgments through the actions of individual states, then one will conclude that the lack of even-handed enforcement is a defect *of the WTO*. In effect, one will describe the WTO as an institution that includes not only public adjudication of disputes, but also enforcement processes that are carried out by states, acting as agents of the

institution. If one draws the boundaries of the ICC much more narrowly, one may conclude that the unfairness of the private enforcement mechanism is a consequence of a failure of the wider international legal system—and perhaps one that deprives *it* of legitimacy—but that it does not follow that the ICC has a legitimacy deficit.

F. Institutional Control and Institutional Boundaries

My aim here is not to solve the institutional boundary problem, either generally or in the case of the ICC, but rather to point out that there is a problem and that until it is solved institutional legitimacy assessments will remain inconclusive. Nonetheless, to drive home these points it may be useful to provide a glimpse of how a discussion to solve the problem might proceed.

My speculation is that employing a broadly functional characterization of the boundaries of the WTO and then using it to argue that this institution has a serious legitimacy deficit makes sense only on the unstated assumption that it is within the power of the WTO either to create a genuinely public enforcement mechanism (which it certainly could not do) or to modify the existing private enforcement arrangement so as to ameliorate its unfairness. Some have suggested that one way to achieve the latter would be for the WTO to create a market in "retaliation permits," so that a weaker state who received a favorable judgment by the Dispute Resolution Panel could either sell its permission to retaliate to an economically stronger state (or perhaps a regional organization of states like the European Union) or pool its permit with those of other weak states. Whether or not this modification of the enforcement mechanism or some alternative would significantly reduce the problem of uneven enforcement is disputable. But the point is that the charge that uneven enforcement is a legitimacy deficit *of the WTO* is most plausible only if one adds the assumption that it is within the power of the institution to correct this deficiency. In other words, it may make sense to draw the boundaries of the WTO in a broadly functional way so as to encompass the enforcement of its judgments if that institution has control or legitimately can gain control over the character of the enforcement process.

Suppose, for the sake of argument, that the WTO could legitimately modify its enforcement mechanism so as to eliminate or reduce the current unfairness that afflicts the latter, by creating a market in retaliation permits. If that is correct, then the case of the ICC is quite different. Neither the judges, nor the Prosecutor, nor any other agent of the Court, nor the states that have ratified the treaty that created the Court have the authority to bring states that have not ratified the treaty under the Court's jurisdiction: like other international courts, the ICC does not have compulsory jurisdiction; instead, jurisdiction is determined by consent. The fact that the strongest countries are excluded from the Court's jurisdiction is a flaw in the overall process by which cases are brought to the Court's attention and then either prosecuted or not; but it does not follow that this is a flaw *of the Court*; nor a fortiori that it is a legitimacy deficit of the Court. Instead, the flaw is the result of two deep, structural features of the international legal system: the fact that international courts are creatures of treaties and hence of state consent; and the fact

that there are such gross disparities of power among states that the stronger ones can afford to abstain from ratifying even the most commendable and morally imperative treaties. Or so one might argue, if one assumes a narrow understanding of the identity of the ICC.

To repeat: my goal is not to articulate and defend a determinate stance on the problem of drawing institutional boundaries for purposes of legitimacy assessments. I have merely suggested that agency or control may be a relevant factor—that whether an institution should be regarded as encompassing certain parts of the larger processes within which it operates may depend on whether the institution's agents have control over them. I have only made this suggestion to try to convey how complex the issue of drawing institutional boundaries is and to make it clear that institutional legitimacy assessments that simply assume, rather than argue for, a particular way of drawing the boundaries are thereby rendered problematic. Critics of the ICC who say that it is either illegitimate or suffers a serious legitimacy deficit because the most powerful states are not subject to its jurisdiction have simply begged the question as to how the conceptual uncertainty of boundary drawing is to be answered. If institutional legitimacy judgments are to be well-grounded, they must rely on a theory of legitimacy that argues for, rather than merely assumes, a solution to the boundary-drawing problem.

CONCLUSION

The legitimacy of the ICC is often challenged or denied outright. The two most important legitimacy deficits of the Court are said to be its pattern of invidiously selective prosecution and its arbitrarily circumscribed jurisdiction. A well-grounded evaluation of the allegation of legitimacy deficits requires the resolution of three distinct types of uncertainties: (1) normative uncertainty about how to weight a plurality of criteria for legitimacy and about how to specify a threshold in order to justify the judgment that an institution is either legitimate or not; (2) factual uncertainty as to the existence and magnitudes of various benefits the existence of the Court provides (uncertainties which must be resolved in order to begin to determine whether the benefits offset the legitimacy deficits); and (3) conceptual uncertainty as to how to draw the boundaries of an institution, in order to determine whether a flaw in the overall process in which it plays a role is a legitimacy deficit *of the institution* or a defect of the larger institutional environment in which the institution is embedded.

Although no attempt has been made here to canvass all accounts of institutional legitimacy currently on offer, it seems clear enough that none of the most developed and influential accounts would be capable of resolving the normative and conceptual uncertainties, even if the factual uncertainties were to be conclusively resolved. If disputes about institutional legitimacy are to rise above a brute clash of ungrounded intuitions, their resolution must be guided by theory. But at present, theoretical groundings for claims about institutional legitimacy are seriously incomplete.

I will end this investigation with what may be to some a troubling thought: if it is unlikely that any theory of institutional legitimacy in the foreseeable future

will be sufficiently developed to resolve the conceptual and/or normative uncertainties in a convincing way, what are the implications for the relationship between the theory and the practice of institutional legitimacy assessments? More specifically, is it the most responsible course of action for those concerned to bring about institutional improvements to frame their advocacy in terms of legitimacy or by using other normative concepts?