

**RESPONSE TO ALLEN BUCHANAN’S “THE COMPLEX
EPISTEMOLOGY OF INSTITUTIONAL LEGITIMACY
ASSESSMENTS, AS ILLUSTRATED BY THE CASE OF THE
INTERNATIONAL CRIMINAL COURT”, MANUSCRIPT,
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The work of Allen Buchanan on the normative theory of international law stands apart. One can think of three contributions that have largely enabled the emergence and progression of that scholarly field. His monograph, *Justice, Legitimacy and Self-Determination: Moral Foundations for International Law*,¹ was the first systematic normative assessment of the international legal order. His more recent book on human rights law, *The Heart of Human Rights*,² is the first normative evaluation of the international legal system of human rights protection. Additionally, his article on the very notion of legitimacy³—developed with Bob Keohane—has, again, generated a strand of research of its own on international institutions more broadly construed.

Buchanan’s recent article, which appears in this journal issue, also stands apart. On the one hand, it is Buchanan’s first piece specifically dedicated to the International Criminal Court (ICC). On the other hand, Buchanan relies on his own account of legitimacy to critically examine the current legitimacy literature on that particular institution. The piece, therefore, has the taste of an experiment. The driving question is epistemological: do we *know* enough to make conclusive arguments about the normative legitimacy of the ICC? His critical assessment, in a nutshell, is that while the arguments of *selective prosecution* and *arbitrary circumscription of jurisdiction* of the ICC are sound, they are epistemologically incomplete *factually, conceptually, and normatively*. The normative deficit is not the lack of legitimacy criteria; rather, it is the lack of “a principled method of weighting different criteria when an institution scores high on some and low on

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1. ALLEN BUCHANAN, *JUSTICE, LEGITIMACY AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW* (2004).

2. ALLEN BUCHANAN, *THE HEART OF HUMAN RIGHTS* (2013).

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

others, so as to be able to make an all-things-considered assessment; and . . . a binary legitimacy assessment—that an institution is legitimate or illegitimate *tout court*”⁴ and that also applies to Buchanan’s own account. The only and rather modest argument Buchanan makes here is 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.”⁵

In this short response, I want to briefly state some elements of Buchanan’s critical assessment and then zoom in on one notion of his own legitimacy framework, the one of “chief justifying functions.”⁶ The point of focusing on this notion is to evaluate the extent to which his epistemological concern(s) apply to the ICC specifically and not to other international courts and institutions more generally. On this basis, I will then argue that Buchanan does not sufficiently engage with the indeterminacy of the ICC’s core function(s). It seems to me that Buchanan’s approach to the ICC is primarily informed by his prior work on international law and institutions (more broadly construed) and human rights institutions in particular. At this point, his approach to the ICC is not responsive enough to some internal legitimacy concerns that are distinctive to the criminal realm. I conclude, somewhat ironically, that the epistemological deficits are even worse in the ICC’s case, but that Buchanan’s current approach is ill-suited to fully track them.

I. FROM LEGITIMACY TO THE ICC

It clearly appears from the first parts of the article that Buchanan’s goal is to *apply* his well-developed approach on institutional legitimacy to this novel object—the ICC—and appropriately so, given how fruitful this framework has been. This top-down methodology, however, may come at some cost. Clearly, the discussion of the three predominant models of legitimacy⁷ applies to all and every authority. The distinction between binary and scalar legitimacy assessments is similarly general. Until Part IV of the article, questions remain unanswered on whether the epistemological deficits are particular to the ICC—such that the ICC may affect how one should think about legitimacy itself—or whether the ICC has some feature(s) that require the framework to be adjusted. This concern is apparent in the application of two of the criteria that Buchanan takes to be particularly relevant to the ICC, namely *comparative benefit* and *institutional integrity*. In Buchanan’s view the ICC is, overall, sufficiently similar to other international

4. Allen Buchanan, *The Complex Epistemology of Institutional Legitimacy Assessment, as Illustrated by the Case of the International Criminal Court*, 33 TEMP. INT’L & COMP. L. J. 323, 325 (2019).

5. *Id.* at 328.

6. *Id.* at 332.

7. Buchanan & Keohane, *supra* note 3; JOSEPH RAZ, *THE AUTHORITY OF LAW* (2d ed. 2009); A. JOHN SIMMONS, *JUSTIFICATION AND LEGITIMACY: ESSAYS ON RIGHTS AND OBLIGATIONS* (2001).

institutions to be similarly assessed. But it seems to me that before—or in addition to—comparing and assessing the ICC along these lines, the very nature and function of these institutions qua international courts has to be sufficiently similar too. And I doubt that this step is achieved in this preliminary article.

The definition of *institutional integrity* in Part I further reinforces the generality, rather than the distinctiveness, of the legitimacy deficit of the ICC. Buchanan rightly terms the Part III “the Distinctive Legitimacy Deficits of the ICC.”⁸ True, the ICC might be particularly concerned since the prosecution it exercises is *invidiously* selective. In other words, the ICC is performing substantially worse than other international bodies on this particular count. This conclusion inevitably supposes comparing the ICC to comparable institutions, and this could loom large, since it applies to virtually any (international) court. For instance, one could say that the European Court of Human Rights’ application of the *margin of appreciation*—in particular, when it abstains from balancing rights and public interests by deferring to their state subjects—is also departing from institutional integrity, but less so. Again, this methodological direction of applying pre-determined criteria does not explain if the ICC is sufficiently comparable in terms of the purpose(s) and function(s). So, while fully agreeing with Buchanan about the outcome of the application of the comparative benefit and institutional integrity criteria to the ICC, I am wondering if these criteria exhaust the legitimacy concerns one could have concerning it.

II. WHAT ARE THE CHIEF FUNCTION(S) OF THE ICC?

To further develop this point, I want now to zoom in on one notion that forms part of the institutional integrity criterion, the one of *chief justifying functions*. I believe that exploring this notion can shed further light on the high—and perhaps excessive—level of dependence of Buchanan’s treatment of the ICC on his pre-determined account of legitimacy. In his terms, the notion of chief justifying function is highly relevant to the overall project of legitimacy assessment to the extent that “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.”⁹ In other words, the match between function and behavior is key.

What is interesting about the notion of “chief justifying functions” is that its content is not determined by moral reasoning at all. Indeed, Buchanan explains that “[d]ifferent 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.”¹⁰ In other words, legitimacy assessment consists of examining the fulfillment of a chief justifying function, but identifying the chief function is, to a large extent at least, beyond normative judgment. Surely, these functions must be morally justifiable to start

8. Buchanan, *supra* note 4, at 332.

9. *Id.*

10. *Id.*

with. But that does not say which function(s) the ICC specifically and distinctively operates. There are indications that Buchanan understands the function of the ICC in consequentialist terms when he repeatedly refers to the benefits of deterrence, the eliciting of evidence of crimes, and the role model of the ICC for domestic systems that must be comparably higher.¹¹ However, it is not the case that he has first established that the principal function of the ICC should be justified along these lines.

I want to argue that Buchanan does not sufficiently engage with the indeterminacy of the chief justifying functions of the ICC. As already mentioned, the fault line in my view is to assume that the ICC is sufficiently comparable qua international court. That is the step prior to the applicability of his pre-determined framework. To further clarify and illustrate this point, consider again the analogy with human rights institutions, Buchanan's other seminal area of research. At various points in his article, and particularly when addressing the notion of chief justifying functions, Buchanan draws analogies with human rights institutions: "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."¹² Yet, human rights courts and international criminal courts are radically different. One categorical difference is that human rights obligations apply to states, whereas international criminal responsibility applies to individuals. Does this discrepancy change anything to the comparability of these institutions and, if so, to their legitimacy concerns? I think it does.

In my view, the main reason why the ICC's chief function is sufficiently different to deserve a slight departure from Buchanan's framework has to do with the fact that it is a *criminal* court. At the very least, a court being criminal poses distinctive questions of legitimacy by virtue of the level of coercion that it exercises upon individuals. As Malcolm Thorburn puts it in the domestic context, "[w]hen trying to make sense of an institution that causes as much hardship as our system of criminal justice, it is perfectly natural to ask what good we mean to bring about through all this suffering."¹³ Exercising coercion over individuals through the criminal law supposes that, initially, the criminal responsibility of individuals has been legitimately established. To use the words of Antony Duff and Sandra Marshall, "[t]o admit that I am responsible for [something], or to be held responsible for [something] by others, is to admit that I must answer, or to be called to answer, for [something]."¹⁴ Thus, until the criminal responsibility of individuals in the international context is established, the ICC is not conferred

11. *Id.* at 334.

12. *Id.* at 332.

13. Malcolm Thorburn, *Criminal Law as Public Law*, in *THE PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW* 21 (R. A. Duff & Stuart P. Green eds., 2011).

14. RA Duff & SE Marshall, *Criminal Responsibility and Public Reason*, in *LAW AND PHILOSOPHY* 224, 226 (Michael Freeman & Ross Harrison eds., 2007) (using "Φ-ing" in place of "something").

legitimacy qua international criminal court. Now, I am confident that the internal resources of Buchanan's framework may help here—my only point is that this legitimacy concern is not explicitly addressed and that it is internal to and distinctive of criminal law. It is also distinctive of international criminal law in that criminal responsibility supposes the existence of a corresponding community to be held responsible against, and the very nature of that community in international criminal law remains unclear. That question, in my view, is not fully addressed in this article.

III. CONCLUSION

To conclude, I worry that, so far, Buchanan's extension of his legitimacy framework to the ICC may be conditioned by his seminal work on international institutions on the one hand and his work on human rights on the other. Extending the analysis of these path-breaking contributions has the virtue of drawing on a well-developed and highly influential framework but may have the unintended effect of overlooking the legitimacy issues that are internal to international criminal law. It is also telling that the vast majority of scholars cited in this article are international criminal law scholars and political theorists, but not criminal law theorists. Now, one could say that precisely because these other issues fall outside of Buchanan's pre-determined framework, they are not relevant. But are they thereby also out of the realm of legitimacy?