

SYMPOSIUM ON GLOBAL DEMOCRACY

# Deliberation and Global Criminal Justice: Juries in the International Criminal Court

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As part of a broad scholarly discussion about how democratic practices may be integrated into global political culture, this article identifies an as yet unrealized opportunity to bring deliberative democracy and an additional infusion of legitimacy into international governance. We propose that a fully developed set of democratic global institutions should include, in some manner, one of the most venerable citizen-centered deliberative mechanisms—the jury. A handful of countries, such as Japan, Russia, and Argentina, have made varying degrees of progress in recent years toward incorporating new jury systems to burnish their legal institutions.<sup>1</sup> Furthermore, civic reformers often have regarded the jury system as an important element of public policy-making, as in the case of citizens’ juries—deliberative bodies of typically randomly selected citizens that are asked to consider testimony and evidence to arrive at recommendations on public policy questions.<sup>2</sup> To date, however, there exists no movement toward a multinational or global jury system, and few have ever taken up the cause, even as a matter of conjecture.<sup>3</sup>

Juries can be powerful instruments of public engagement, education, and legitimation. At the national level they offer valuable civic education in self-governance,<sup>4</sup> and there is no reason to assume they could not perform a similar function at the international level. There are many ways in which one could approach the establishment of a global jury. In this article, we develop our argument in relation to one particular venue, the International Criminal Court (ICC). This deliberate narrowing of scope gives us a concrete frame of reference within which to test an abstract philosophical argument, but it also foregrounds

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the most provocative—and, perhaps, most promising—global setting in which a jury might be implemented. We wish to stress our view that a jury may not be appropriate for all cases brought before the ICC, but that under certain circumstances it could contribute significantly to the perceived legitimacy of the Court's decisions and to its function as a legal institution. Neither do we propose simply to transfer the Court's ultimate decision-making power from judges to juries. Rather, we envision a scenario whereby case managers may incorporate citizen deliberation into the process at key stages of the proceedings to foster greater fairness and transparency.

Specifically, our argument has three parts. First, we demonstrate the basis upon which we believe the jury system can confer greater legitimacy on the ICC. Next, we address the most significant logistical challenges to implementing such a system. Finally, we provide a concrete example of just how such a global jury might be developed and managed.

## LEGITIMACY

Public legitimacy—broadly understood as the acceptance of a public institution's authority to govern—has been a foundational tenet throughout the process of establishing the ICC. It was essential in the early stages, when negotiators were developing a framework that would attract a sufficient number of potential member states to ensure viability, and it remains essential now, as decisions in The Hague begin to exert practical political and legal influence. From the pre-ratification debates over jurisdiction to the more recent controversy over Prosecutor Luis Moreno-Ocampo's charging of Sudanese president Omar al-Bashir with war crimes, the question of legitimacy emerges repeatedly as a touchstone for both the ICC's proponents and critics.<sup>5</sup> Michael Struett, for example, notes that “the rules, procedures, and crimes embodied in the ICC statute are the result of a broadly consensual, rational, communicative discourse. Consequently, the ICC stands in a considerably stronger position to gain worldwide respect and legitimacy”; nevertheless, key criticisms persist, “claim[ing] that the ICC prosecutor and judges are insufficiently accountable to others, and therefore the exercise of the ICC's powers is potentially anti-democratic.”<sup>6</sup>

To understand the evolving role of legitimacy in international law, we reach back to the Nuremberg Military Tribunals at the end of World War II, which represent a pivotal moment, not least because they required feats of judicial creativity that

have been characterized as audaciously improvisational. In the political labyrinth of postwar international brinkmanship, national delegations were divided over what sort of justice should be dispensed and how bluntly. It was the United States' new president, Harry Truman, a former judge, who helped tip the balance toward the creation of a tribunal that would forestall accusations of victors' justice and be seen as legitimate in the postwar world community.<sup>7</sup>

Since Nuremberg, legitimacy has resonated as a fundamental principle in attempts to shape and administer the International Criminal Court. As the legal scholar Amy Powell writes, "The appearance of legitimacy is particularly important in the international system, perhaps more so than at the national level. Because international law is not made by elected representatives, its legitimacy rests on shaky ground."<sup>8</sup> Though the 1998 Rome Statute—the treaty that created the ICC—and the current charge of the ICC represent a robustly innovative exercise of legal principles, public legitimacy remains a lynchpin for the continuing efficacy and credibility of the Court.

Every time the Court asserts its power, officials undertake a long chain of decisions designed to advance its mission within a specific set of legal, logistical, and political dynamics. We are by no means suggesting that juries would be required or even desirable in all cases—the Court's hard-won authority is sufficiently broad and robust to pursue its goals with great effectiveness. However, when the exigencies of a particular case leave the Court open to critiques hampering that pursuit, the jury could prove to be a valuable instrument. This might include cases where the perception of victors' justice is particularly acute or where the Court's intervention is hotly contested by populist critics. Any case that hinges on the systemic or historical suppression of an underrepresented population might benefit from the legitimacy conferred by a jury that includes that population.

We will provide a more precise argument for how and when a jury might be employed by the ICC, but first we wish to consider what exactly *constitutes* public legitimacy and the ways in which the ICC might need more of it. Allen Buchanan and Robert O. Keohane have proposed a means of assessing the legitimacy of international institutions, four elements of which have direct bearing on our proposal. Following Buchanan and Keohane, we conclude that a jury may aid the ICC by (1) securing wider public trust and support, (2) enhancing procedural fairness, (3) ensuring deliberative reasoning, and (4) generally embodying democratic values.<sup>9</sup> Both analytically and practically, these four elements are intertwined, but

scrutiny of each individually makes clearer the variety of ways in which a jury system could bolster the ICC's legitimacy.

#### *Public Trust and Support*

First, write Buchanan and Keohane, the legitimacy of a global institution “must take the ongoing consent of democratic states as a presumptive necessary condition.”<sup>10</sup> The more than one hundred signatories to the Rome Statute demonstrate that the ICC has done well in respect to gathering state consent, but there remains significant room for improvement in terms of ratification by more governments and the need to secure broad public support in the coming years. Winning over the United States would constitute a dramatic advance, but the ICC must also remain concerned with its perceived legitimacy in states where international crimes are alleged to occur. In both cases, a jury system may help to secure the necessary legitimacy.

A system of jury service based at the ICC has the potential to profoundly influence the perceptions of those relatively few individuals who would serve as jurors, but it could also have a profound impact on the broader global citizenry. An ICC jury would bring perhaps a few dozen individuals to The Hague in a given term, but through media, local governments, and civic organizations it would symbolically and literally extend the international community to include people who typically do not view themselves in that context. ICC jurors and applicants would step forward, interact face-to-face with counterparts from around the globe, and then return home with concrete experience and valid insights into the meaning of interdependence among nations. In this, the ethic of a “jury of one's peers” is evoked in the context of a global demos—one's peers are other citizens of the world. Such a system would build crucial grassroots awareness, acceptance, and legitimacy for the Court, with the added benefit of enhancing the quality of international criminal justice. In sum, a jury system could bolster public support for the ICC and its national partners.

#### *Institutional Integrity and Procedural Fairness*

Buchanan and Keohane further argue that global democratic institutions must maintain their procedural integrity: “If an institution exhibits a pattern of egregious disparity between its actual performance, on the one hand, and its self-proclaimed procedures or major goals, on the other, its legitimacy is seriously called into question.”<sup>11</sup> Specifically with regard to the ICC, many others have stressed that its legitimacy hangs on its ability to secure the accused's right to a fair trial.<sup>12</sup>

The prosecution of international crimes, even as a direct intervention to protect human rights, always risks the appearance of politicization (as in the common critique of victors' justice in the ad hoc tribunals that commonly follow wars), and a permanent international court was conceived in large part to extend justice more broadly and more consistently.<sup>13</sup> As such, the principles of integrity and fairness become central to legitimacy, not only for the victims of crimes but for the alleged perpetrators as well.<sup>14</sup> The deliberations that led to the Rome Statute and the modern ICC strove to reflect this concern.<sup>15</sup> Structurally, the Court's operations represent a system of balance and evenhandedness, achieved through term limits, appeals procedures, restrictions on prosecutorial power, and so on.<sup>16</sup> From the early stages of the Court's conception to the day the Rome Statute entered into force, a key theme has been the efficacious protection of human rights through a broadly recognized public system built on fundamental principles of fairness. As Dominic McGoldrick has argued,

A factor in a court's international legitimacy is the degree to which it administers equal justice in comparable cases. Equally important is whether it is perceived as doing so. The universal potential of the ICC enhances this element of legitimacy. . . . Its investigations, prosecutions and judgments will be critiqued by standards of equal treatment.<sup>17</sup>

A problem arises for the ICC when, in spite of its procedural safeguards, it comes to be seen as a *political* body, especially when appointing the judges who render its verdicts. As Benjamin Schiff observes in his study of the ICC, "Exhortations in the Statute notwithstanding, selection of the judges appeared more a political campaign by states than a selection based on merit."<sup>18</sup> The jury provides a powerful counterpoint to the accusation of a partial or politicized legal process. From the perspective of scholars familiar with the jury's power as a legitimizing legal institution and its ability to proactively engage citizens in democracy, it seems incongruous that the idea of an international jury should still be so strange. After all, juries were originally developed to help bolster the legitimacy of the government in England, which found that its judgments seemed more fair when rendered by the direct consent—or even direction—of the lay public itself.<sup>19</sup> Thus, the institution of the jury can push aside questions of judicial bias by giving the final decision of guilt or innocence to a body that was randomly—not politically—selected, and one that has no permanent institutional seat or vested interests.

Moreover, recent research has shown that participating in juries tends to increase the public's confidence in the justice system and judges themselves. In other words,

the ICC jurors—as representatives of the international community—are likely to come away not with the belief that the jury protected the public from a corrupt court, but rather that the court *enabled* the jury to render a fair verdict through a high-quality legal process.<sup>20</sup> As should be apparent from such findings, the specific perception of fairness, in turn, further bolsters the public’s general support for and trust in an institution, thereby reinforcing the first criterion for legitimacy introduced earlier.

### *Deliberative Judgment*

A third aspect of legitimacy concerns the nature of judgment in international bodies. Buchanan and Keohane argue that a legitimate global institution “must provide a reasonable public basis for coordinated support for the institutions in question, on the basis of moral reasons that are widely accessible in spite of the persistence of significant moral disagreement—in particular, about the requirements of justice.”<sup>21</sup>

Struett discusses this problem when he writes that the ICC’s legitimacy “depends ultimately on its capacity to persuade observers that the exercise of its powers . . . is consistent with the application of rules that are *universal* in nature” (italics added). With allusion to the language of Jürgen Habermas, Struett argues that “the ICC’s rules must be seen to apply equally to everyone for the communicatively rational justification of the ICC to be sustained over time,” yet “there is good reason to be concerned that the political structure of the ICC, including its reliance on powerful states in the international system, will threaten its capacity to dispense justice in a way that diverse observers agree is principled and just.” In sum, Struett argues that the ICC needs to bolster its “discursive legitimacy.”<sup>22</sup>

To see how juries could reinforce this aspect of the ICC’s legitimacy, let us step back and consider the relationship between deliberative democracy and moral legitimacy. In a democratic system, a decision holds legitimacy if the public consents to it as a legal policy arrived at by an appropriate decision-making body or executive. A democracy distinguishes itself from noncoercive political systems (such as an informal alliance of entirely sovereign nations) in its readiness to *enforce* its decisions on its members. In a benign anarchy, decisions are not “binding”; rather, they are strictly provisional agreements reached by a provisional consensus. In a democracy, by contrast, even those who resist the law through acts of “civil disobedience” still must accept that their actions may earn them time in jail.<sup>23</sup>

Many modern critics of liberal democratic systems have called for a more *deliberative* democracy to move beyond free elections and mass participation to consider the *quality* of public discourse among citizens, between citizens and government, in the media, and within government bodies themselves. In a review of this literature, Simone Chambers describes deliberative democracy as being focused on “the communicative processes of opinion and will-formation that precede voting,” such that the legitimacy of a political system’s outcomes, for instance, ultimately hinges on the quality of its deliberative *process*.<sup>24</sup> John Gastil provides a succinct definition of democratic deliberation that encompasses everything from macro-level elections to micro-level processes, such as juries. In this view, democratic deliberation combines a rigorous analytic process with an egalitarian and respectful social process.<sup>25</sup> Pulling these elements together, one can say that when a deliberative process meets the highest standard of design integrity, it generates a considered judgment that the wider society or organization might, in turn, endorse and support as legitimate. As John Dryzek argues, “Outcomes are legitimate to the extent they receive reflective assent through participation in authentic deliberation by all those subject to the decision in question.”<sup>26</sup>

To secure the deliberative legitimacy of their legal judgments, the United Kingdom and many other countries—particularly those with historical ties to England—already rely on juries,<sup>27</sup> but juries have not made their way into international law. Moreover, critics consider jurors to be susceptible to emotional arguments, ignorant of the law, and generally incompetent in reaching sound conclusions.<sup>28</sup> For example, a recent popular criticism was lodged by Cass Sunstein, who argued that civil juries frequently become polarized, moving to an extreme and irrational judgment that perhaps *none* of the jurors would have supported at the outset.<sup>29</sup> From such skeptical standpoints, juries would do the *opposite* of securing moral legitimacy through deliberation; rather, the jury would undermine the moral authority of the judge and replace it with the capricious, malleable, and exceedingly fallible judgment of a small group of citizens largely ignorant of the law.

The principal problem with these criticisms is that, on closer scrutiny, they focus on data collected in mock juries rather than actual impaneled juries of lay citizens. The most extensive study on the subject found that in nearly four-fifths of actual criminal and civil cases, the jury’s conclusion aligns with the judge’s own view of the case, with the differences showing the jury leaning slightly more toward criminal defendants and, to a lesser extent, plaintiffs, as compared to judges.<sup>30</sup> This not only suggests that nonexpert citizens can in fact be trusted to learn and

apply legal concepts but it also undermines the various claims about how juries routinely diverge from sensible judgments.

Similarly, Lynn Sanders's critique "Against Deliberation" recounts the tremendous asymmetries in participation rates among jurors—differences that reflected preexisting status differences, such as between male and female jurors.<sup>31</sup> However, a recent examination of these claims in an unusually large study of actual juries showed that such differences did not appear.<sup>32</sup> Moreover, the most sophisticated integrations of actual trial data with mock jury experiments, such as those conducted by Valerie Hans, have shown that both criminal and civil juries typically render verdicts that are sound, thorough, and fair.<sup>33</sup> In sum, it is fair to say that juries live up to the standards of the label "deliberative," a word that in many countries has come to be used most commonly in relation to the jury itself.

This strongly suggests that a jury can deliver deliberative judgments, and that it can also confer a corresponding legitimacy on the body that convenes the jury. After all, the jury remains a tremendously popular institution in those jurisdictions that employ it.<sup>34</sup> For the ICC, this could ultimately confer a deliberative legitimacy on its judgments that it cannot claim as easily when its verdicts come at the hands of appointed judges. Admittedly, it would take time for jury deliberation to become appreciated by those unaccustomed to its workings, partly given the popular persistence of the jury's critics, who can always point to one or another exceptional verdict as evidence of the jury's general incompetence. Overcoming such skepticism warrants patience and persistence, however, not dismissal of the jury itself.

### *Global Democratic Values*

A fourth aspect of legitimacy highlighted by Buchanan and Keohane concerns the idea of "global democracy"—something they stress is important but should not be the *principal* basis for assessing the legitimacy of international institutions. They write that while a standard for legitimacy "should not make authorization by a global democracy a necessary condition of legitimacy, it should nonetheless promote the key values that underlie demands for democracy."<sup>35</sup> Buchanan and Keohane operate with a definition of global democracy based on a constrained set of values that includes only "equal regard for the fundamental interests of all persons . . . , decision-making about the public order through principled, collective deliberation . . . , and mutual respect for persons as beings who are guided by reasons."<sup>36</sup> As we have already discussed, the inclusion of the jury could bolster each of these values by promoting fairness and deliberative judgment.



For some critics of the ICC, however, Buchanan and Keohane may not go far enough in articulating the standards for democratic legitimacy of international bodies. For example, the legal scholar Madeline Morris argues that the ICC lacks legitimacy because it privileges its pursuit of global justice above the principle of democratic representation:

The ICC treaty seeks to make important headway in ensuring the accountability of perpetrators of genocide, war crimes, and crimes against humanity. But it does so at a cost to the democratic legitimacy of the ICC itself. Two fundamental values are in tension here—the human right to freedom from violent abuse and the human right to representative government. Neither should be sacrificed. The abuse and suffering of innocent men, women, and children should not be countenanced. And neither should the erosion of democratic governance. Indeed, the two are joined; it is typically the erosion of democracy that leads eventually to violent abuse.<sup>37</sup>

A related observation lowers the legitimacy bar slightly. Some critics worry that the ICC's cosmopolitan aim to secure justice for individuals could run counter to the need for keeping stable the international order, which concerns not individuals but the sovereignty of nation-states.<sup>38</sup>

Establishing a representative, deliberative democratic body that gives all members the chance to participate is a formidable challenge at any level of government. The conventional solution is to elect representatives who, in a global context, typically appoint delegates or judges to serve in a global body. So long as this process begins with democratic elections, the public *may* come to view the decisions of these international institutions as legitimate, but broad public confidence in global institutions has yet to be secured. There is another solution, however, and the jury embodies this alternative. Rather than electing or appointing representatives, authority and deliberative responsibility can be placed in the hands of the public itself, as represented by a randomly selected microcosm.<sup>39</sup> This approach addresses the democratic legitimacy problem by passing judgments on to the public itself.

To this point in history, no legal system has deployed a jury that reaches beyond the confines of a local, state, or federal jurisdiction, but the legitimizing *principle* of a deliberative random sample is being extended in other novel ways. For example, the state of Oregon in the United States is experimenting in 2010 with a deliberative microcosm that will write critiques of ballot initiatives that the Oregon secretary of state will put in official voting guides mailed to every registered voter.<sup>40</sup> The state of California has passed an initiative to do its legislative redistricting through the use of a quasi-random citizen panel.<sup>41</sup> Experiments across the globe with

consensus conferences, planning cells, citizens' juries, and deliberative polls show the potential for deploying deliberative microcosms—including the jury—in novel ways.<sup>42</sup>

One might object to this line of argument claiming that one cannot shift from novel extensions of juries within nation-states to considering the application of the jury to an international body, such as the ICC. In this view, there simply exists no basis for believing in a “global public” from which one could draw a jury. We acknowledge that there exists a dramatic plurality of values—and conceptions of justice—across the globe (though we cannot but notice that deep cultural and moral conflicts already exist within nations employing the jury successfully). At the same time, we agree with Hauke Brunkhorst and others that a proto-public is forming globally—a web of problem-solving communities that have an *emergent* coherence that could sustain global institutions.<sup>43</sup> Individual citizens have increasing access to—and some degree of standing in—a global public sphere loosely analogous to a politically defined demos.

By some accounts, global justice has emerged as the defining principle of the new century.<sup>44</sup> These emphases on human rights and global justice have shifted the balance of power between states and citizens. At several key points in modern international law, human rights have been granted greater weight in relation to national sovereignty.<sup>45</sup> International law has been incrementally reengineered to recognize the individual as an object of scrutiny, including through the process of framing and debating the foundational tenets of the ICC.<sup>46</sup> The establishment of global conventions on human rights does not, in and of itself, establish anything approaching a coherent global demos, but it has brought us closer to the point where we can imagine a representative international body of citizens working together to render a judgment on human rights or other international legal principles.

### *Summary*

As stated earlier, we do not mean to suggest that global legitimacy rests exclusively on the four aforementioned pillars of public trust, procedural fairness, deliberative reasoning, and the embodiment of democratic values. Rather, we have simply demonstrated that each of these counts are important *elements* of legitimacy—both from the standpoint of international theorists hoping to develop a coherent model of global institutional legitimacy and from the perspective of the ICC's critics, who judge that particular institution as incomplete or, less commonly, altogether

illegitimate. Moreover, we believe these elements of legitimacy are precisely those that the jury could provide to the ICC.

The absence of a global jury system could simply reflect the fact that global quasi-democratic institutions remain young themselves, and, in pursuit of ever-greater legitimacy, the jury may find its way into them in due course. More likely, however, we suspect that the direct selection of jurors from among the larger global public strikes even the most populist democratic theorists as an impractical course of action in an international context. In this view, it is hard to imagine how one could draw a cross-section of global citizens *directly* into international institutions. The underlying suspicion here is that such a venture would prove logistically impractical, undermining any promise of legitimacy that the jury might hold. We devote the remainder of this article to addressing these logistical challenges, and we then provide a concrete example of how one might implement such a global jury.

## LOGISTICS

A jury program at the ICC would face many logistical challenges, and we address five such issues below before laying out the design principles of an ICC jury. In order of increasing significance, the challenges we anticipate include: institutionalization, administration and staffing, cost, security, and jury-pool creation. For some of these, we find that the Court has already overcome comparable challenges for its current operations and could accommodate a limited jury system quite easily. We give the greatest attention to the last logistical challenge—assembling the jury pool—owing to the special problems it poses.

### *Institutionalization*

Even in the most practical terms, the procedure to amend the Rome Statute to create a jury would present a significant challenge. According to Article 121, amendments can now be made by a two-thirds majority of the Assembly of States Parties, but they will not enter into force until seven-eighths of the states have officially ratified or accepted them.<sup>47</sup> Thus, the greatest hurdle to adding the jury to the ICC is probably the requirement that the proposal receive the assent of the overwhelming majority of member nations. This is a political challenge, rather than a philosophical or technical one, and it requires persuading member states without a legal tradition of jury deliberation of the efficacy of this proposal. The greatest barrier may be a collective state of mind that cannot conceive of citizens

playing a direct role in global governance, but the history of international law shows that seemingly unlikely ideas *can* become possible when we cultivate the imagination to press them forward.

### *Administration and Staffing*

The managerial capacity native to the ICC should be more than sufficient to oversee a limited jury system. As a bureaucratic task, implementation of such a system would be well within the scope of the responsibilities granted to the four organs of the Court. The Presidency is charged with the administration of the Court and would handle planning and oversight. The Chambers deal most directly with judicial functions and could establish limited but relevant responsibilities for juries within the Pre-Trial, Trial, and Appeals divisions. The Office of the Prosecutor might be expected to exercise certain rights congruent with federal and state prosecutors in terms of impaneling a jury. Finally, the Registry is responsible for managing the public records of Court proceedings, which expand whenever the Court takes on additional tasks. The history of the Court so far suggests that a sufficient infrastructure exists for meeting the administrative challenges of a complex international legal system.

Though experienced administrators would be needed to determine precisely how best to manage a jury system, the existing staff already has experience handling language barriers, travel arrangements, facilities management, and so on. The jury phase of a trial could be sufficiently specific and limited such that very few permanent staff would be required to manage it, and such staff might even be cultivated from within the existing organization.

### *Cost*

The cost of running the ICC is considerable, and the governing bodies have established a commendable ethic of minimizing expenditures and maintaining open reporting. The projected 2009 ICC budget was €102.63 million. Fortunately, we see no administrative functions required by a jury system that do not already exist in some capacity. Management, training, security, travel, translation—all these core functions are already being conducted, efficiently and cost-effectively, somewhere in the Court. Considering the relatively small number of cases the Court is likely to try, we expect that the jury program would be rather limited in scope, at least in terms of the ICC as a whole.

We do acknowledge, however, that establishing new procedures, departments, and positions would require time and money. And not all functions could

be expected to transfer directly. For example, translation systems designed for experienced international judges and officials might need to be expanded to accommodate jurors who have no legal training and whose languages are not currently accommodated at the Court. As with victims and witnesses, it would be of paramount importance that jurors understood precisely what was at stake and what consequences were implied in their decision-making. The advantages offered by a jury system, however, should exceed such costs. Like the work undertaken by the national delegations that developed the Rome Statute, there must be a certain amount of faith that the financial commitments will eventually generate social rewards.

### *Security*

Security concerns for prospective ICC jurors are more significant than staffing or budgetary issues. The Court reviews extremely serious crimes, and some cases will involve extant criminal networks or militias. In addition to protecting individuals from physical harm, the Court would need to guard against intimidation that might threaten a juror's impartiality. Jurors could attract unwanted attention from parties who wished to disrupt the Court's work. To ensure jurors' security, the ICC's jury managers could draw on the example of the Court's Victims and Witnesses Unit, which has already set an extremely high standard for the protection of individuals from whom the Court solicits official assistance.<sup>48</sup> Moreover, individual jurors with exceptional risks of danger could be excused, just as prospective jurors in existing courts are routinely excused from service for lesser hardships.

In cases where the likelihood of violence against jurors from a specific country is still significant, the Court would have at its disposal the larger global pool of jurors. Though we think it is essential to incorporate jurors from the general location where crimes have been committed, the concept of a global community allows for a multiregional, multinational jury pool. Also, as we discuss below, juries need not be compelled to deliver ultimate verdicts or pass extreme sentences; individuals can be brought into the process without making them responsible for every element of the international community's response.

### *The Jury Pool*

The most daunting logistical question concerns the establishment of the jury pool. As we will elaborate in the following section, juries might be drawn from qualitatively different pools depending on the specific context and task a jury faces. In particular, there might exist more conventional jury pools drawn

from a given geographic locale, such as the site of a civil war that has necessitated the Court's intervention. Here, however, we take on the most logistically challenging jury pool, and the one that speaks most directly to questions of legitimacy: that which aims to assemble a diverse cross-section of the global community.

The creation of a global jury pool would need to meet two criteria. First, it would need to contribute to the legitimacy of the Court's larger legal process and institutions. After all, the principal driving force for even considering global juries is precisely the legitimacy that a lay jury can confer on an otherwise abstract, distant international legal institution. The second (and somewhat countervailing) criterion requires that assembling a global jury pool remains a realistically achievable task, one that does not overly tax the limited capacity and resources of the Court. The responsibility for developing and maintaining an international jury pool would presumably be based in The Hague. Lightly staffed regional offices could be established in key locations to oversee informational and administrative functions, such as promoting the program through nongovernmental organizations (NGOs) and public media, coordinating with national and local governments to attract applicants, or leading training sessions.

Recruiting for an ICC jury system would constitute a profound way to cultivate individuals as engaged members of the world community. National governments would have a powerful new reason to inform and involve citizens in a broader public dialogue about international conflict, the costs and benefits of a supranational justice system, and the widespread social and economic benefits of fostering peace. NGOs and civic networks could also be instrumental in communicating procedures and developing social capital around participation. Advertising campaigns could reach vast audiences with messages of global unity, serving both to attract qualified candidates and as a public invitation to learn more about the ICC.

Though compulsory jury service is appropriate within a national context, we envision the ICC jury as voluntary (except, perhaps, within those states that choose to make service compulsory once summoned). A complex global random-selection process could be developed, perhaps following the model of door-to-door national household surveys, which select a limited number of small geographic areas within which they then survey to create the overall national sample. So, too, might each jury pool be drawn from a structured random sample of countries (a representative cross-section of the global community) and, in turn, from individual communities within the sampled countries.

Unlike some other international institutions, an ICC jury could bring together a cross-section of the world's populations in a venue where formal power and influence were genuinely equalized. As to the complexities of equalizing social influence across lines of class, race, gender, and culture, current theory and practice on deliberative processes offer some hopeful evidence that rigorous orientation and training can help juries overcome the challenges posed by socioeconomic inequalities among jurors.<sup>49</sup> After all, such disparities are common to all existing jury systems.<sup>50</sup>

It would be worth considering whether the type of individual who was willing and able to take on a commitment of this nature might bring distinct prejudicial attitudes—that is, might the jury pool skew toward wealthy, educated social activists who have the luxury of temporarily leaving their jobs and families? In this, as in other elements of our proposal, we believe that existing procedures can be adapted to accommodate an international scope. Where applicant selection and juror training were insufficient to overcome such problems, defense attorneys would still have a voice in jury selection through the *voir dire* process.

Once individuals entered the pool of eligible jurors, they would receive preliminary information raising their general awareness of the ICC and preparing them for possible service. Members of the jury pool might receive general training and background over a period of time in their home countries so as to be fully prepared when their term of service begins. Even if only a small fraction of accepted jurors ever serve, as is typical in jury pools, this would be a powerful way for the ICC and the international community to interact with citizens worldwide.

The jury service term would be carefully managed to ensure that jurors could fulfill their deliberative duties efficiently. The system would have to provide ample time for jurors to fully understand the case and come to a decision, while not unduly disrupting people's lives. We imagine a residency of roughly one month, during which different phases of the jury proceedings would be capped at a limited number of days, ensuring an efficient and predictable process (avoiding unnecessarily lengthy deliberations, for example). Multiple juries could even be in residence simultaneously, depending on the Court's caseload.

## DESIGNING AN INTERNATIONAL JURY

At base, an ICC jury system would function much like any other part of the Court. It would be a transparent multistage process, managed and funded through the

Court, and approved by member states. As with other elements of the Court, a jury must be flexible in its design and function. The adaptability that gives ICC officials such effective discretion in managing the operations of the Court would be essential to the legitimacy of a jury system.<sup>51</sup> Considering the breadth of issues facing the Court, the individual case itself should largely determine the design and function of the jury.

In this spirit, ICC jury managers would design a jury suited to each type of case, carefully setting in place for each trial three key design elements: the jury's charge, its composition, and the decision rule—that is, the method by which a jury decides. The first of these elements concerns the jury's specific charge in a given case. As stated at the outset, we do not propose simply to substitute a jury for the decisions of the ICC judges. Rather than tasking jurors with ultimate decisions of guilt or innocence, juries could effectively be used to render specific decisions within the framework of a case, as they often are in state and federal courts in the United States. The second key issue, jury composition, points toward the strategic construction of juries in a range of combinations, each with a different set of advantages (and drawbacks). Finally, there is the matter of the jury's decision rule. Not every decision requires unanimity, and different circumstances might warrant setting different majoritarian thresholds for a jury's decision.

Below, we establish a hypothetical situation to examine how one might combine these three features—charge, composition, and decision rule—to construct a uniquely legitimizing jury. In our hypothetical case, we posit a multiethnic regional conflict involving several nations in which the head of a state government is accused of ordering militias to take actions later determined to be crimes against humanity. After a protracted conflict, military leaders have been deposed, the head of state is in custody, and a period of reconciliation and relative stability has begun.

### *The Jury's Charge*

As the Court prepares to try such a case, it would identify the points at which a jury decision adds the most legitimacy to the proceedings. For example, the multiethnic nature of our hypothetical region suggests that a harsh sentence delivered by judicial fiat could exacerbate lingering resentments in the postconflict environment. By charging a jury with the responsibility of sentencing, therefore, the Court would recognize and incorporate the diverse social and political perspectives present in the region. With that key function established, jury managers could then ask what kind of jury composition best serves that goal.



### *Jury Composition*

Jury managers also would have options available in determining the makeup of a jury, including nationality, regionality, and “hybrid” tribunals. National identity is a powerful force, which manifests itself with lethal consequences during armed conflicts. In cases where nationality would preclude productive deliberation, jury managers could step back and use a wider criterion of regionality to construct a representative microcosm. If the crimes in question were widely dispersed, for example, or ethnic populations had been completely eliminated from the region, then drawing a jury pool from a narrowly defined geographic region would fail to include the wider relevant population. Our hypothetical case—in which established ethnic communities are intact but resentments are simmering—would probably call for both regional and extra-regional jurors, so as to clearly represent the principal players in the conflict, but also to incorporate the voice of the wider international community. This balance between local and outside participants also applies to choosing different nationalities for the jury.

The choice of jurors based on nationality will be similarly complex. International law is a delicate balancing act between national agendas and supranational jurisdiction.<sup>52</sup> In a given case, the international community may perceive a greater or lesser need to be involved. In our imaginary conflict, the objective is to bring ethnic tensions to light, not bury them, and this points to the need for jurors who represent not only different countries involved in the conflict but also different ethnicities within those countries. One can imagine that the jury room deliberation might grow heated in such a situation, but it could also have the tremendous healing potential of representing various ethnic and national discourses in microcosm, which might well make the overarching judicial process more legitimate in the eyes of the affected populations—and of the world.

A third choice worth considering is the “hybrid” tribunal, in which both judges and jurors make up the deliberative body that renders a decision. The tribunal is a foundational institution in international law, but there are currently calls for greater flexibility in these judge-jury hybrids.<sup>53</sup> In the context of an ICC jury, the decision to incorporate judges might depend on a number of factors, such as the legal complexity of the case, the perceived emotional intensity of the conflict, or the general benefit of the legal imprimatur that judges confer. In our scenario, where citizen participation is fully viable and offers a pronounced potential for social healing, it might be preferable to turn over a significant amount of deliberation to lay citizens, though judges would still carefully oversee the process.

### *Jury Decision Rule*

So far, we have designed a hypothetical jury that includes members from around the region, from countries involved in conflict, and from different ethnicities among those countries. Our jury managers have found ways to represent multiple voices and interests, including that of the international community. In this case, regular citizens will determine the final sentence rather than a judge or a hybrid tribunal. These characteristics, then, lead to choosing a decision rule—the last design feature that the jury managers must set.

As with these other parameters of jury design, managers would have options in setting the decision rule for different types of cases, as is already common practice in those nations using juries. The most basic choice is between a unanimous decision rule or some form of supermajority threshold. The default setting for juries should be unanimity, as that is where the jury gains much of its legitimizing power. The popular cultural representation of the jury, such as the classic American film *12 Angry Men* and the 2007 Russian loose remake *12*, hinges on the power of a minority of one to eventually sway an entire jury. Nonetheless, on a case-by-case basis, jury managers might decide that a supermajority or other variation is most appropriate.<sup>54</sup>

To see how alternative decision rules might be fashioned, let us return to the hypothetical example with which we began this section. Presuming a jury size of a dozen (a number that would suit our case with its multiple overlapping interests), jury managers might select six “international” jurors from outside the region and six “regional” jurors from areas closer to the conflict. Among the six regional jurors, ethnic nationals could be represented in equal proportion. Ultimately, the decision rule could stipulate not only the total number voting in agreement but also their composition. In this case, for instance, the Court could require a minimum of nine jurors in agreement, including *at least* four international jurors and *at least* two jurors from each ethnic group within the region. The final decision on sentencing would be the product of not only rigorous deliberation but also compromise across key social rifts. Even if the decision were deemed by some to be “too harsh” or “too light,” the fact would remain that it was reached by a representative group in a process carefully designed to ensure a fair outcome, and overseen by a judge at every stage.

## CONCLUSION

Introducing the jury as a reliable mechanism of international justice would entail more than simply adapting an existing system. An international jury has a different set of requirements and objectives, and it faces unique challenges. As we noted at the outset, a jury may not be appropriate for all cases brought before the ICC, but under some circumstances it could contribute significantly to the perceived legitimacy of the Court's decisions and its function as a legal institution. Beyond the expected logistical challenges of distance and scale, an international jury would have to manage linguistic and cultural differences within the court and among jurors. It would also have to establish legitimacy for the system within a sometimes-skeptical international legal community. These challenges, however, are not new. They are common to the entire project of the Rome Convention from its inception. To understand why an international jury merits more serious consideration, it is critical to balance these challenges against the potential benefits that such a system offers.

The fundamental challenge to the ICC is one of establishing international legitimacy. Are its judges to be trusted as impartial? In the long run, why should any state believe that the ICC is qualified to take on the difficult problem of adjudicating human rights cases that may arise within their own borders or regions? Why should the ICC not be viewed as a threat to sovereignty? This was the position taken by the U.S. government when it refused to accept the jurisdiction of the ICC over U.S. nationals. A jury system that embodies and reflects values familiar to the U.S. system of jurisprudence could help the ICC bridge its legitimacy gap with the United States by putting legal decisions not in the hands of appointed judges but in those of a broader lay public. Moreover, the potential for such appeals reaching a sympathetic ear in the United States are now more likely with the election of President Barack Obama, who has a stronger appetite for international cooperation and public engagement than did his predecessor. In this and other cases, the ICC must look toward innovative means to establish enduring legitimacy as an institution among those nations still reluctant to recognize its authority.

The promise of the jury system is that of legitimacy conferred through direct citizen participation. Whereas victim participation serves to represent the voices of those who have been grievously harmed by war crimes, a jury system can extend both the reach and the meaning of representation to all affected populations. By engaging citizens as jurors across borders, the system could foster crucial networks of mutual awareness, security, and responsibility. In this way, international law might better serve diverse world communities and bring more individuals into the process. It could also serve as a mechanism for reintegrating societies into the community of nations after separation through conflicts or isolationist regimes. An international jury, perhaps more than any other single innovation, could advance the ICC's goal of broadening the reach of justice beyond political and legal elites. Although the jury is no cure-all for the legitimacy challenges confronting the ICC, a jury system would expand and affirm the Court's image as an enduring, legitimate institution that seeks to fairly represent all people in the pursuit of global justice and in defense of human rights.

#### NOTES

- <sup>1</sup> Valerie P. Hans, "Jury Systems Around the World," *Annual Review of Law and Social Science* 4 (2008), pp. 275–97.
- <sup>2</sup> For an overview, see Ned Crosby and Doug Nethercutt, "Citizens Juries: Creating a Trustworthy Voice of the People," in John Gastil and Peter Levine, eds., *The Deliberative Democracy Handbook* (San Francisco, Calif.: Jossey-Bass, 2005), pp. 111–19.
- <sup>3</sup> The strong exception here is Amy Powell, whose law review essay on the subject was invaluable in developing our argument. See Amy Powell, "Three Angry Men: Juries in International Criminal Adjudication," *New York University Law Review* 79 (2004), pp. 2341–80.
- <sup>4</sup> William L. Dwyer, *In the Hands of the People* (New York: St. Martin's, 2002).
- <sup>5</sup> Julie Flint and Alex de Waal, "To Put Justice Before Peace Spells Disaster for Sudan," *Guardian*, March 6, 2009; available at [www.guardian.co.uk/commentisfree/2009/mar/06/sudan-war-crimes](http://www.guardian.co.uk/commentisfree/2009/mar/06/sudan-war-crimes).
- <sup>6</sup> Michael J. Struett, "The Legitimacy of the International Criminal Court," in Michael J. Struett, *The Politics of Constructing the International Criminal Court: NGOs, Discourse, and Agency* (New York: Palgrave Macmillan, 2008), pp. 155, 177.
- <sup>7</sup> Richard Overy, "The Nuremberg Trials: International Law in the Making," in Philippe Sands, ed., *From Nuremberg to The Hague: The Future of International Criminal Justice* (Cambridge: Cambridge University Press, 2003), p. 2.
- <sup>8</sup> Powell, "Three Angry Men," p. 2376.
- <sup>9</sup> These four criteria are adapted from Allen Buchanan and Robert O. Keohane, "The Legitimacy of Global Governance Institutions," *Ethics & International Affairs* 20, no. 4 (2006), pp. 405–37.
- <sup>10</sup> *Ibid.*, p. 417.
- <sup>11</sup> *Ibid.*, p. 422.
- <sup>12</sup> Aaron Fichtelberg, "Democratic Legitimacy and the International Criminal Court: A Liberal Defence," *Journals of International Criminal Justice* 4, no. 4 (2006), pp. 765–785.
- <sup>13</sup> Gerry Simpson, "Politics, Sovereignty, Remembrance," and Dominic McGoldrick, "The Legal and Political Significance of a Permanent International Criminal Court," in Dominic McGoldrick, P. J. Rowe, and Eric Donnelly, eds., *The Permanent International Criminal Court: Legal and Policy Issues* (Oxford: Hart Publishing, 2004), pp. 48–51 and 459–60, respectively.
- <sup>14</sup> Hans Köchler, *Global Justice or Global Revenge? International Criminal Justice at the Crossroads* (Vienna: Springer-Verlag, 2003), pp. 9–13.
- <sup>15</sup> Fichtelberg, "Democratic Legitimacy and the International Criminal Court," p. 782; see also Dominic McGoldrick, "Criminal Trials Before International Tribunals: Legality and Legitimacy," in McGoldrick, Rowe, and Donnelly, eds., *The Permanent International Criminal Court*, p. 10.
- <sup>16</sup> Fichtelberg, "Democratic Legitimacy and the International Criminal Court," p. 767.

- <sup>17</sup> McGoldrick, "The Legal and Political Significance of a Permanent International Criminal Court," p. 455.
- <sup>18</sup> Benjamin N. Schiff, *Building the International Criminal Court* (Cambridge: Cambridge University Press, 2008), p. 142.
- <sup>19</sup> Dwyer, *In the Hands of the People*, p. 32.
- <sup>20</sup> John Gastil, Perry Deess, Phil Weiser, and Cindy Simmons, *The Jury and Democracy: How Jury Deliberation Promotes Civic Engagement and Political Participation* (New York: Oxford University Press, forthcoming).
- <sup>21</sup> Buchanan and Keohane, "The Legitimacy of Global Governance Institutions," p. 417.
- <sup>22</sup> Michael J. Struett, "The Politics of Discursive Legitimacy: Understanding the Dynamics and Implication of Prosecutorial Discretion at the International Criminal Court," in Steven C. Roach, ed., *Governance, Order, and the International Criminal Court* (New York: Oxford University Press, 2009), pp. 107–10.
- <sup>23</sup> See Robert A. Dahl, *On Democracy* (New Haven, Conn.: Yale University Press, 1998).
- <sup>24</sup> Simone Chambers, "Deliberative Democratic Theory," *Annual Review of Political Science* 6 (2003), p. 308.
- <sup>25</sup> John Gastil, *Political Communication and Deliberation* (Thousand Oaks, Calif.: Sage, 2008), pp. 8–10.
- <sup>26</sup> John S. Dryzek, "Legitimacy and Economy in Deliberative Democracy," *Political Theory* 29 (2001), pp. 651–69. Jürgen Habermas, *Legitimation Crisis* (Boston: Beacon Press, 1975), offered an early, influential analysis of the relationship between system legitimacy and public discourse.
- <sup>27</sup> See Neil Vidmar, "A Historical and Comparative Perspective on the Common Law Jury," in Neil Vidmar, ed., *World Jury Systems* (New York: Oxford University Press, 2000), pp. 1–52; and Neil Vidmar and Valerie Hans, *American Juries: The Verdict* (Amherst, N.Y.: Prometheus, 2007).
- <sup>28</sup> For an overview of such criticisms, see Powell, "Three Angry Men," pp. 2353–56.
- <sup>29</sup> Cass R. Sunstein, "The Law of Group Polarization," *Journal of Political Philosophy* 10 (2002), pp. 175–95.
- <sup>30</sup> Harry Kalven, Jr., and Hans Zeisel, *The American Jury* (Boston: Little, Brown, 1966).
- <sup>31</sup> Lynn Sanders, "Against Deliberation," *Political Theory* 25 (1997), pp. 347–76.
- <sup>32</sup> Andrea Hickerson and John Gastil, "Assessing the Difference Critique of Deliberation: Gender, Emotion, and the Jury Experience," *Communication Theory* 18 (2008), pp. 281–303.
- <sup>33</sup> For thorough reviews of the record of criminal and civil jury deliberation, see Vidmar and Hans, *American Juries*; and Valerie P. Hans, *Business on Trial: The Civil Jury and Corporate Responsibility* (New Haven, Conn.: Yale University Press, 2000). See also Vidmar, "A Historical and Comparative Perspective on the Common Law Jury"; and Gastil, *Political Communication and Deliberation*, chap. 6.
- <sup>34</sup> See Gastil et al., *The Jury and Democracy*; and Vidmar and Hans, *American Juries*.
- <sup>35</sup> Buchanan and Keohane, "The Legitimacy of Global Governance Institutions," p. 417.
- <sup>36</sup> *Ibid.*, p. 433.
- <sup>37</sup> Madeline Morris, "The Democratic Dilemma of the International Criminal Court," *Buffalo Criminal Law* 5 (2002), p. 600.
- <sup>38</sup> For a discussion of this criticism, see Catherine Lu, "The ICC as an Institution of Moral Regeneration," in Michael Milde, Richard Vernon, and Joanna Harrington, eds., *Bringing Power to Justice? The Prospects of the International Criminal Court* (Montreal: McGill-Queen's University Press, 2006), p. 195.
- <sup>39</sup> Lyn Carson and Brian Martin, *Random Selection in Politics* (Westport, Conn.: Praeger, 1999).
- <sup>40</sup> For the complete text of this bill, see [gov.oregonlive.com/bill/HB2895](http://gov.oregonlive.com/bill/HB2895). The nongovernmental organization Healthy Democracy Oregon, which championed the CIR through the Oregon legislature, is likely to be the organizer of the panels. See [www.healthydemocracyoregon.org](http://www.healthydemocracyoregon.org).
- <sup>41</sup> In 2011, California will create a redistricting panel that has a random-selection element as part of a complex citizen-panel selection process. This was established by Proposition 11, which passed in the 2008 general election. See [ca.lwv.org/lwvc/action/redistrict/index.html](http://ca.lwv.org/lwvc/action/redistrict/index.html).
- <sup>42</sup> See Gastil and Levine, eds., *The Deliberative Democracy Handbook*, esp. chaps. 5–8.
- <sup>43</sup> Hauke Brunkhorst, "Globalising Democracy Without a State: Weak Public, Strong Public, Global Constitutionalism," *Millennium: Journal of International Studies* 31 (2002), pp. 675–90.
- <sup>44</sup> John Gerring, "Global Justice as an Empirical Question," *PS: Political Science & Politics* 40, no. 1 (2007), pp. 67–77.
- <sup>45</sup> Köchler, *Global Justice or Global Revenge?*, p. 1.
- <sup>46</sup> Adriaan Bos, "The International Criminal Court: A Perspective," in Roy S. Lee, ed., *The International Criminal Court: The Making of the Rome Statute—Issues, Negotiations, Results* (The Hague: Kluwer Law International, 1999), p. 468.
- <sup>47</sup> The Rome Statute of the International Criminal Court, art. 121, p. 85; available at [www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome.Statute.English.pdf](http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome.Statute.English.pdf).
- <sup>48</sup> International Criminal Court, "Victims and Witnesses Protection"; available at [www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Protection/Victims+and+Witness+Unit.htm](http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Protection/Victims+and+Witness+Unit.htm) (accessed December 16, 2009).

- <sup>49</sup> On juries in particular, see Hickerson and Gastil, “Assessing the Difference Critique of Deliberation.” For examples of how to handle these challenges, see the methods in Gastil and Levine, eds., *The Deliberative Democracy Handbook*.
- <sup>50</sup> See Vidmar and Hans, *American Juries*.
- <sup>51</sup> ICC guidelines read, “Participation before the Court may occur at various stages of proceedings and may take different forms, although it will be up to the judges to give directions as to the timing and manner of participation.” International Criminal Court, “Victims and Witnesses”; available at [www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Victims](http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Victims) (accessed December 16, 2009).
- <sup>52</sup> Köchler, *Global Justice or Global Revenge?*, p. 4.
- <sup>53</sup> Anthony Costi, “Hybrid Tribunals as a Viable Transitional Justice Mechanism to Combat Impunity in Post-Conflict Situations,” *New Zealand Universities Law Review* 22, no. 2 (2006), pp. 213–39.
- <sup>54</sup> Civil and criminal juries use different decision rules, and different rules are sometimes used to distinguish low- from high-stakes criminal cases (e.g., misdemeanors versus felonies). See Vidmar and Hans, *American Juries*.