

A Deliberative Design for Securing Global Justice:
Imagining Juries in the International Criminal Court

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ABSTRACT

Many proponents of stronger and more democratic international institutions focus on the deliberative qualities of those bodies, advocating practices and norms that emphasize broad participation, careful problem analysis, and respectful discourse. The jury system is one of the oldest deliberative democratic bodies, and it has a fairly robust historical record spanning hundreds of years in numerous countries. As scholars and civic reformers envision a deliberative democratic global public sphere and multi-national institutions, we advocate the inclusion of juries of lay citizens as a means of administering justice and promoting deliberative norms. Juries could present novel logistical, philosophical, and legal problems, but each of these might be overcome to make juries a viable element of international governance. To provide a concrete illustration of this idea, we propose incorporating juries into the toolkit of procedures used in the International Criminal Court.

As part of a broad scholarly discussion about how democratic practices may be integrated into global political culture, this paper identifies an as-yet-unrealized opportunity to foster multi-national cohesiveness through the legitimacy of deliberation. 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. The jury has already had some traction as a means of democratic reform. A handful of countries, such as Japan, South Korea, and Mexico, have made varying degrees of progress toward incorporating new jury systems to burnish their legal institutions.¹ In the political realm, many democratic reformers have taken the jury seriously as an *analogy* for public-policymaking, as in the case of the Citizen Juries that began in the United States but have appeared in England, Australia, Mali, and a wide range of other countries.² To date, however, there exists (to the best of our knowledge) no movement toward a multi-national or global jury system, and few have ever taken up the cause, even as a matter of conjecture.³

At the outset, we wish to acknowledge that the jury system has specific political-cultural roots, which have resulted in its widest application in those countries historically linked to England.⁴ Thus, many nations have nothing resembling a jury system, and its use in global affairs may be limited to those instances in which the jury at least has *some* cultural resonance for the parties most directly involved. We also wish to stress that there are many different ways in which one could approach the establishment of a global jury. In the interest of parsimony, we develop our argument as a model existing hypothetically within 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.

Having made these qualifications, we hope to show that juries can be powerful instruments of public engagement, education, and legitimation. At a national level, they offer valuable civic education in self-governance and there is no reason to assume they could not perform a similar function at the international level. Juries have the capacity to bring to life to such conceptual principles such as universal jurisdiction and complementarity. A system of jury service based at the ICC has the potential to profoundly influence not only those who would serve, but a broad range of 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 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 as ambassadors of the world. All those who learn about the process would come to know more directly how they are bound together. Such a system would build crucial awareness, acceptance and legitimacy for the Court, with the added benefit of enhancing the quality of international social justice.

We acknowledge this notion is easy to imagine and difficult to realize. Three primary roadblocks to such a system are established legal tradition, an absence of political will, and challenges of implementation. We suggest none of these barriers are as significant as they may seem. In fact, we will show that the Court is already more than capable of implementing a modest, manageable jury system that could reap tremendous rewards. The greatest hurdle 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 important ideas can become possible when we cultivate the imagination to press them forward.

In the following pages, our hypothetical ICC jury system unfolds in three stages. We begin by explaining how such a system can provide political and legal legitimacy both at the national level and for the intervening global institutions. Next, we anticipate the primary logistical challenges a global jury would face, including many already encountered by the ICC. Finally, in light of these considerations, we propose a design for an ICC-based jury system and conclude by highlighting certain benefits and concerns.

LEGITIMACY

To understand the evolving concept of international legal legitimacy, we reach back to the Nuremberg Military Tribunals at the end of World War II. These represent a pivotal moment in international law, not least because they required feats of judicial creativity that have been characterized as audaciously improvisational. In the political labyrinth of post-war international justice, national delegations were divided. It was America's new president, Harry Truman, whose experience as a judge helped tip the balance toward the creation of a tribunal that would be seen as *legitimate* in the post-war world community.⁵

The International Criminal Court and the Individual

Since Nuremberg, legitimacy has resonated as a fundamental principle in attempts to shape and administer international justice, including the International Criminal Court.⁶ Though the 1998 Rome Statute 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. Both the scope of the Court's jurisdiction and its constitution as a permanent body demand particularly high levels of credibility, probity and transparency. The Rome Statute constitutes a bold advance in human rights law,⁷ but its final form was not

agreeable to every member nation. The United States, for instance, ultimately argued against it and withdrew support, claiming that the Court would lack democratic legitimacy.⁸

One such guiding principle in claims of international legitimacy is the evolving conceptualization of human rights. For all its tragedies, the twentieth century saw a dramatic shift in the capacity of individuals to demand representation and to speak as individuals. The number of world democracies has increased dramatically over the last century, particularly in the post-war era,⁹ and this has bolstered international alliances that feature democratic dimensions. Simultaneously, the discourse of global justice has permeated world culture, such that it commands the attention of the international scholars, politicians, journalists and activists. Indeed, in some senses, global justice is emerging as the defining principle of the new century.¹⁰ 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.¹¹ Clapham (2003) described the Nuremberg trials as a “new way of thinking about international law as going beyond obligations on states and attaching duties to individuals involving criminal responsibility.”¹² Since that time, international law has been incrementally reengineered to recognize the individual as an object of scrutiny.¹³

The Perception of Fairness

The prosecution of international crimes, even as a direct intervention to protect human rights, always risks appearing to be “victor’s justice,” for example as in the *ad hoc* tribunals that commonly follow wars.¹⁴ As such, the principle of *fairness* becomes central to legitimacy, not only for the victims of crimes, but for the alleged perpetrators as well.¹⁵ The deliberations that

led to the Rome Statute and the modern ICC reflect this concern.¹⁶ Structurally, the Court's operations represent a system of balance and even-handedness, through term limits, appeals procedures, restrictions on prosecutorial power, and so on.¹⁷ From the earliest 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.¹⁸ As Dutch jurist Adriaan Bos wrote¹⁹:

...the establishment of an international criminal court springs from a universal human desire for justice. At the same time, however, it is bound up with trends in the international arena and in international law. It is fair to say that the adoption of the Rome Statute means that, as regards the most serious crimes that exist, the international society has evolved into an international community: a community that no longer accepts impunity for such crimes and that holds the perpetrators individually liable for their actions.

And yet, despite a decades-long tradition of bringing individuals under the purview of international law, and despite the extraordinary effort required to construct and approve a fair and transparent prosecutorial system, the ICC has never embraced one of the most effective tools for establishing judicial legitimacy: *the jury*. Though individuals have been brought into the realm of international law as both victims and perpetrators, they are, as yet, allowed no role in rendering judgment. 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.

Juries and Deliberative Democracy

From their origin, juries have been used to negotiate power between authorities and the governed population. In the 12th century, the English crown used the jury as a popular means by which to separate the church from its traditional power (and to protect itself from the difficulties

of an unpopular verdict). In 1215, the Magna Carta codified the notion of peer judgment, though it was not until the seventeenth century that English juries were officially granted the right to reach conclusions independent of a judge.²⁰¹

Other countries with political ties to England also rely on juries, but nonetheless, it is a legal construct that is limited in scope. Inasmuch as international law is based upon blueprints from national systems, juries are not widely accepted international law. Critics consider juries—or perhaps more specifically, jurors—susceptible to emotional arguments, ignorant of the law, and generally incompetent in reaching sound conclusions.²¹ Research tells a different story. Juries are quite able to render verdicts that are sound, thorough and fair.²² In the vast majority of cases, the jury’s conclusion aligns with the judge’s own opinion, suggesting that non-expert citizens can in fact be trusted to learn and apply legal concepts.²³

To see the powerful link between juries and legitimacy in the modern context, let us step back and consider the relationships among legitimacy, democracy, and deliberation. 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.²⁴ A democracy distinguishes itself from non-coercive 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 nobly resist the law through acts of “civil disobedience” still must accept that their actions earn them time in jail.²⁵ Thus, in a

democracy, it is critical that decisions have legitimacy, lest its membership refuse to follow its laws.

In the particular context of *deliberative* democracy, political theorist John Dryzek argues that “outcomes are legitimate to the extent they receive reflective assent through participation in authentic deliberation by all those subject to the decision in question.”²⁶ In practice, this can be a challenge owing to the difficulty of establishing “authentic” deliberation,²⁷ particularly a deliberative process that gives all members the chance to participate in the proceedings. 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 illustrates 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. This approach solves the government’s legitimacy problem by passing the problem on to the public itself. To this point in history, however, no legal system has deployed a jury that reaches beyond the confines of a local, state, or federal jurisdiction.

The absence of a global jury system could simply reflect the fact that global quasi-democratic institutions remain young themselves, and 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 public strikes even the most populist democratic theorists as an impractical course of action in a global context. In this view, it is one thing to extend the principle of elected representation to a global body (made up of delegates appointed by electeds), but it is another

thing altogether to 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. The following section addresses this very problem.

LOGISTICS

We acknowledge that there would be many logistical challenges facing a jury program at the ICC, and we address the five primary concerns below before proceeding to the crucial question of jury design. In order of increasing significance, the objections we anticipate include management, staffing, cost, security, and the creation of an impartial jury pool. 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. The fifth logistical challenge—that of assembling the jury pool—receives the greatest attention owing to the special problems it poses.

Management

A number of legal scholars—some of whom were delegates to the Rome Conference—published overviews of the Court’s structure and administration after it was established in 2002. These substantive surveys suggest that the managerial capacity native to the Court would be more than sufficient to oversee a limited jury system. As a bureaucratic task, 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 has the ability to establish new functions. The Chambers deal most directly with judicial functions and could establish specific responsibilities for juries within the Pre-Trial, Trial and Appeals Divisions. The Office

of the Prosecutor might have certain rights congruent with federal and state prosecutors in terms of empanelling a jury. Finally, the Registry is responsible for managing the public records of Court proceedings, which expand whenever the Court takes on additional tasks. All of these systems are designed to address complex legal, logistical and staff issues. The infrastructure not only exists but would seem to be tested and proven. Beyond these gross structural capacities, nominations and appointments of judges and other officers of the Court are conducted according to strict criteria of personal and professional probity. With care and judiciousness, these criteria could be adapted to the selection of prospective jurors. Structurally, the oversight of a limited jury system would require nothing more complicated than has already been accomplished and implemented by the Court.

Staffing

Any international institution is a somewhat audacious undertaking, requiring significant organizational and communication capacity. There are language barriers, travel arrangements, facilities management issues, and much more, all needing to be coordinated among a diverse population scattered around the globe. Certainly the Court itself is a large and complex operation, but the impact of a jury system on staffing at the ICC is likely to be limited.

Though experienced administrators would be needed to determine precisely how best to manage a jury system, it seems reasonable that some type of program could be implemented without threatening the Court's viability. Certainly the existing staff has extensive legal and administrative expertise and presumably a new, dedicated jury program staff could be cultivated from within the existing organization. Moreover, it may be that the jury phase of a trial is specific and limited enough that very few permanent staff would be required to manage it.

Despite inevitable organizational challenges, it is likely no radical change in staffing procedures would be required to implement a jury program.

Cost

As with all other elements of the Court—paying judges and prosecutors, communicating with the public, offering counseling to witnesses—the primary financial considerations will compare administrative outlays against the legitimacy they help create. The cost of running the ICC is obviously considerable and the governing bodies have established a worthwhile ethic of minimizing expenditures and maintaining open reporting. The projected 2009 budget puts the total ICC budget at €102.63 million.²⁸ Fortunately, we see no administrative functions required by a jury system that do not already exist in some capacity. Management, training, security, travel, translation—any core function is already being conducted, efficiently and cost-effectively, somewhere in the Court. Considering the relatively small number of cases the Court is likely to try, any jury program would be rather limited in scope, both in terms of jurors and in the more cost-intensive phases of service (i.e., in-country training would be expensive, but not prohibitively so; the Court's explicit commitment to digital communication may also help mitigate costs in this area). Even in a situation where multiple juries are empanelled for different cases at the same time, the number of people involved and the amount of time they serve will be limited.²⁹

The potential gains offered by a jury system are significant but perhaps difficult to quantify. Like the work undertaken by the national delegations that developed the Rome Statute, there is a certain amount of faith that the costs will eventually reap rewards. In total, the actual

costs are quite small when considered against the potential benefits that a true international jury system offers.

Security

Concerns of security for prospective ICC jurors are more significant than staffing or budgetary worries. The Court reviews serious crimes and some cases will involve extant criminal networks or militias. This problem, however, is not unique to the ICC. In the United States, for instance, concern for juror safety has at times led to special security details during trials, but the names and identities of jurors have remained public record even in cases that involve the prosecution of individuals alleged to lead criminal organizations with histories of violent retribution.³⁰ One can object that the established political culture of the United States ensures the relative safety of such jurors, but that misattributes the nation's generally benign civic culture to the manifestly *criminal* (i.e., deviant) organizations that would carry out retributive violence against jurors. The fact that such actions remain exceedingly rare should offer some comfort.³¹

To take a more pertinent example, the Truth and Reconciliation model of justice has exposed not jurors but actual perpetrators of violent crimes and atrocities to public scrutiny. At least one ethnographic study found that the South African Truth and Reconciliation Commission did not dissuade previously oppressed communities from their desire for retribution.³² Nonetheless, those making public admissions of guilt have managed to lead relatively secure lives, even if subject to the ostracizing that many view as their due.

If these examples do not provide sufficient reassurance, we would also point to the past experience of the ICC. All members of the Court are citizens of their home countries and have certain reasonable expectations of security. International legal bodies routinely expose public

officials to similar risks, and no prospective juror would be compelled to participate if she felt her security was endangered. If, as we suspect, ICC jury service becomes a point of national pride, then it would not fall solely to the Court to provide protection. As with other aspects of the Court, responsibility is shared across institutional and national borders.

Moreover, the ICC's jury managers could draw upon the example of the Court's Victims and Witnesses Unit. This program has already set an extremely high bar for the protection of individuals from whom the Court solicits official assistance.³³ The security of jurors (and thus, of the jury system and of the Court itself) would be of paramount importance, but it is unlikely that present and former jurors would require the level of protection afforded to victims and witnesses. Existing institutional knowledge and support could ensure that an appropriate security protocol is developed.

The Jury Pool

The most daunting logistical question, however, concerns the establishment of a qualified, impartial jury pool. We foreshadow the Design section of this essay by noting that juries might be drawn from qualitatively different pools depending on the specific context and tasks 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—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 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 NGOs and public media, coordinating with national and local governments to attract applicants, or leading training sessions. We address these and other issues below.

Recruiting for an ICC jury system would constitute a profound and immediate means through which to draw citizens into the world community and the discourse of social justice. 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 supra-national justice system, and the widespread social and economic benefits of fostering peace. Non-governmental organizations (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, an international jury would need to be voluntary. An application process would allow jury managers to develop a pool of potential jurors who met basic criteria, but any qualification barriers should be reasonably open and a measure of active recruitment would help ensure diversity. Potential jurors, for instance, could be sought in those communities lacking access to the internet or other electronic media. 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 offers some hopeful evidence that rigorous orientation and training can help juries overcome the challenges posed by socio-economic inequalities among jurors.³⁴

Once individuals enter the pool of eligible jurors, they would receive preliminary information that raises their general awareness of the ICC and prepares them in case they are called to serve.³⁵ Even if only a fraction of accepted jurors ever served, this could be an extraordinarily powerful way for the ICC and the international community to interact with citizens. Accepted jurors would be under no immediate obligation to serve and a deep enough pool of candidates would assure redundancy in selection criteria. One possible design will be explored below, but in general terms, juror selection could function much like the empanelling process in a national or state court, but with *voir dire* being conducted on a global scale. Once chosen to serve, jurors would receive training and background on the case over a period of time in their home countries so as to be fully prepared when their term begins.

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 would be allotted a minimum and a maximum number of days. Multiple juries could be in residence simultaneously, if required, either on a rolling or concurrent schedule.

A final element of the jury pool process concerns the difficulty posed by pre-trial publicity. Pretrial publicity poses a special problem for juries. Strong doubts have been raised

about the adequacy of the *voir dire* process in compensating for the influences of extensive pretrial publicity in *extraordinary* cases, and some of those before the ICC would qualify as such. So serious is this concern that courts have taken additional measures to address the biasing influence of pretrial media coverage, such as silencing publicity, sequestering juries, or changing trial venues.³⁶

The impact of pretrial publicity on juries can manifest itself in various ways. The most obvious of these is pretrial publicity that disseminates false information or inadmissible evidence. Despite instructions to disregard such evidence, jurors can potentially be influenced by anything they hear, regardless of the source. Pretrial publicity can further prejudice a jury by advocating a particular verdict. During *voir dire* a juror might downplay (or honestly underestimate) the strength of the biases developed through such coverage, but their lingering negative impression of a defendant can build up on its own as the trial progresses.³⁷

Viewed from our sanguine perspective, substantial pretrial publicity is not so much a problem for juries as it is an argument for using them. A single judge or panel of judges cannot readily balance the voice of the international community and local citizens most directly affected by the crimes under consideration. Either judges must be drawn exclusively from uninvolved nations or they will include justices who were involved in politics and cannot easily claim impartiality. A jury can balance these voices by selecting people from near the region affected by the crime *along with some more impartial citizens* drawn from the larger global community.

As we suggest in the Design section below, the composition of a jury should specifically consider the potential impartiality of jurors, perhaps with a preference for the inclusion of local citizens when possible. In extreme cases, such as genocide or other mass crimes against humanity, it may be impossible to identify local jurors unaffected by the crimes, let alone

untouched by pretrial publicity. It may then be necessary to assemble an entirely extra-national jury—as though one had changed the venue from the affected nations to a different region of the world.

Though deciding cases with a small number of judges does not inherently mean rulings are myopic, having the option to add local and international jurors can potentially increase diversity and enhance legitimacy. Samuel Sommers has shown that racially diverse juries engaged in longer deliberation, used more information, and made more accurate statements about the case.³⁸ It has also been shown that more diverse juries are less harsh toward minority defendants; perhaps, when deliberating in the presence of those minorities they are more likely to remember their egalitarian values.³⁹ Finally, although research has not conclusively shown the beneficial effects of juror diversity in establishing legitimacy, one does not have to look far for examples that drive home the point. In one tragic instance—the Rodney King decision in Los Angeles, California in 1992—riots broke out after an all-white jury acquitted white police officers of beating King, an African-American. Within hours, 54 people had died and entire neighborhoods lay in ruins. Where such dynamics engulf whole regions and populations, any mechanism for enhancing legitimacy merits serious consideration.

DESIGN PROPOSAL

At base, an ICC jury system would function much like any other part of the Court. It would be a transparent multi-stage process, managed and funded through the Court, and approved by member states. As with other elements of the Court, an ICC 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.⁴⁰ 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 individual case, carefully setting in place three key design elements—the jury’s charge, its composition, and the decision rule. The first concerns the jury’s charge in a given case. The general reticence in international law toward juries suggests that it would not be feasible (nor would it be desirable) to task jurors with making the ultimate decisions of guilt or innocence in a case. However, juries could effectively be used to render *specific decisions within the framework of a case* that would be more widely accepted for having emerged from a deliberative process. The second key issue, jury composition, points toward the strategic construction of juries in 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.

The Jury’s Charge

With a robust, diverse, well-trained pool from which to draw, managers would be able to construct a jury that best confers legitimacy within the context of a given case. Each situation will have distinct parameters and conditions.⁴¹ Selectively designing and charging a jury could address many of these issues, potentially defusing some local or international tensions even

before jurors have even been selected. In the following example, we walk through some of the choices that jury managers might make. In our hypothetical case, we posit a multi-ethnic 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 rapprochement and relatively stability has begun.

As the Court prepares to try such a case, it would be essential to identify the points at which a jury decision offers enhanced legitimacy to the proceedings. For example, if the case is unambiguously criminal, a determination of guilt might not be the central issue. Perhaps instead it is the question of sentencing that would best be addressed by a representative, deliberative body. The multi-ethnic nature of our hypothetical region suggests that a harsh sentence delivered by judicial fiat could exacerbate lingering resentments in the post-conflict 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 would have several options available in determining the makeup of the specific jury. In our example, we might consider, nationality, and hybrid tribunals (i.e., those that empanel professional judges and lay citizens *together* in a jury). Different factors might prove relevant in different cases, but such factors would clearly affect how the Court's is perceived.

National identity is a powerful force, and never more than when it manifests as armed conflict. But such animosity does not recognize national borders.⁴² As such, regionality could be a useful criterion for jury managers in selecting jurors.⁴³ Again, depending on the specifics of the case, managers might face the decision of whether to include or exclude regional representation. If the crimes in question were widely dispersed, for example, or ethnic populations had been completely eliminated from the region, then strict regional representation would be compromised. When adjudicating conflicts within a relatively stable local context, however, regional representation might be preferable to bringing in “outsiders” from other parts of the world.

Our hypothetical case—in which established ethnic communities are intact but resentments are likely simmering—would probably call for both regional and extra-regional jurors, so as to clearly represent the principle players in the conflict, but also to incorporate the voice of the wider international community. This balance of local voices and outside objectivity 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 supra-national jurisdiction.⁴⁴ In a given case, the international community may perceive a greater or a lesser need to be involved.⁴⁵ But the right to national identity and national representation is a cornerstone of global society and of the ICC itself. As such, nationality is bound to impact almost any design factor in an international jury program. In our imaginary conflict, the objective is to bring ethnic tensions to light, not bury them. This points to the need for jurors who represent not only different countries involved in the conflict, but different ethnicities within those countries. One can imagine that the jury room deliberation might grow heated in such a situation. But it would also have the

tremendous healing potential of representing various ethnic and national discourses in microcosm. That fact might well make the overarching judicial process more legitimate in the eyes of the affected populations and 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.⁴⁶ 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, it would be preferable to leave the sentencing to be debated and decided by “regular citizens” (although clear guidelines would need to be provided by judges).

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 ethnic orientations 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 a number of options in setting the decision rule for a specific case. Most basically, they might require a unanimous decision or a majority decision. If the latter, other possibilities come into play. For example, the decision could theoretically be weighted to reflect a balance (not necessarily an equal balance)

between regional and extra-regional jurors. This could require that any decision include at least some voice from the region itself (though not necessarily the assent of all regional representatives). Similarly, in a given case, a balance might be struck between jurors of specific nationalities, so as to establish a level of international legitimacy. This would not be a requirement in every case, but it offers another instrument with which to construct a balanced public reckoning. It is true that there are international alliances that might conceivably affect jurors' views (e.g., cultural or economic ties between two disparate countries), but this could be mitigated in the process of jury selection.⁴⁷

Finally, judges or jury managers may give juries certain options in reaching their decision, as they commonly do in American courts. In sentencing, for example, specific ranges may be set. Jury nullification rules may vary from case to case. Jurors may or may not have the right to request further information from the prosecution or defense, to abstain from voting, or to review evidence. Each of these dimensions offers another way to fine-tune the jury design, not so as to control the outcome, but rather to create deliberative body that can offer a fair and representative decision in a specific case. In our scenario, unanimity might be too high a bar to meet, so we might expect managers to choose a majority rule. But if a majority, what kind would be best? Let us review the steps that gave our hypothetical jury its shape.

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. Strict sentencing guidelines could offer a range of 12 to 24 years of incarceration. Ultimately, a 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.

CONCLUSION

Introducing the jury as a responsible 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. A jury would 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 beginning. 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 nation 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 United States when its government refused to accept the jurisdiction of the ICC over U.S. nationals. Given its prominent geopolitical role and the lingering possibility of war crimes charges associated with the Iraq War, there is a need for rapprochement between the U.S. and the ICC. A jury system that embodied and reflected values familiar to the American system of jurisprudence could help the ICC bridge the legitimacy gap with the U.S. 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. Those who have suffered great harms could be a bit more confident that their voices would be heard in the process of justice, not only as citizens of a nation, but as members of a region or an ethnic group. In this way, international law can 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.

Consistent with the nature of the ICC, any jury system it adopts should be flexible to reflect the particular requirements of the case. In all cases, the choice of a jury trial would be made with the intention of enhancing the legitimacy of the court's decision. In addition to meeting the needs of the court, recruiting and training for a jury system would raise awareness of the court and its practices not only internationally but also internally. Members of international institutions can easily overestimate their own importance and their public image, unaware that

the world is ignorant of what they do or how they operate. By managing the jury pool to represent all nations and train ordinary citizens for participation, the ICC would not only advance its own mission, but it would develop valuable institutional knowledge that would ground it in the communities it serves. In a heavily mediated world, this process would have a multiplying effect. Imagine the excitement of media outlets when a local citizen is selected to go to The Hague as an ICC juror. In the eyes of the world, this would populate the Court with representatives of all member states, from all walks of life. Although the jury is no cure-all for the challenges confronting the ICC, it could nonetheless 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 the defense of human rights.

¹ For a discussion of these cases, see Jennifer McNulty, “Nations Embracing Jury System,” *University of California*, Nov 15 2007 [cited January 13 2009], available from <http://www.universityofcalifornia.edu/news/article/16823>.

² 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, CA: Jossey-Bass, 2005) pp. 111-119.

³ The strong exception here is Powell, whose law review essay on the subject was invaluable in developing our argument. Amy Powell, “Three Angry Men: Juries in International Criminal Adjudication,” *New York University Law Review* 79 (2004) pp. 2341-2380.

⁴ See Neil Vidmar, “A Historical and Comparative Perspective on the Common Law Jury,” in Hans 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, NY: Prometheus, 2007).

⁵ “The Nuremberg Military Tribunal was, as Ley realized, an experiment, almost an improvisation. For the first time the leaders of a major state were to be arraigned by the international community for conspiring to perpetrate, or causing to be perpetrated, a whole series of crimes against peace and against humanity. For all its evident drawbacks, the trial proved to be the foundation of what has now become a permanent feature of modern international justice.” 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) pp. 2.

⁶ “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,” Powell, pp. 2376.

⁷ “...the body of human rights norms is to be considered as the basis of the validity – and legitimacy, for that matter – of any legal system. In this sense, the principles of human rights constitute the common denominator for all systems of law, whether national or international.... The universal validity of human rights legitimizes – even stipulates – the exercise of universal jurisdiction over those international crimes that are specified in relevant international treaties such as the Rome Statute of the International Criminal Court.” Hans Köchler, *Global Justice or Global Revenge? International Criminal Justice at the Crossroads* (Wien/NewYork: Springer-Verlag, 2003) pp. 17.

⁸ The central source that Fichtelberg cites in making an argument against the legitimacy of the ICC is Madeline Morris of Duke University School of Law (pp. 776); Fichtelberg acknowledges the appeal of her argument though he opposes it. Aaron Fichtelberg, “Democratic Legitimacy and the International Criminal Court: A Liberal Defense,” *Journals of International Criminal Justice* 4, no. 4 (2006) pp. 765-785.

⁹ This assertion comes from data at the Polity IV Project, though other sources may be available and/or preferable. The description of the project includes the following, for reference: “The Polity project has proven its value to researchers over the years, becoming the most widely used data resource for studying regime change and the effects of regime authority. The Polity IV Project carries data collection and analysis through 2006 and is under the direction of Monty G. Marshall at the Center for Systemic Peace and George Mason University.” Monty G. Marshall,

Keith Jagers and Ted Robert Gurr, “Polity IV Project: Political Regime Characteristics and Transitions, 1800-2007,” [cited July 2, 2008], available from <http://www.systemicpeace.org/polity/polity4.htm>. The “polity” measure is described as follows: “The Polity conceptual scheme is unique in that it examines concomitant qualities of democratic and autocratic authority in governing institutions, rather than discreet and mutually exclusive forms of governance. This perspective envisions a spectrum of governing authority that spans from fully institutionalized autocracies through mixed, or incoherent, authority regimes (termed “anocracies”) to fully institutionalized democracies. The “Polity Score” captures this regime authority spectrum on a 21-point scale ranging from -10 (hereditary monarchy) to +10 (consolidated democracy)”;

There’s a lot of data there, but this is the graph that essentially shows a dramatic rise in the number of global democracies in the post-WWII era. For the graph, see “Global Regimes by Type, 1946-2006,” [cited July 2, 2008], available from <http://www.systemicpeace.org/polity/global2.htm>.

¹⁰ John Gerring, “Global Justice as an Empirical Question,” *PS: Political Science & Politics* 40, no. 1 (2007) pp. 67-77.

¹¹ “Progress in terms of a just, more humane world order was essentially achieved through a system of limitations on national sovereignty. Increasingly, human rights were perceived as the fundament of any system of law, including international law. With the end of the Cold War, this perception led to the revival of the doctrine of *humanitarian intervention* which per se implies the subordination of the norms related to national sovereignty to those human rights,” Köchler, pp. 1.

¹² Andrew Clapham, “Issues of Complexity, Complicity and Complementarity: From the Nuremberg Trials to the Dawn of the New International Criminal Court,” in Philippe Sands, ed., *From Nuremberg to The Hague: The Future of International Criminal Justice* (Cambridge: Cambridge University Press, 2003).

¹³ “One of the most important qualities of the Rome Statute is that it enshrines and elaborates the principle of individual criminal responsibility.” Adriaan Bos, “The International Criminal Court: A Perspective,” in Lee, Roy S., ed., *The International Criminal Court: The Making of the Rome Statute—Issues, Negotiations, Results* (The Hague: Kluwer Law International, 1999), pp. 468; see also Orentlicher (1991) cited in Bruce Broomhall, *International Criminal Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (Oxford: Oxford University Press, 2003), pp. 19-20. “While public international law has been known to confer rights upon individuals from time to time, and does so increasingly in the context of human rights protection, it is in the case of international criminal prohibition that this law strikes most forcefully what was traditionally the strictly national sphere of the individual: ‘Although international law generally establishes rights and duties between and among states, international criminal law imposes obligations on individuals, making them liable to criminal punishment.’”

¹⁴ “A permanent institution created on the basis of consent of the State parties to the Statute will have ‘greater’ legitimacy than ad hoc institutions created by the [U.N. Security Council], an organ of limited membership.” Gerry Simpson, “Politics, Sovereignty, Remembrance,” in Dominic McGoldrick, P. J. Rowe, and Eric Donnelly, eds., *The Permanent International Criminal Court: Legal and Policy Issues* (Oxford: Hart Publishing, 2004), pp. 455.

¹⁵ Köchler, pp. 9-13.

¹⁶ Fichtelberg, pp. 782; see also Dominic McGoldrick, *Criminal Trials Before International Tribunals: Legality and Legitimacy*,” in Dominic McGoldrick, P. J. Rowe and Eric Donnelly, eds., *The permanent International Criminal Court: legal and policy issues* (Oxford: Hart Publishing, 2004), pp. 10: “There has been a clear recognition of the need to comply with the human rights of defendants and to take greater account of the interests of victims.”

¹⁷ Fichtelberg, pp. 767: “Fair trials in a liberal sense depend on a respect for human rights to procedural and substantive due process and the right of the accused to decent treatment. The individual must be given the proper tools to defend herself from a particular charge and, if found guilty, to protect herself from an inappropriate degree of punishment.”

¹⁸ McGoldrick, pp. 455: “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.”

¹⁹ Bos, pp. 470.

²⁰ William L. Dwyer, *In the Hands of the People* (New York: St. Martin's, 2002).

²¹ Powell, pp. 2353-56.

²² Vidmar; see also John Gastil, *Political Communication and Deliberation* (Thousand Oaks, CA: Sage, 2008), chapter 6.

²³ Harry Kalven and Hans Zeisel, *The American Jury* (Boston: Little, Brown).

²⁴ This section is adapted from Gastil (2008).

²⁵ See Robert A. Dahl, *On Democracy* (New Haven: Yale University Press, 1998).

²⁶ John S. Dryzek, “Legitimacy and Economy in Deliberative Democracy,” *Political Theory* 29 (2001) pp. 651-669. Jurgen Habermas, *Legitimation Crisis* (Boston: Beacon Press, 1975)

offered an early, influential analysis of the relationship between system legitimacy and public discourse.

²⁷ For a review of literature on various forms of deliberation, see Gastil (2008).

²⁸ See note 34.

²⁹ In the example we offer in the Design section, we present several ideas for making resource requirements regular and predictable.

³⁰ On the importance and history of public juries, see Dwyer..

³¹ We could not find any documented instances of such retribution, though statistically speaking, it seems likely to have occurred in some instance.

³² See Rich Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State* (Cambridge: Cambridge University Press, 2001).

³³ “Equally important, at the International Criminal Court, will be the function related to the protection of victims and witnesses appearing before the Court: experience from the two International Penal Tribunals for former Yugoslavia and Rwanda has shown how crucial it is for any international criminal tribunal to arrange for the protection and assistance of victims and witnesses that appear before the Court so as to contribute to the establishment of truth about the most serious crimes existing. To this end, and learning from the experience of the two ad hoc International Penal Tribunals, article 43 paragraph 6 of the Statute has foreseen that the Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in

consultation with the Office of the Prosecutor, counselling [sic] and other appropriate assistance for witnesses, victims who appear before the Court and others who are at risk on account of testimony given by such witnesses, as well as plan protective measures and security arrangements for them.” International Criminal Court, “Victims and witnesses protection,” [cited May 24 2008], available from <http://www.icc-cpi.int/victimissues/witnessprotection.html>.

³⁴ On juries in particular, see Andrea Hickerson and John Gastil, “Assessing the Difference Critique of Deliberation: Gender, Emotion, and the Jury Experience,” *Communication Theory* 18 (2008) pp. 281-303. For examples of how to handle these challenges, see the methods in Gastil and Levine.

³⁵ This might include information on the general history of international law, specific cases, goals of the ICC, security procedures and an explanation of benefits to jurors and their home countries.

³⁶ See Vidmar and Hans, pp. 116-117.

³⁷ See Terry E. Honess and Michael Levi, “Factual and Affective/Evaluative Recall of Pretrial Publicity: Their Relative Influence on Juror Reasoning and Verdict in a Simulated Fraud Trial,” *Journal of Applied Social Psychology* 33 (2003) pp. 1404-1416.

³⁸ See Samuel Sommers, “On Racial Diversity and Group Decision-Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations,” *Journal of Personality and Social Psychology* 90 (2006) pp. 597-612; see also Richard Lempert, “Uncovering ‘Nondiscernible’ Differences: Jury Research and the Jury Size Cases,” *Michigan Law Review* 73, no. 644 (1974/1975) pp. 670-671.

³⁹ See Samuel Sommers and Phoebe C. Ellsworth, “Race in the Courtroom: Perceptions of Guilt and Dispositional Attribution,” *Personality and Social Psychology Bulletin* 26 (2000) pp. 1367-1379.

⁴⁰ “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,” [cited May 22 2008], available from <http://www.icc-cpi.int/victimissues.html>.

⁴¹ For example, the scope of the crimes, particular tensions in a given region, or the duration of the conflict.

⁴² Indeed, in the type of cases the ICC addresses, borders may be contested, redrawn or simply dissolved.

⁴³ Here, we suggest a “region” might mean a geographical space that is smaller than a continent but larger than a single country, e.g. the Balkans or Southern Africa.

⁴⁴ Köchler, pp. 4: “...the creation of the International Criminal Court....constitutes a major *paradigm change* in international law.... The *antagonistic* trends toward limiting the sovereignty of the nation-state on the one hand, and reinstating its old status in the form of special prerogatives claimed by the most powerful states... have to be reconciled through agreement on a universal, comprehensive and non-discriminatory system of norms that are binding upon *all* states and upon *all* officials of states acting in the exercise of their states’ sovereignty....” (Italics in original).

⁴⁵ In some cases, qualified nationals may not be found easily or quickly, and of course, ethnic affiliations can blur political and social allegiances.

⁴⁶ 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. 213-239: “Hybrid courts represent a sincere and laudable effort to improve on past transitional justice experiences and remedy many of the major shortcomings of purely international tribunals. Some of the potential advantages of hybrid courts include the ability to foster broader public acceptance, build local capacity and disseminate international human rights norms. Collaboration with national and international legal personnel helps bring international law and norms to bear in ways that can be internalised and institutionalised. More generally, hybrid tribunals may go a long way to eliminate definitely the perception that transitional justice mechanisms reflect victors’ justice,” pp. 239.

⁴⁷ For example, a businessman from Country A with ties to oil interests in Country B might not be selected as an extra-national juror in a case against a national of Country B.