Can International Justice Be Democratized?
Global Democracy and Inclusion at the International Criminal Court

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I. Introduction

Our lives are increasingly caught in social structures and governance relations that exceed the control of state governments. Whether global governance can be made democratically legitimate has been called "one of the central questions – perhaps *the* central question – in contemporary world politics" (Moravcsik 2004; 336). Democratic global governance offers an alternative to imperalism, isolationism, "undemocratic liberalism (Barnett and Finnemore; 2004), and other undesirable frameworks. There is, however, considerable disagreement over what model of global democracy is normatively desirable, and what democratic principles and mechanisms can be practically implemented. Drawing on the work of James Bohman and Iris Marion Young, this paper develops a model of global democracy that I call *inclusive transnational democracy.* It is driven by one critical element of global democratization—that those people most affected by institutions of global governance have a say in the activities that impact them. This simple principle, the *democratic inclusion of those most affected,* becomes complicated when we consider the diverse functions of international institutions. To explore both the complexity and feasibility of this approach to global democracy, I examine how it might apply to international criminal tribunals. Such tribunals, I argue, pursue multiple governance projects that impact different persons and social structures in different ways. As a result, these tribunals have several different constituencies, and thus require different mechanisms of democratic inclusion.

To illustrate these issues in a concrete case, I turn to the International Criminal Court. The ICC was created to help govern peace and security in international society and individual states, as well as to intervene in the lives of victims of certain crimes. When compared to prior tribunals, from Nuremberg to the *ad hoc* tribunals for Rwanda and the former Yugoslavia, the ICC offers greater opportunity for the democratic inclusion of victims. First, the Rome Statute grants victims the rights of legal participation and reparations. Second, The Trust Fund for Victims can directly assist victims in diverse ways, expanding the ICC's capacity beyond simply pursuing retributive justice. Third, the Court's outreach programs, in addition to transmitting information about the ICC, have the capacity to support public deliberation about past and present injustices. Despite these new opportunities for the democratic inclusion of victims, however, I point to several obstacles the ICC must face.

II. Global Democracy as the Inclusion of Those Most Affected

The contemporary world is increasingly globalized, with transnational relations increasing in intensity and extensiveness (Held *et al* 1999). The actions and policies of state governments have effects beyond their borders, and their authority *within* borders is challenged by a range of transnational actors, from social movements to multinational corporations to terrorist networks to non-governmental organizations. States have also created diverse intergovernmental institutions in an attempt to regulate transnational forces, achieve shared interests, and seek global public goods. To understand this proliferation of transnational forces and relationships, many scholars of world politics have shifted their attention from "international relations" to "global governance." The term "governance" can be contrasted to a concept of unitary and hierarchical

"government" (Hurd 1999; Hurrell 2007). Governance refers to the creation and implementation of rules, and the exercise of power, that shapes or structures the field of action of actors in particular domains; "global governance'" therefore refers to the creation and implementation of rules, and exercise of power, at a global scale (Keohane 2006).

The erosion of decision-making power by state governments poses a challenge for democratic theory. As new sites of power and decision-making are created, it is unclear whether longstanding democratic concepts and practices can be applied to them. The participatory processes of democracy that arose in ancient Greece and elsewhere remain important, but they are unable to address the scale and complexity of contemporary social relations. Modern democratic nation-states addressed these problems of scale and complexity through the social practice of representation, paired with the concept of self-legislation. On this model, citizens choose representatives who – in creating laws and policies – pursue citizens' interests or values. Although there are different understandings of representation in modern democracies, the fundamental conception is that the laws and policies exist *as if* they were legislated by the citizens themselves.[1] To make this model of representation and self-legislation work on a global scale, we would need to expand it to create a democratic world state. Citizens would need to elect representatives to a global government, and perhaps accept compulsory jurisdiction of an international court.[2] However, not only is a democratic world government unfeasible in near- and medium-terms, many believe it to be undesirable. To take but two examples, Michael Walzer (2004) argues that even if a global state could somehow be created peacefully, it would tend to eliminate cultural difference and solidarity; and Robert Dahl (1999) notes that "global citizens" would not have the knowledge, the opportunity for meaningful deliberation, or the shared political allegiance necessary to make a democratic government work.

For these and other reasons, global democracy cannot be achieved by simply expanding the scale of conventional models of democracy. James Bohman has proposed one of the most compelling alternatives. He defines democracy as "that set of institutions by which individuals are empowered as free and equal citizens to form and change the terms of their common life together, including democracy itself" (2007; 2). To pursue democracy at a global scale, Bohman argues that we abandon the search for a global government that could serve the will of a single, unified global constituency (a *demos*). Instead, he proposes that there be diverse transnational *demoi*, which engage at multiple sites of authority and decision-making. For example, British Columbians and Washingtonians who share a single river system could constitute a *demos*, and create a decision-making body that allows them to make decisions over the river's use. This *demos* would need to take into account the rules of overlapping *demoi*, including national and international environmental policies, but the British Columbians and Washingtonians could also work together to democratically challenge those policies. Bohman sees in the European Union a promising experiment in this form of democratic architecture:

[1] For recent reviews of the concept of representation, see Pitkin (2004); and Urbinati and Warren (2008).

[2] Such proposals have been made by Falk and Strauss (2001); and Archibugi (1993); among others.

> [T]he EU is a highly differentiated, "decentered" political structure that is both diverse and dispersed. It is diverse since there are at any location many different peoples; and it is dispersed since political authority is exercised at many different sites and at many different levels. More precisely, it is a political structure that does not attempt to construct democratic decisions in a single unified political will. Its lack of territoriality and a unified sovereign will mean that it is not a "single perspective" political structure, but a new political form, a dispersed and 'multiperspectival polity'. (2004; 54)

One of the virtues of Bohman's model is its emphasis on the principle of *non-domination*. He recognizes that rules and institutions can have very different effects on different people. In my example above, for instance, national policies for river management have a different intensity of impact on distant city-dwellers than they do for the aboriginal groups that inhabit the riverine territory in question. Rather than subsume those aboriginal groups in a national or international *demos*, Bohman's model seeks to increase their democratic control over key issues in their lives.

To clarify and supplement Bohman's model of transnational democracy, I will draw on three concepts from the democratic theory of Iris Marion Young. Young was particularly concerned with the oppression of social groups, which can continue even in political systems that grant universal suffrage and formal legal equality. This concern with group oppression will be important in the context of international criminal justice, as I discuss later.

The first concept I draw on, *inclusion*, holds that those people substantively affected by a decision be included in the processes of deliberation and decision-making. Young stresses that those groups that are disadvantaged or dominated under a regime of governance are often excluded from these processes. Such individuals and groups require formal rights of participation, but they also may require mechanisms that address informal obstacles. She notes the problem of paternalism, for instance, in which individuals who lack particular kinds of eloquence or technical knowledge are excluded from participation in decision-making.

Many *demoi* will be too large for direct participation by all affected individuals, and so democratic representation will be necessary. Young develops a conception of representation that can work in pluralistic, differentiated publics (2000; 121-153). Her proposal is persuasive but complex, and I will here only mention two elements that directly apply to my discussion of the International Criminal Court below. First, Young argues that a representative must be familiar with the "social perspectives" of the group he or she represents. The social perspective of a group is not an aggregation of the opinions of its members, or an assessment of its interests, but a thick understanding of the experience of inhabiting that group's positions in society. A representative that lacks a thick understanding of the real social predicament of a group, she argued, will fail to adequately address its problems. Second, Young sees representation as a relationship that exists over time, in which there are moments of authorization and accountability. The representative is authorized to represent constituents as he or she sees best (which goes beyond simply relaying their opinions, since the representative may have knowledge or capacities that constituents lack). From time to time, the representative is held to account

by constituents, through formal processes (such as elections) and informal processes (such as media attention or meetings with constituents). While Young mentions different mechanisms of authorization and accountability, she sees representation not simply as an institution but as an ethical relationship that is flexible but principled.

A third concept that I will borrow from Young is her architectural model for global democracy. She proposes that, by and large, issues or conflicts are best addressed democratically by as small a group as possible. Such groups are constituted when they share significant interests or problems in particular areas, and these groups may or may not be constituted by geography (2000; 268). If a group cannot resolve its conflicts, or if other agents have a legitimate stake in the issue, then the level of decision-making should "kick up to a more comprehensive level" (2007; 35). Some issues and problems would therefore be raised to a global level of decision-making. However, Young does not advocate a single, overarching site of global decision-making, or a world government. Instead she proposes a "polyarchic" model, with different institutions and sites of decision-making for different global issues, such as security, finance, human rights, and environmental protection (150). The resulting model produces "systems of both upward and downward accountability – local units having to explain their actions to outsiders and to global-level review processes, and global decisions having to answer to locales" (151). What Young's architecture loses in simplicity, it makes up in multiple venues and opportunities for disadvantaged persons to contest unfair rules.

Young's three concepts generate what I call the principle of *democratic inclusion of those most affected*. According to this principle, sites of decision-making and deliberation should exist that will include – directly or by representation– all those who are significantly affected by an issue or conflict. Moreover, special effort should be made to include the opinions, interests, and social perspectives of those people who are disadvantaged or dominated under a governance regime. At a global level, this principle generates the decentered and differentiated model of democracy proposed by Bohman, and it advances the aim of non-domination in global governance. I will refer to my model of global democracy as *inclusive transnational democracy*.

Inclusive transnational democracy will not come about through a single constitutional act and it will not culminate in an ideal institutional arrangement. Rather, it must be pursued through the continual work of democratization, following the principle of inclusion of those most affected. This democratization will be advanced through three general projects. First, it will be pursued reactively, as new transnational relations and regimes of governance are created, including new international organizations like the International Criminal Court. Second, transnational democratization will develop through the articulation and enforcement of political rights, which empower individuals and groups to communicate, organize, and advocate in their struggles for inclusion.[3] Third, democratization can be advanced in a constitutional mode, through the creation of new democratic institutions, such as the United Nations General Assembly or the European Parliament.

International criminal justice is implicated in the first two of these projects of democratization. It is a new regime of global governance, with far-reaching effects on the

[3] It is beyond the scope of this paper to engage the debate on human rights and global political rights. For important contributions, see Benhabib (2006); Bohman (2007); Habermas (2001); Held (2004); and Tully (2009).

state system, on particular states, and on specific communities and individuals. It therefore warrants reactive modes of democratization, which aim to make international criminal tribunals accountable to those most affected by them. International criminal justice also contributes to the advance of various global rights. It sanctions individuals and governance practices that grossly violate basic rights, and it contributes to an evolving "victims' rights regime," which spans national and international legal systems (Musila 2010). In the sections that follow I shift away from a general consideration of global democracy, and I explore democratic inclusion at international criminal tribunals.

III. The Multiple Targets of International Criminal Tribunals

In the last three decades transitional justice institutions and instruments have proliferated, but the arguable flag-bearer is the international criminal trial. As Mark Drumbl writes, international criminal law "has gained ascendancy as the dominant regulatory mechanism for extreme evil" (3). At the end of World War Two, the International Military Tribunals at Nuremberg and Tokyo established the precedent and the jurisprudence for the international criminal trials of political leaders. Since the end of the Cold War, United Nations Security Council and General Assembly have created new international and hybrid tribunals.

In all cases, international criminal tribunals have been used to pursue multiple objectives. For instance, the Allies created the Nuremberg IMT to punish individuals who had broken international law (both pre-existing law and the *sui generis* "crime against peace" and "crimes against humanity"). The IMT was also one of an array of instruments, including lustration, that the Allies used to exclude National Socialist leaders while at the same time reconstituting the German government and economy. Furthermore, the Allied leaders saw the Nuremberg IMT as a tool to manage the post-war sentiment of Allied and German publics. They believed a high-profile trial would create a historical narrative that "proved" the extraordinary criminality of German leaders, while at the same time downplaying the complicity or legitimate grievances of average Germans.[4]

International criminal tribunals, I suggest, have diverse aims and functions. For my model of inclusive transnational democracy to work, it must be possible to distinguish between these functions and to identify the corresponding groups of affected persons who can demand democratic inclusion. To help gain conceptual traction on the multi-functionality of international criminal tribunals, I propose that they address disorder in four socio-spatial domains. These domains are the international society, the state, the group, and the individual.[5] (See Table 1 below.)

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[4] For accounts of the Nuremberg IMT see Bass (2000); Cohen (2006); and Douglas (2001).

[5] Elsewhere, I investigate the kinds of normative "order" that international criminal justice might aim to achieve. In brief, I propose two ideal types of global order, drawn from long-standing moral traditions. *Legal cosmopolitanism* insists that all human beings have a minimum set of rights, universal in their justification and applicability, which should be guaranteed by the international community. It emphasizes the incapacities of post-conflict or rights-violating societies, and seeks to strengthen the enforcement of international law. As a result, it is predisposed toward intervention. *Reconstructive communitarianism* accentuates the paternalistic or imperialistic aspects of such interventions. It seeks the self-determination of political communities and is skeptical of a universal rights framework. This approach nevertheless argues that transnational assistance can be given through inter-community relations of solidarity.

First, ICTs aim to promote peace in the society of states by criminalizing individuals who perpetrate certain acts of war, with the hope of deterring such acts in the future. The architects of the Nuremberg IMT were clear about this aim, arguing that the crime against peace was the supreme crime of German leaders. More recently, when the UN Security Council authorized the creation of the International Criminal Tribunal for the former Yugoslavia, it declared that the tribunal "would contribute to the restoration and maintenance of peace" (UNSC 1993). Furthermore, ICTs help bring a juridical logic to international society, binding all states to certain laws and institutions. This process, which some international relations scholars have referred to as *legalization*, can be seen as an attempt to remove some of the realpolitick from international politics.[6] The apotheosis of these projects of peace-promotion and legalization is the attempt to give the International Criminal Court jurisdiction over the crime of aggression.

Table 1

Domain	***Aims***	***Types of Programs***
International Society	Peace promotion. Standardization and enforcement.	Criminalize and deter acts of war, or aggressive war itself. Form single body of international criminal jurisprudence. Seek universal application and enforcement.
State	Stabilize state by legitimizing or delegitimizing actors. Judicial reform.	Incarcerate or delegitimize actors that threaten state government. Produce discourse that legitimizes post-conflict or post-authoritarian regime. Train domestic lawyers and judges.
Group	Protect legitimate communities from collective violence. Target dangerous groups.	Criminalize violence or discrimination against certain groups (especially those based on ethnicity, religion, and gender). Incarcerate or delegitimize key members of groups that engage in illegitimate violence.
Individual	Reform legal subjectivity. Promote victim recovery.	Public outreach and courtroom dramaturgy to cultivate liberal, legal subjectivity, and to provide a sense of justice and truth-telling for victims.

Second, ICTs aim to introduce order in states that have perpetrated or allowed massive human rights violations. This is done in several ways. Actors perceived as contributors to disorder can be incarcerated or delegitimized, while those actors that opposed or replaced them can be legitimized. Examples range from trials of militia leaders in Sierra Leone (who could have posed a threat to the government in Freetown) to trials of the essentially-powerless Khmer Rouge leaders by the current governing party in Cambodia (which continues to draw legitimacy from overthrowing the Khmer Rouge

[6] See Goldstein *et al* (2000); Abbott *et al* (2000).

three decades ago). Moreover, ICT interventions in a state often include various programs to help reform the domestic judicial sector. (For example, training programs of domestic judges and lawyers by foreign jurists at the tribunal.) Finally, supporters of ICTs have argued that they can promote reconciliation by individualizing responsibility for conflict, thereby dampening inter-group animosity (Cassese 1998; challenged by Stover and Weinstein 2004).

Third, ICTs target elements of the social life of communities, organizations, or other sub-national groups. International criminal law aims to protect groups against discrimination and violence by criminalizing certain acts that target collectivities (e.g. genocide, apartheid, or sexual violence against women). International criminal law can also be used to disempower or disrupt certain organizations or groups whose principle activities are defined as crimes (e.g. insurgencies and rebel movements).

Fourth, ICTs target the legal subjectivity and psycho-social health of individuals. Tribunals seek to inculcate particular understandings of the rule of law through outreach and educational programs, as well as the spectacular public event of the trial itself. Drumbl calls this messaging value of trials their "expressivist function," which seek "to affirm respect for rule of law, reinforce a moral consensus, narrate history, and educate the public" (12).[7] Other scholars have examined the role of international criminal tribunals in assisting – or impeding – victim recovery.[8]

IV. The International Criminal Court and Its Constituencies

According to my model of inclusive transnational democracy, those most affected by an institution of governance should be included in its decision-making. We can therefore determine the *constituencies* for an institution – the appropriate groups to be included in decision-making – by identifying whom the institutions significantly impact. This can be called a *consequential* mode of determining constituencies. Constituencies can also come about through a *statutory* mode, when an institution or its architects create mechanisms of accountability for particular groups. Ideally, the consequential constituencies (those who ought to be included) and the statutory constituencies (those granted means of inclusion) should overlap.

The Rome Statute of the International Criminal Court specifies three different constituencies that can contribute to decisions over its actions: the United Nations Security Council, State Parties to the treaty, and victims of crimes within the Court's jurisdiction. These three constituencies roughly align with my above categories of the international society, individual states, and most-affected groups and individuals. As a result, I will argue that for the ICC there is significant congruence between consequential and statutory constituencies. It is less clear, however, whether the mechanisms of inclusion granted to these constituencies are adequate. In this section I will briefly examine the ICC's inclusion in decision-making of international society and individual states, and in the next section I will more deeply investigate the inclusion of victims.

[7] Other scholars who emphasize this expressivist function are Douglas (2001); and Felman (2002); and Osiel (1999).

[8] For different approaches, see Danieli (2009); Hirsch (2010); Sonis *et al* (2009); and Stover (2005).

Like other international criminal tribunals, the ICC was created – in part – to promote international peace. The preamble to the Rome Statute argues that the Court will target crimes that "threaten the peace, security and well-being of the world." The statute also gives the ICC jurisdiction over intentional attacks against peacekeepers (Art. 8). Given that the ICC aims to promote peace in the international society, and that its actions may jeopardize peace processes (Allen 2006; Hovil and Quinn 2005; Human Rights Watch 2009), the consequential constituency for these matters includes all states, not just parties to the treaty.

According to the Rome Statute, the statutory constituency that corresponds to these functions is the United Nations Security Council. The UNSC can recommend a situation to the Court for investigation (Art. 13) and can request that the Court postpone for at least a year an investigation or prosecution (Art. 16). As a representative body for international society, the UNSC is imperfect and in need of reform. Nevertheless, it is the UN organ with "primary responsibility for the maintenance of international peace and security" (UN Charter, Art. 24). Given the absence of a global parliament, no better alternative exists. I therefore argue that in matters of peace and security for the international society, there is an appropriate overlap of the ICC's consequential and statutory constituencies.

What impact does the ICC have on individual states?[9] All state parties to the ICC must cooperate and give funds, and they deserve to be consulted on matters of Court management. At its entry into force, the Rome Statute created the Assembly of State Parties, an oversight body made of representatives each state that has ratified the statute. The ASP deals with matters ranging from the Court's operating budget to the election of judges.

While these management issues affect all State Parties, the ICC will have a much greater impact on states whose citizens are – or ought to be – investigated. There is considerable debate over just what impact that might be, however. Possibilities include increasing or decreasing inter-group animosity; legitimizing or delegitimizing political leaders; and promoting or undermining peace deals.[10] For simplicity, I will treat these diverse effects as impacting a state's internal order. Thus, for matters in which the ICC may significantly affect the internal order of a state, the consequential constituency is that state's government and citizenry.

The Rome Statute provides two means for governments to influence decisions over ICC intervention. Article 13 gives states the power to refer a situation to the Prosecutor for investigation, and the first three situations taken up by the Court were "self-referrals" by Uganda, the Democratic Republic of the Congo, and the Central African Republic. Furthermore, according to the principle of complementarity, states are able to preempt ICC investigation by mounting their own credible investigations and prosecutions ("negative complementarity," set out in Art. 17), or get assistance from the

[9] By "state" I refer to the government and its citizenry, not to the particular individuals who might head the government.

[10] For useful surveys of approaches to this issue, see Human Rights Watch (2009); and Sriram, Martin-Ortega, and Herman (2009).

Court to help them do so ("positive complementarity"[11]). Thus, individual states whose citizens are being – or ought to be – investigate by the ICC are constituted as a statutory constituency through the mechanisms of self-referral and complimentarity.

However, there are two important limitations to these mechanisms of inclusion. First, it is the state – including the citizenry –that ought to be included in these matters, and not just the government. However, there is no guarantee that governments pursue the interests of their citizens in matters of self-referral or complimentarity.[12] In particular, they are unlikely to represent disadvantaged or oppressed sub-groups within the state. Second, the Office of the Prosecutor is the primary site of decision-making over investigations. The Prosecutor's autonomy was a hard-won achievement by certain like-minded states and civil society organizations (Glasius 2006), but in practice the OTP's decision-making has been criticized as opaque and arbitrary (Flint and De Waal 2009). These two problems are beyond the scope of this paper. However, they show that even when a statutory constituency is constituted by mechanisms of inclusion in decision-making, democratic inclusion can fall short.

In this section I have looked at whether two consequential constituencies – the international society and individual states – are granted standing as constituencies in relevant decision-making processes at the ICC. With important caveats, I have argued that they are. However, I have not looked at the *quality* of their inclusion. It is clear, for instance, that the Rome Statute gives considerable decision-making power to the Prosecutor over which cases to investigate, when to do so, and who to target. The simple fact that states – or other constituencies – can make submissions to the OTP does not necessarily render its decision-making democratic. In the section that follows, I pursue a finer-grained analysis of the mechanisms of inclusion of victims.

V: The International Criminal Court and Victim Inclusion

Victims of war crimes and crimes against humanity should be a key constituency for democratic inclusion at any international criminal tribunal.[13] Tribunal programs often target them specifically. Moreover, they are unlikely to be well-represented by their governments at tribunals, as victims tend to come from disadvantaged social groups. However, the tribunals that preceded the International Criminal Court were not designed to engage victims in any capacity other than as witnesses. In this section, I will sketch the shift in victim framework from the Nuremberg IMT to the *ad hoc* tribunals to the ICC. I then turn to three key processes that engage victims: legal participation, reparations and assistance, and outreach. I argue that legal participation is a major development, but its success as victim inclusion will depend on how victims are represented at the trial, and what their participation yields. Reparations and assistance from the Trust Fund for

[11] The Prosecutor attributes "positive complementarity" to the spirit of Paragraph 6 of the Preamble of the Rome Statute: "Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes."

[12] See, for instance, Valerie Freeland's paper for this panel.

[13] The term "victim" has political consequences, especially in situations of mass conflict where many individuals are both victims and perpetrators of crimes (Clarke 2009; Hirsch 2010). In this paper, I use the term "victim" as the ICC does—referring to an individual who has been harmed in some way by acts criminalized by international criminal law.

Victims address a longstanding criticism of previous international tribunals—that despite their great expense, they offer little direct benefit to victims. The promise of the Trust Fund, however, is limited by its budget and its opaque decision-making. Finally, outreach programs can contribute to public deliberation among victims, but they have often been used for one-way information transmission. Ultimately, I argue, without appropriate representation and informed deliberation, the formal rights that the ICC grants victims will yield little democratic inclusion.

The Role of Victims at International Criminal Tribunals

International humanitarian law defines the category of victim, and justifies itself by appeals to their suffering, but tribunals have not necessarily focused on their wellbeing. As William Schabas notes:

> until recently, international humanitarian law focused on the methods and materials of war, and had relatively little to say with respect to victims, at least to the extent that victims were considered to be 'innocent' civilian non-combatants (as contrasted with wounded soldiers or sailors, or prisoners of war). (324)

At Nuremberg, the IMT and subsequent trials made little attempt to include victims, even as witnesses. As several scholars have pointed out, victims were an afterthought in the trials and rarely given the opportunity to tell their stories.[14] Benjamin Ferencz, Prosecutor in the Einsatzgruppen case at Nuremberg, illustrated this tendency to an extreme when he decided not to use the testimony of a single victim-witness. "I didn't want any witnesses," Ferencz explains. "They would be confused, they would all testify against every defendant in the dock… I didn't need them, because I could prove the guilt of these men with their own documents."[15]

The ICTY and ICTR often highlighted the plight of victims in their judgments and public pronouncements, but the role of victims was limited to giving evidence. This approach was criticized in the lead-up to the negotiation of the Rome Statute. The War Crimes Research Office notes:

> The drafters of the ICC victim participation scheme were…influenced by the widely-perceived failure of the *ad hoc* criminal tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) to connect their work with the very people who had suffered from the crimes being prosecuted by those courts. While many of these criticisms arose from the tribunals' inadequate outreach and education programs, critics have also pointed to the fact that neither the ICTY nor the ICTR provide any opportunity for victims to interact with the courts other than as witnesses called to serve the evidentiary needs of a given party in a given case. (2007; 2)

Two groups in particular promoted a new framework for victims at the ICC: civil society organizations (especially human rights NGOs), and states with civil law systems (which grant victims the right to participate in their domestic criminal trials).[16] Moreover, the

[14] See, for e.g., Douglas (2001), or Dembour and Haslam (2004).

[15] Author interview. Washington, D.C., November 2008.

[16] Unpublished research by the author.

ICC framework is part of a shift toward victims' rights that spans domestic criminal systems and international human rights law (Funk 2010; Musila 2010). The expansion of victims' rights can be seen as a shift toward restorative justice, and some civil society organizations have urged the ICC to pursue a restorative justice model (Glasius 2006; WCRO 2007). This paper examines victims' rights in terms of democratic inclusion rather than restorative justice. However, it would be unsurprising if a more inclusive criminal court was also more restorative: both normative frameworks propose that victims have greater agency in justice processes.

Victim Legal Participation at the International Criminal Court

The Rome Statute's Article 68(3) establishes a general right of victims to legal participation in Court processes:

> Where the personal interests of victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

The founding documents of the ICC left the Court to work out most concrete details of victim participation. As a result, many early Court decisions have addressed the topic.[17] In general, to receive the right to legal participation, an individual has to show that he or she suffered a significant harm (bodily or emotional harm, or material loss), and that this harm can be causally linked to an alleged crime that falls under the Court's jurisdiction. Individuals apply to the Victims Participation and Reparations Section, usually by a standardized form, and judges review their applications. It has been argued that there is insufficient public outreach to inform individuals about the possibility of participation; that the application form is too complex; and that the Court takes too long to determine whether an applicant has received victim status (Chung 2008; WPRO 2009). However, the criteria for victim status are generally seen as reasonable (Funk 2010; Musila 2010). I would argue that the category designated by these processes is an appropriate statutory constituency for victim inclusion.

Victims have the right to participate at all phases of the trial: pre-investigation, pre-trial, trial, and appeals. While these rights remain in flux to a degree, it has been established that victims have the right to:

- Give observations to judges when the Court is deciding whether or not to proceed with an investigation or case;
- Access case records;
- Provide observations to judges to challenge the Prosecutor's decisions on charges against the accused;
- Make statements in court at the beginning and end of a stage of proceedings (opening and closing statements);
- Ask questions of witnesses or experts who are giving evidence to the Court

[17] For a synthesis of decisions on victims, see *Representing Victims before the International Criminal Court*, produced by the ICC's Office of Public Counsel for Victims. Available at: <<http://www.icc-cpi.int/iccdocs/PIDS/tmp/Representing%20Victims%20before%20ICC.PDF>>

- Ask questions of the accused;
- Provide evidence, including through a Personal Statement before Court.

In all cases, judges have considerable discretion over the extent to which these rights can be pursued. For instance, judges can limit information granted to victims or block the questioning of witnesses, if such acts are deemed to jeopardize a fair trial or the rights of the accused.

It remains to be seen how this judicial discretion will be used, or – critically – whether the decisions of judges will be substantively influenced by victims' contributions. Chung argues that the "process of granting the participation right has been intense and all-consuming, whereas the incorporation of the substance of victims' 'views and concerns' in underlying ICC proceedings has been meager" (2008; 509). The Court has not yet completed a single trial, however, so this claim may be premature.

One major obstacle to meaningful victim inclusion is the problem of collective representation. Due to the mass nature of crimes prosecuted by the ICC, it is possible to have hundreds or even thousands of individuals granted victim participation status in a case. For reasons of cost and logistics, it is obviously impossible for each victim to have their own legal representative. Collective representation is necessary, and the ICC's Rules of Procedure and Evidence give judges the power to appoint common representatives for multiple victims. In such situations, Funk observes, "it is unlikely that the attorney will have significant personal involvement with each victim," and therefore few victims will have "meaningful control over their attorney's conduct and decisions" (2010; 108).

Funk proposes that victim advocates follow the model of the class action lawsuit in the United States, where clients can opt-in or opt-out at the beginning of the legal action, and then vote for or against a settlement (analogized to reparations) at the end. There are, however, two problems with this approach. First, as Funk admits, most victims will lack the resources to evaluate their representation or pursue an alternate legal recourse—they will therefore have to take what the Court offers or get nothing at all. Second, the model of the class action lawsuit doesn't address the diversity of victim interests and desires. As Schabas notes, "Those who have worked closely with victims of atrocities appreciate just how varied and complex are their perspectives, and how difficult it can be to attempt to generalise as to their best interests and their wishes" (2007; 330). Moreover, the "interests" of victims can change over time and for diverse reasons, including through encounters that victims have with different discourses and processes of justice (Hirsch 2010).

The model of representation used in class action lawsuits will not provide democratic inclusion to victims. But a modern democratic form of representation – with formal elections – is also inappropriate. Such a model is too costly, and it is unsuitable for the situations of political or military conflict in which the ICC intervenes. Instead, I propose that victim advocates adopt the model of representation developed by Iris Marion Young (see Section II above). The victim advocate receives authorization to represent certain individuals, either directly through written communications or indirectly through intermediaries. This initial authorization creates a professional and ethical relationship between the advocate and his or her constituents. The relationship requires continual communication and deliberation, as the advocate must test his or her understanding of the

wishes and the social perspectives of constituents. This understanding will be easier to achieve for representatives who have similar experiences as victims, and the ICC should fund training programs to assist lawyers from diverse backgrounds to attain the standards needed to advocate at the Court.

Moreover, victim representation does not only entail deliberation between victims and advocates. Critically, it also requires deliberation among victims and their communities, so that groups can better understand and formulate their own interests. Thus, one possible model for collective representation is for the Court to help create victims' associations that have low barriers to entry and high internal democratic accountability. These associations would need to be organized in such a way that victims with different perspectives and interests would be adequately represented, as not all victims seek the same things from justice processes. Legal representatives would report to these associations and respond to their requests, rather than maintain the façade of individual consultations with all clients. The Victims Participation and Reparations Section would therefore shift some of its resources away from identifying and addressing individual victims, and toward support of effective and inclusive victims' associations.

The Trust Fund for Victims

One frequent criticism of international criminal tribunals is that, despite their multi-million dollar budgets, they do not provide tangible benefits to victims. The Rome Statute created the Trust Fund for Victims to address this dissatisfaction with purely retributive justice. According to the statute, the TFV will provide resources for the "benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims" (Art. 79). In doing so, the TFV has two distinct mandates.

The first mandate is to assist the reparations process. The TFV will collect funds for reparations (whether from convicted persons or other sources, including voluntary contributions from states and individuals) and disburse them to victims on the orders of the Court. Under this mandate, "victims" deserving of reparations are limited to persons victimized by the acts of a perpetrator who has been found guilty. While it is reasonable that only convicted persons are responsible for restitution and compensation, such a limitation may prove contentious. The Prosecutor has been clear that he will only prosecute a small number of perpetrators in each situation, and may limit the charges sought in any particular case. For instance, Thomas Lubanga Dyilo – a militia leader who human rights groups have linked to widespread killings, lootings, and sexual violence – was only charged with using child soldiers. Should he be found guilty, reparations will be limited to those affected by this single crime.

The Trust Fund for Victims has a second mandate, which is to provide assistance to victims *prior* to a conviction. "Assistance" has been defined by the TFV as "holistic rehabilitation and reintegration," through the mechanisms of physical rehabilitation, psychological rehabilitation and material support (TFV 2010). Here, the category of "victim" includes all people harmed by alleged crimes in the Court's jurisdiction, in those situations where the Court is involved. This acknowledges an appropriate constituency of victims, but it creates a different problem—a gap between the mandate and resources.[18]

[18] Drafters of the Rome Statute were aware that the TFV, which relies on voluntary contributions, would have limited resources. Schabas notes: "There were far more ambitious proposals for compensation of victims, but these fell by the wayside during the negotiations" (338).

In Uganda, for instance, tens of thousands of people could qualify as victims deserving assistance, but the TFV has about $1 million dollars to spend each year. Decisions about how to spend these limited funds are made by TFV staff members through a process that is opaque and – from the point of view of victims - arbitrary.[19] Currently there are no formal mechanisms or rights for victims to make their views and concerns known to the TFV.

The Trust Fund for Victims, which in theory represents a major shift for international criminal tribunals, therefore suffers from two deficits in terms of democratic inclusion. The first is the problematic restriction of reparations to a small subset of victims; this limitation can be partly ameliorated by robust victim participation at early phases of the trial process, such that can they influence the cases and charges that are pursued. The second is the lack of any inclusion in decisions of how assistance may be targeted. Should the ICC help support inclusive victims' associations, as argued above, these associations could be consulted on such matters.

Outreach Programs to Victims

It has long been held that justice must not only be done, it must be seen to be done. This maxim is particularly apt for international criminal tribunals, which depend on their "expressivist function" to achieve various ends (Drumbl 2007; Vinck and Pham 2010). The ICTY and ICTR failed in their early years to engage the communities affected by the crimes they prosecuted. To address that problem, the *ad hoc* tribunals created outreach programs in the late 1990s. The creators of the ICC recognized that outreach would be a key function, since the Court would hold trials at great distances from the scenes of alleged crimes, and follow legal processes that are unfamiliar to the communities affected by those crimes. As a result, the ICC was created with outreach programs within the Court registry and within the Office of the Prosecutor. Since the Court began operating, however, these outreach programs have been widely criticized (Glasius 2010; IBA 2009).[20] Civil society groups in Uganda were particularly unimpressed by outreach officials, who seemed unaware of the cultural and political context of the conflict, and uninterested in engaging civil society in substantive discussions.[21]

Public deliberation is essential for democratic accountability and decision-making. However, venues and opportunities for open, inclusive deliberation are rare in post-conflict situations. For that reason, the ICC will often need to do more than simply disseminate information about what the Court is and how trials are proceeding. The International Bar Association, among others, has recommended a "shift towards the conception of outreach as a participatory dialogue rather than simple information provision" (2007). To date, this shift has not occurred (Glasius 2010).

To improve victim inclusion at the ICC, outreach programs could assist in three processes that go beyond information dissemination. First, outreach programs can help organize public deliberation by victims associations, to help facilitate collective representation. Legal advocates may lack the budget and capacity to facilitate such processes. Second, outreach programs can help fund and organize events or venues

[19] According to my interviews with directors of two Ugandan civil society organizations.
[20] Outreach programs may have improved after 2006, when the Assembly of States Parties drafted a strategic plan for outreach and significantly increased its budget.
[21] Author interviews with directors of two civil society organizations in Uganda.

(including public meetings and radio programs) where victims can share their diverse understandings of past and present injustices. While some outreach officials are concerned that to do so would confuse victims about the role that the ICC itself can play,[22] this obstacle can be overcome. Third, outreach programs can provide opportunities for victims to voice their personal narratives and views in public.[23] Only a small fraction of victims will be able to give direct testimony in trials, and outreach programs offer another opportunity for public recognition.[24]

These recommendations will not apply in all situations. For instance, they would be less necessary in contexts where domestic civil society – including social and news media – are open and vibrant. Instead, outreach programs need to be tailored to the needs of communities. But in all cases, inclusive public deliberation – and in particular deliberation that includes those who are often kept silent – is necessary for democratic mobilization.

V. Conclusion

In this paper I have proposed a model of global democracy – oriented by the principle of inclusion of those most affected – and I have applied it to a new institution of global governance, the international criminal tribunal. Specifically, I have argued that international criminal tribunals intervene in different social domains, and thereby produce different constituencies of affected persons deserving of democratic inclusion. One key constituency is constituted by victims of international crimes. The International Criminal Court has introduced new opportunities for victim inclusion, but suffers from several limitations. I have proposed democratic reforms that would, I believe, improve victim inclusion. However, this paper has been primarily theoretical, and my analyses and recommendations need to be explored through ethnography and participatory research.

The ICC is the most significant formal institution of global governance to develop since the end of the Cold War. It remains to be seen what impact the ICC and other tribunals have on behavior—from the deterrence of crimes, to the consolidation of rights-respecting state governments, to the satisfaction of victim demands for justice. The normative legitimacy of international criminal tribunals also remains an open question, one that will be addressed and re-addressed as they intervene in new situations and involve new actors. I believe that democratic reform is the most promising means to ensure that international criminal tribunals will pursue justice and accountability for those who need it most.

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[22] Author interviews with two outreach officials.

[23] Only a subset of victims may be interested in doing so (Stover 2005).

[24] Such an approach has been productively pursued in Sierra Leone and Cambodia (personal observations, Sierra Leone 2006; Cambodia 2008 and 2009).

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