

**JUSTICE AND INCLUSION IN GLOBAL POLITICS:  
VICTIM REPRESENTATION AND THE INTERNATIONAL CRIMINAL COURT**

by

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## Abstract

There are widespread concerns that those people who ought to benefit from global governance are instead ignored, disempowered or harmed by it. Central to these concerns, this dissertation argues, is the principle of *inclusion*. Bringing together normative and empirical inquiry, this dissertation explains why inclusion matters and how it might be achieved in global governance, and uses this approach to assess the oft-criticized relationship between the International Criminal Court (ICC) and victims of international crimes.

Inclusion is crucial for both justice and democratic legitimacy. Inclusion can empower constituencies to address injustices they face and negotiate what justice should entail. Inclusion is also necessary to address democratic deficits in global governance, when constituencies are excluded from decision-making processes that significantly affect them.

The complexity and large scale of global governance make inclusion difficult to conceptualize and promote. Building on democratic theory, this dissertation proposes the framework of *mediated inclusion*, which identifies the key activities of representation and communication needed for constituencies to understand and influence decision-making. It then engages with International Relations scholarship to identify actors, institutional design features and contexts that can promote or frustrate the inclusion of the intended beneficiaries of global governance. This analysis reveals both persistent challenges and positive trends in opportunities for inclusion at international organizations.

These insights are used to assess the inclusion of victims in the creation and operations of the ICC. This analysis draws on over 100 interviews with ICC staff, state officials and civil society members, as well as focus groups with survivors of violence in Uganda and Kenya. Close examination of negotiations to create the ICC reveals how advocates for victims' rights achieved a strong legal framework for victim inclusion. Case studies of the ICC's interventions in Uganda and Kenya evaluate diverse advocates for victims, and identify opportunities and limitations for victim inclusion in judicial, bureaucratic and diplomatic decision-making sites.

Contributing to debates on global democracy, transnational advocacy, international organization design and international criminal justice, this dissertation shows how the principle of inclusion can be used to critically assess global governance and to create institutions that are more legitimate and just.

## **Preface**

This is an original intellectual product of Chris Tenove.

Chapter 6 draws in part on research published in Tenove, Chris. (2013). *International Justice for Victims? Assessing the International Criminal Court from Victims' Perspectives in Kenya and Uganda*. Waterloo, Canada: Centre for International Governance Innovation.

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## List of Abbreviations

AIDS	Acquired Immune Deficiency Syndrome
ARLPI	Acholi Religious Leaders Peace Initiative
ASP	Assembly of State Parties to the Rome Statute
AU	African Union
CAR	Central African Republic
CICC	Coalition for the International Criminal Court
CLR	Common Legal Representative for victims at the ICC
DRC	Democratic Republic of the Congo
ECOSOC	Economic and Social Council of the United Nations
EU	European Union
GFATM	Global Fund to Fight AIDS, Tuberculosis and Malaria
HRC	Human Rights Center, University of California, Berkeley
HRW	Human Rights Watch
ICC	International Criminal Court
ICTJ	International Center for Transitional Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
ILC	International Law Commission
IMF	International Monetary Fund
IMT	International Military Tribunal
IO	Intergovernmental Organizations (or “international organization”)
IR	International Relations LRA            Lord’s Resistance Army
NATO	North Atlantic Treaty Organization
NGO	Non-governmental organization
OPCV	Office of Public Counsel for Victims, ICC
OTP	Office of the Prosecutor, ICC
REDRESS	The Redress Trust Limited (UK-based NGO)

TFV	Trust Fund for Victims, ICC
UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nations
UNFCCC	United Nations Framework Convention on Climate Change
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNSC	United Nations Security Council
USA	United States of America
VPRS	Victim Participation and Reparations Section, ICC
VRWG	Victims' Rights Working Group of the Coalition of the International Criminal Court
WHO	World Health Organization
WTO	World Trade Organization
WW2	World War Two

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for Elin

## CHAPTER 1: INTRODUCTION

In David Scheffer's memoir of his time as the United States Ambassador-at-Large for War Crimes Issues, he reflects on his efforts to push colleagues in government to take stronger action on international criminal justice:

Often, while listening to senior officials sitting comfortably in the White House Situation Room explain why other national priorities trumped atrocities and the pursuit of war criminals, I wanted ... [the] mutilated bodies and missing souls of girls, boys, women and men of Bosnia, Rwanda, eastern Congo, and Sierra Leone to file silently through that wood-paneled room and remind policy-makers of the fate of ordinary human beings.<sup>1</sup>

Like many advocates of international criminal justice, Scheffer promotes its rules and institutions by referring to the suffering of victims and their need for redress. Scholars have shown that contemporary debates about international criminal justice often focus on whether or not it provides “justice for victims.”<sup>2</sup> But Scheffer's image is telling in another way. The role for victims in his imaginary scene is to wait silently for decision-makers to speak on their behalf. Critics of international criminal justice often make just this accusation: that victims are effectively voiceless, unable to advance their interests and desires, the targets of governance rather than agents of justice. On this view, “justice for victims” is a slogan that adds a moral veneer to a governance regime that state governments and other powerful actors use to promote their own interests.

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<sup>1</sup> Scheffer, 2013, 2.

<sup>2</sup> On the importance of victims to the legitimacy of international criminal justice, see Fletcher, forthcoming; Glasius, 2012; Hirsch, 2010; Kendall and Nouwen, 2013; McEvoy and McConnachie, 2012; Mégret, forthcoming; Shaw *et al.*, 2010.

By “victims,” I refer to people harmed by acts defined as crimes by the ICC's Rome Statute. The term is contentious for some scholars, and activists and its various connotations – such as those of powerlessness or dependency – warrant attention. For a discussion of the appropriateness of the term “victims” by survivors of mass violence in Kenya and Uganda see Chapter Six, Section 6.4, and Tenove, 2013b, 10-14.

Such concerns are not limited to international criminal justice. Many global governance institutions<sup>3</sup> have been criticized for excluding the voices of their intended beneficiaries<sup>4</sup> from decisions that will significantly affect them. These criticisms frequently draw on the normative language of democracy: global governance institutions are accused of lacking democratic legitimacy or being deficient in democratic values such as transparency, accountability and participation.

How should we understand and address widespread concerns that the people who ought to benefit from global governance institutions are ignored, disempowered or harmed by them? In this dissertation I respond to that central question through both normative and empirical inquiry, and in doing so I aim to make three scholarly contributions.

First, I seek to clarify the normative issues at stake. I propose that the principle of *inclusion* is central to many concerns about global governance. Inclusion means that people have an opportunity to understand and influence decisions that affect them. I argue that inclusion is crucial for global governance to promote justice and to be democratically legitimate.

Inclusion is not a controversial principle in the abstract. What inclusion entails in practice, however, is frequently complicated and contested. We can easily imagine what inclusion looks like when decisions affect members of a small group. It is much less clear what inclusion should look like in global governance, where complex policies are made at multiple decision-making sites and affect millions of people across continents. Because of the complexity and scale of global governance, inclusion requires political representation. I propose the framework of

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<sup>3</sup> By “global governance institutions” I refer to formal organizations that govern individuals in two or more states. “Governance,” to use a prominent definition, refers to the “processes and institutions, both formal and informal, that guide and restrain the collective activities of a group” (Nye and Donahue, 2000, 12). Global governance institutions include intergovernmental organizations (henceforth “international organizations” or IOs) that states create and delegate authority to, and IOs are the focus of this dissertation’s more empirically-grounded work in Chapters Four, Five and Six. Global governance institutions can also include public-private regulatory bodies, multi-national corporations, transnational professional bodies, and non-governmental organizations (NGOs). The normative and theoretical work of Chapters Two and Three applies to this broader category of global governance institutions.

<sup>4</sup> The social categories of “intended beneficiaries” will be discussed in greater detail in Chapter Four.

*mediated inclusion* to explain how representation can enable inclusion in governance decisions that affect large constituencies.

The second contribution of this dissertation is to identify factors that make global governance institutions more or less inclusive of their intended beneficiaries. To do so I draw on and intervene in International Relations (IR) scholarship on transnational advocacy, inter-state negotiations and the design of global governance institutions. I examine the social construction of different categories of “intended beneficiaries” of global governance, and I identify actors, institutional design features, and contexts that can promote or frustrate their inclusion in global governance decision-making.

The dissertation’s third contribution is an investigation of the relationship between a prominent IO and its intended beneficiaries: the ICC and victims of international crimes. This in-depth case study adds to our understanding of actors and mechanisms of inclusion in global governance. It also contributes to important debates in the field of international criminal justice concerning the ICC’s responsiveness to victims and its ability to promote justice for them. I use the framework of mediated inclusion to evaluate victim inclusion in the creation and ongoing operations of the ICC. I show that during negotiations of the Rome Statute, the founding treaty of the ICC, civil society actors worked together with several state officials to insert key victim-related provisions into the statute text. These provisions provide a strong legal basis for victim inclusion. However, my analysis of the ICC’s interventions in Uganda and Kenya reveals that the implementation of these provisions leaves many victims’ advocates – and victims themselves – unsatisfied.

In the remainder of this chapter, I expand upon the problem that this dissertation addresses, the research approach I take and the principal arguments I develop in subsequent chapters.

## **1.1 The Problem: Global Governance in a Democratic Era**

In recent years there has been widespread criticism of the democratic legitimacy of global governance institutions, including major international organizations like the United Nations

(UN) or the World Bank, private and semi-private regulatory bodies, and civil society organizations. Two important trends in recent decades have triggered these concerns: the increasing authority and regulatory capacity of global governance institutions and the increasing prominence of democracy as a standard of political legitimacy.

Global governance has expanded in recent decades and it is likely to continue to do so. Since World War Two there has been a dramatic increase in the number of “global governors” that exercise power across borders, including international organizations as well as public-private regulators, multinational corporations, transnational professional associations and NGOs.<sup>5</sup> These global governors have modified our expectations and practices of state sovereignty, they increasingly target individuals and groups rather than states, and their decisions are often enforced through coercion rather than state consent.<sup>6</sup> In some cases, global governance institutions supersede state governments. We see this when people flee their states and wind up under the protection of the UN High Commissioner for Refugees (UNHCR); when natural disasters overwhelm states and humanitarian actors rush in to provide life-saving aid; when the UN or other international organizations take over administration of a state during major transitions; and – in the principal empirical case of this dissertation – when international criminal tribunals take over justice-seeking functions that states are unwilling or unable to perform.

Zürn and co-authors have convincingly argued that the expanding regulatory capacity of global governance institutions has provoked the politicization of their authority and contests over their legitimacy.<sup>7</sup> As people become more aware of the impact that global governance institutions have on their lives, they increasingly mobilize to have these institutions promote their own political preferences.<sup>8</sup> For many people, the conventional standard of legitimacy for global governance – the consent of state governments – is not sufficient.

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<sup>5</sup> Avant *et al.*, 2010; Barnett and Finnemore, 2004; Keohane, 2002a.

<sup>6</sup> Hurrell, 2007.

<sup>7</sup> Zürn, 2004; Zürn *et al.*, 2012.

<sup>8</sup> Zürn *et al.*, 2012, 71.

These challenges to the legitimacy of global governance have come in an era when political legitimacy is frequently evaluated according to the language and practices of democracy.<sup>9</sup> Democratic normative expectations are particularly prominent in Western countries, but not only in the West. The proportion of states that count as democracies has increased substantially in the last century and even patently non-democratic states use the language of democracy to promote their own legitimacy. Since the Cold War ended, democratic state government has become a prominent though contested norm in international society<sup>10</sup> and a hallmark of “civilized” states.<sup>11</sup> Buchanan and Keohane argue that we live in a “democratic era” and international organizations “will only thrive if they are viewed as legitimate by democratic publics.”<sup>12</sup> Moravcsik has thus claimed that the democratic legitimacy of global governance is “one of the central questions – perhaps *the* central question – in contemporary world politics.”<sup>13</sup>

The expansion of global governance in a democratic era has generated a central *problematization* in global politics, to use Foucault’s term.<sup>14</sup> An area of political contest and ethical importance has become problematic, it has become an important object of thought, and it has provoked diverse responses in theory and practice. People whose lives are deeply affected by global governance have taken to the streets and to diplomatic conferences to criticize democratic deficits and demand that their voices be heard in decision-making. Global governance institutions from UN agencies to the World Bank to international NGOs like Oxfam and Amnesty International have introduced new processes to consult and to be accountable to stakeholders.<sup>15</sup> Democratic theorists, IR scholars and other academics have themselves proposed

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<sup>9</sup> Democracy is not the only alternative to state consent as a normative standard for global governance legitimacy. Others include legality, efficacy and cross-cultural acceptability (Zürn and Stephen, 2010).

<sup>10</sup> Clark, 2009.

<sup>11</sup> Hobson, 2008.

<sup>12</sup> Buchanan and Keohane, 2011, 407.

<sup>13</sup> Moravcsik, 2004, 336.

<sup>14</sup> Foucault, 2003.

<sup>15</sup> Dingwerth (2014) therefore identifies a burgeoning norm of “democratic global governance.”

new and competing models to democratize global governance, and some have asked whether democracy itself must be rethought in an interdependent world.<sup>16</sup>

This proliferation of democratic demands and practices in global governance poses a number of empirical puzzles. How do democratic norms and practices change when they move from domestic to global governance? Why have different global governance institutions adopted different practices? What impact do these different practices have on the function or legitimacy of institutions? Are they superficial, low cost gestures that institutions use to placate critics? Or do these changes take us toward a structural change in global politics and the nascence of something like a global democratic polity?

For each of these questions the answer will depend in part on how democracy is understood, both in its normative commitments and its instantiation in practice. Democracy is an essentially-contested concept. Different values and practices have been called “democratic” and some of these compete with each other. To take a classic example, while modern democracy is often equated with periodic elections, Rousseau claimed that representative government was a form of feudalism and that free citizens become slaves between elections.<sup>17</sup> In recent debates about democratic deficits in global politics, different scholars have advanced very different notions of democracy. Some focus on the threat that global governance poses to democracy within states. Such fears have been raised by conservative American scholars of the “new sovereigntist” movement, who believe that global governance is undermining popular sovereignty and constitutional conventions.<sup>18</sup> Similar fears have been raised by post-colonial and left-leaning thinkers who worry that the democratic will of weaker states is subsumed under global governance rules imposed by the United States and other powerful actors.<sup>19</sup> Other scholars embrace global governance that promotes common interests among states, and believe that its

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<sup>16</sup> See, for instance, Bohman, 2007; Dryzek, 2006; Fraser, 2009; Held, 1995; Scholte, 2014; Tully, 2014.

<sup>17</sup> Rousseau, 1978.

<sup>18</sup> Bolton, 2000; Goodhart and Taninchev, 2011; Rabkin, 2005.

<sup>19</sup> Chandler, 2011; Conway and Singh, 2011; Rajagopal, 2003.

legitimacy depends upon some but not all democratic norms.<sup>20</sup> Cosmopolitan democrats promote a more thoroughgoing democratization of global politics to enact universal moral equality, with some calling for an elected UN People's Assembly and other institutions of a democratic world government.<sup>21</sup>

These scholars develop different understandings of democracy to address different problems. I do the same in this dissertation. The problem animating this dissertation is the harm and political disempowerment that global governance institutions can cause those people who are nominally their intended beneficiaries. Many scholars and practitioners have raised this concern.<sup>22</sup> It is particularly well illustrated in the work of Michael Barnett. In his probing analysis of international organizations in general, and humanitarian organizations in particular, Barnett illuminates a deficiency at the heart of much global governance. Global governance institutions frequently act in the name of a group of concern, such as refugees or the poor or victims of disaster, and derive authority by doing so. However, these global governors are often unresponsive or unaccountable to their intended beneficiaries, and as a result their actions may be ineffective, unwanted, disempowering or harmful. In different writings, Barnett has characterized this problematic relationship between global governance institutions and affected groups as undemocratic liberalism,<sup>23</sup> paternalism<sup>24</sup> or a form of imperialism<sup>25</sup>—all characterized by the limited inclusion of intended beneficiaries in decisions that affect them. Barnett and others have clearly articulated a serious problem in global governance today. This dissertation aims to do something he and other IR scholars have not done, which is to propose a framework for inclusion that could feasibly address the problem they describe.

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<sup>20</sup> See, among many examples, Buchanan and Keohane, 2011; Keohane *et al.*, 2009; Moravcsik, 2004; Payne and Samhat, 2004; Scholte, 2014; Zürn, 2004; Zürn and Walter-Drop, 2011.

<sup>21</sup> Most prominent among these is Held, 1995, 2009; but see also Archibugi, 2004, 2008; Cabrera, 2010; Patomäki, 2011; Tånnsjö, 2008.

<sup>22</sup> Among many, see, De Waal, 1997; Mégret and Hoffman, 2003; Rieff, 2003; Terry, 2013; Wilde, 1998.

<sup>23</sup> Barnett and Finnemore, 2004.

<sup>24</sup> Barnett, 2011a, 2011b, 2012.

<sup>25</sup> Barnett, 2011a.

## 1.2 Beyond Utopia? Democracy and Inclusion in International Relations

The argument that global politics can and should be influenced by transnational constituencies, and in particular “weak” groups such as refugees or victims, runs counter to influential lines of thinking in IR. In Carr’s foundational work in the discipline, he argued that two liberal democratic values were disastrous when scholars and policy-makers translated them from national to international politics: that public deliberation would lead to right thinking, and that public opinion would or should determine inter-state relations.<sup>26</sup> Based on Carr’s work and others, much IR scholarship is grounded in the primacy of state interests and skepticism toward the impact of deliberation, morality, public opinion and non-state actors in an anarchic system of states. Furthermore, prominent IR approaches such as neo-realism and neo-institutionalism have assumed that the distribution of states’ material power and interests will determine the behaviour of international organizations. If these assumptions are accepted, the democratic inclusion of affected groups makes little sense – they are not states, they are not “at the table” in international negotiations, and even if they were they lack the economic and military power that determines outcomes.

However, recent developments in global governance practice and in IR scholarship have challenged these assumptions.<sup>27</sup> First, global governance practice has been transformed by a dramatic growth in civil society involvement. Indeed, developments in global civil society have gone hand-in-hand with the increasing prominence of global governance institutions. As Tallberg and Jönsson observe: “Much as the emergence of the nation-state stimulated the growth of new forms of citizen activism, the creation of international institutions in the postwar period provided new political opportunities and incentives [for civil society] to organize.”<sup>28</sup> The increased prominence of civil society has provided a new category of actors capable of representing the views and promoting the interests of groups other than states.

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<sup>26</sup> Carr, 1940.

<sup>27</sup> These developments, as well as their implications and limitations, will be discussed in greater detail in Chapter Four.

<sup>28</sup> Tallberg and Jönsson, 2010, 5.

Second, and relatedly, inter-state negotiations and global governance institutions have significantly “opened up” to non-state actors, and particularly civil society organizations.<sup>29</sup> Non-state actors now have considerable opportunities to scrutinize or even contribute to global governance decision-making. Additionally, many global governance institutions have created roles for individuals to consult and represent affected groups in organizational policy-making. Neither of these practices cause global governance institutions to surrender their authority or ignore the dictates of states, but they can create opportunities for representatives of intended beneficiaries to be at the table for decisions that affect them.

Third, in recent decades there has been a significant increase in the capacity for actors to access, analyze and share information about global governance decision-making. This development is partly technological, with improvements in information and communication technologies. There has also been a normative shift toward greater institutional transparency. Some inter-state negotiations and institutional decision-making processes remain largely secret, and even those that are not may be difficult for members of affected publics to learn about and evaluate. Nevertheless, general improvements in transparency and information dissemination can improve these possibilities.

These changes in global governance practice are key parts of an emerging norm of global democratic governance,<sup>30</sup> and they make the inclusion of affected groups more feasible. At the same time, new approaches in IR have opened theoretical space and suggested new empirical strategies to study the inclusion of affected groups.

First, constructivist scholars have greatly expanded our understanding of how ideas matter in global politics. This literature has convincingly shown that material power and interest are not the only factors that affect the behaviour of states and global governance institutions. Many different kinds of actors, including expert bodies and NGOs, can contest and contribute to the social understandings that shape global governance. Scholars have proposed different types of

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<sup>29</sup> Tallberg *et al.*, 2013.

<sup>30</sup> Dingwerth, 2014.

authority, including moral and expert authority, that enable non-state actors to influence decision-making by states and global governance institutions.<sup>31</sup>

Second, constructivists have identified the role of constitutive norms in global politics. As I argue in Chapter Four, the constitutive norms of different global governance regimes<sup>32</sup> create certain categories of “intended beneficiaries,” such as “refugees,” “the global poor” and “victims of international crimes.” These social categories are central to these regimes, and actors make claims about intended beneficiaries to promote the legitimacy of global governance institutions and to advance their own authority.

Third, scholars have more closely examined the forms of power, authority and autonomy wielded by global governance institutions, rather than treating them as passive agents of states or intervening variables that reflect a distribution of states’ powers and interests.<sup>33</sup>

Fourth, as civil society organizations have grown in prominence in global politics, IR scholars have studied how they make decisions, mobilize authority, engage with donors and beneficiaries, and compete with one another. These analyses challenge the notion that such actors are simply altruistic. By zooming in to examine the structure and institutional practices of civil society organizations, and by pulling back to examine entire fields of competing organizations, scholars have identified factors that may make organizations more or less capable to operate as representatives of affected groups.<sup>34</sup>

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<sup>31</sup> See in particular Avant *et al.*, 2010; Barnett and Finnemore, 2004.

<sup>32</sup> Governance regimes have been defined a “set of implicit or explicit principles, norms, rules, and decision-making procedures around which actors expectations converge in a given area of international relations” (Krasner, 1983, 2). Global governance regimes often have prominent international organizations, such as the UNHCR for the refugee regime or (currently) the ICC for the international criminal justice regime.

<sup>33</sup> See, among others, Avant *et al.*, 2010; Barnett and Finnemore, 2004; Betts, 2009.

<sup>34</sup> This literature is discussed further in Chapter Four. See, among others, Barnett, 2011a; Bob, 2005; Brown *et al.*, 2012; Carpenter, 2007; Cooley and Ron, 2002; Hopgood, 2006.

Fifth, IR scholars have increasingly examined the communicative encounters in global governance decision-making. An important stream of this research explores the possibility for deliberation or Habermasian communicative action in inter-state negotiations.<sup>35</sup> Scholars have begun to identify conditions in which reason-giving, rather than bargaining or coercion, shape decision-making processes. This research can help us see when members or representatives of groups affected by global governance might shape decisions through normative or expert claims.

Taken together, these IR approaches provide much greater analytical traction on how global governance decisions are made, on the forms of authority that are at play in these decisions, and on how diverse actors – from state officials to IO bureaucrats to NGOs – may be able to mobilize that authority and influence outcomes. These research approaches do not dismiss the importance of state interest and power, but help us understand in finer detail how state interest and power are created, acted out and constrained. They also make it possible to see how constituencies that exist within or across state borders *could* be included in global governance regimes' decision-making. However, we currently lack a framework that brings together these empirical insights with careful normative argument.

### **1.3 The Approach: Concept Development, Empirical Analysis and Situated Study**

This dissertation takes a pragmatic approach, in several senses of the word.<sup>36</sup> A pragmatic approach aims to create knowledge that can inform prudent, value-rational action. This approach challenges the conventional division of labour between researchers who do abstract normative theory and others who do value-neutral, empirical inquiry.<sup>37</sup>

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<sup>35</sup> Crawford, 2009; Deitelhoff, 2009; Deitelhoff and Müller, 2005; Johnstone, 2011; Mitzen, 2005, 2013; Risse, 2000, 2004; Ulbert *et al.*, 2004.

<sup>36</sup> For reflections on pragmatism in IR research, see Brown, 2012; Friedrichs and Kratochwil, 2009; Kratochwil, 2011.

<sup>37</sup> For compelling examples of this approach in democratic theory, see Mansbridge, 1983; Wedeen, 2007. See also Flyvbjerg, 2001.

The thinking of pragmatist philosopher John Dewey informs this dissertation. Dewey, along with other pragmatist thinkers, argued that we should not treat concepts and values as deductive categories but rather as objects of thought that can be worked on to solve problems in our lives.<sup>38</sup> One cluster of concepts and values that he worked on was democracy. He argued that democracy has to be continually rethought to address the problems faced in increasingly complex societies. Confronting the dramatic changes to social and political life at the beginning of the 20<sup>th</sup> century, he identified two key tasks for those who wanted to contribute to rethinking democracy. In Bohman's words, these tasks are "clarifying and deepening our conceptual resources related to the core ideals of democracy, and then using these resources normatively to criticize and remake existing political and institutional forms."<sup>39</sup>

This dissertation is also pragmatic in that it responds to the problems and practices of individuals involved in an area of governance. The research began with a specific set of frustrations and confusions that I encountered among lawyers, tribunal staff, civil society actors and victims of mass violence. In particular, these individuals expressed concern about the apparent lack of agency of victims in international criminal justice and questioned its cross-cultural legitimacy.

The research for this dissertation thus took the pragmatic approach of moving back and forth between conceptual work, empirical study and practical engagement with a particular social field. To do so it brings together democratic theory, IR scholarship and an in-depth case study of victim inclusion in international criminal justice.

I draw on democratic theory because key problems of global governance are currently formulated in democratic terms, and contemporary democratic theorists have developed nuanced conceptual tools and reflections on institutional design that can enhance IR scholarship. In particular, few IR scholars have drawn on the productive vein of contemporary democratic theory that unpacks and re-articulates concepts of inclusion and representation, making them

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<sup>38</sup> Dewey, 2004.

<sup>39</sup> Bohman, 2007, 171.

more applicable to complex, large-scale governance in an interdependent world.<sup>40</sup> This literature enables us to identify and assess a wide range of actors who can function as political representatives in different sites of decision-making. For instance, we can evaluate Bono's claims to represent Africans on matters of debt and trade or Oxfam's advocacy on behalf of the global poor.<sup>41</sup> Unfortunately, IR scholars have tended to use the language of democracy in a very broad sense, clarifying little, or they have narrowly defined it in order to differentiate democratic from undemocratic states. As Keohane *et al* caution fellow IR scholars, the study of global governance and democracy "requires not just subtle empirical investigation, but philosophical clarity."<sup>42</sup>

At the same time, IR scholarship can enrich democratic theory by informing its empirical assumptions about the practices and possibilities of global governance. For instance, recent work on global civil society shows the different roles, organizational forms and competitive pressures of NGOs, identifying factors that make them better or worse representatives of constituencies affected by global governance. And IR scholarship on the design of global governance institutions provides insights into how they are created and modified over time, and how principles like accountability and transparency may be built into them.

Finally, this dissertation is informed by engagement with the actors and practices of international criminal justice. It benefited from formal interviews and informal discussions with diplomats and civil society actors, as well as with ICC staff ranging from prosecutors to judges to registry officials who work closely with victims. Given this dissertation's focus on inclusion, it was also important to engage with the perspectives of those who have been harmed by violations of international criminal law. I therefore conducted focus groups in Kenya and Uganda. Their findings are presented near the end of this dissertation, in Chapter Six, but these conversations were held midway through the research process and shaped the dissertation's theoretical

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<sup>40</sup> Though see Macdonald, 2008; Steffek and Hahn, 2010; Zürn and Walter-Drop, 2011.

<sup>41</sup> See, among others, Montanaro, 2012; Rubenstein, 2014; Saward, 2009.

<sup>42</sup> Keohane *et al.*, 2011, 602.

framework. For instance, discussants proposed multiple and complementary standards for actors who might represent them, and they alerted me to the hollowness of representation when constituency members are unaware of the positions put forward by their own representatives. These observations influenced my approach to representation and publicity in the mediated inclusion of constituencies. They also contributed to policy reports and posts on expert blogs that were published during dissertation research.<sup>43</sup>

#### **1.4 The Argument: Justification and Prospects for Inclusion in Global Politics**

I argue in Chapter Two that inclusion is central to advancing justice and democratic legitimacy in global governance. Inclusion may contribute to justice, as inclusion enables those who experience injustice to raise their voices and be heard, demand redress, hold decision-makers to account, and shape collective standards of justice. Inclusion is also inherent to democracy, and lies at the core of the democratic conviction that people should give rules to themselves. However, it is not clear how inclusion or democracy might be promoted at the scale and with the complexity of global governance.

To address this issue, and to develop a conception of democracy that is appropriate to an interdependent world, we need to reconsider fundamental assumptions about the boundaries and practices of democracy. Democracy requires that we are included in decision-making that significantly affects us. A central assumption of modern democracy is that inclusion is linked to one's status as a citizen of a state. But today our lives are shaped by decisions made beyond our states' borders. Rather than see states as distinct and separate units of democratic activity, we need to examine the global political system in its totality. When we analyze democracy systemically, we look for institutional arrangements that promote inclusion and collective action wherever they are most needed. Global governance institutions can contribute in positive or negative ways. They can advance different capacities that individuals and groups require for

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<sup>43</sup> Tenove, 2012a, 2012b, 2013a, 2013b, 2013c, 2014; Tenove and Radziejowska, 2013.

democratic agency – such as ensuring basic levels of protection, education and means of communication – but can also undermine these capacities. Furthermore, the architecture of global governance can help structure relations among polities to minimize situations where people are governed by others without any say, but it can also create such situations. As an example, the international criminal justice regime might contribute to democracy in the global political system if it helps protect individuals, ethnic groups and states from forms of violence that radically limit people’s capacities to act as democratic agents. But international criminal justice might undermine democracy in the global political system if it fails to deter violence or help people recover from it, and if it provides an additional means for powerful states to exert control over weaker states and non-state actors.<sup>44</sup>

Global governance institutions can thus affect democracy within and across polities in complex ways, and we need to assess these systemic effects. We also need to pay close attention to the particular relationships between global governance institutions and those categories of people whose lives they aim to significantly affect. The majority of this dissertation focuses on these relationships, and the possibility for inclusion of targeted groups.

To understand what that inclusion might look like, Chapter Three proposes the framework of *mediated inclusion*. To preview my argument, mediated inclusion, as opposed to direct inclusion, uses practices of representation to include people’s interests and perspectives in relevant decision-making processes. Representation does not replace participation, but it enables forms of participation that are workable in large-scale governance.

Mediated inclusion has three necessary elements: *representative claim-making*, *advocacy* and *publicity*.

- First, representatives must make valid claims on behalf of a constituency. Representatives can advance different normative goods for their constituencies, and thus have different

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<sup>44</sup> These arguments are developed further in Chapter Two and Chapter Seven.

standards of legitimacy. I propose three ideal types of representative claims: speaking *for*, speaking *as* and speaking *about* a constituency.

- Second, representatives must be able to advocate for a constituency in relevant decision-making processes and possibly influence them. To do so, they require access to these processes and consideration of their claims by decision-makers.
- Third, decisions must be made in a sufficiently transparent manner for decision-makers to be evaluated and held to account, and constituency members must be able to cultivate informed opinions about decision-making processes that they believe to be important or harmful.

Focusing on these three elements helps us assess whether a constituency is included in particular situations or decision-making processes. It also highlights those functions that are necessary for inclusion, thereby focusing our attention on issues of governance design.

Chapter Four turns to IR scholarship to understand opportunities and obstacles to inclusion in global governance today. Many global governance institutions have introduced practices to include the views and interests of their stakeholders. But do any of these diverse practices contribute to the meaningful inclusion of the intended beneficiaries of governance regimes?

To address this question, I clarify the central place of “intended beneficiaries” in global governance regimes. Intended beneficiaries, such as refugees and victims of international crimes, are social categories constructed by some but not all regimes. They are key to these regimes’ legitimacy, and actors within regimes engage in authority contests by making claims about them. However, despite the prominence of claims about intended beneficiaries, their actual views and interests may be misrepresented or ignored. In some cases, for instance, being designated a refugee or a victim of international crimes can be disempowering or harmful. Inclusion can address this predicament by giving intended beneficiaries opportunities to contest and modify the social category, or to influence the governance that applies to it.

To determine whether and how inclusion in global governance is possible, I examine the trends mentioned in Section 1.2 above. For each trend, I identify arguments that challenge its possible contribution to the mediated inclusion of intended beneficiaries, and then propose conceptual and

empirical reasons to temper this skepticism. I conclude that opportunities for the mediated inclusion of intended beneficiaries in global governance have improved.

The rise of global civil society, the first trend, appears to create actors capable of representing the intended beneficiaries of global governance. However, as these civil society actors have become more influential their own authority claims have been politicized and subjected to greater scrutiny, including questions about their representative role and their own democratic legitimacy.<sup>45</sup> Scholars have shown that NGOs frequently are not good representatives for these groups, due to factors including their organizational structure and their competition for funding. These findings do not mean that good representation of intended beneficiaries is impossible. I argue instead that some but not all types of NGOs can play important roles as representatives. Moreover, NGOs are not the only actors capable of representing intended beneficiaries. Others include academics, IO staff designated to play a representative role, and diplomats who advocate for constituencies other than their own state's citizens.

International negotiations and IO decision-making have increasingly opened up to non-state actors, the second trend.<sup>46</sup> However, some research suggests that this access does not translate into real influence for representatives of intended beneficiaries, who will nevertheless lack influence over states or international organizations. This is a serious challenge, but there are two reasons to be less skeptical. First, IR researchers have shown that non-state actors can wield expert, moral and political authority in decision-making. Second, certain conditions exist in which global governance decisions are influenced by arguing rather than bargaining, meaning that reasons rather than resources can shape outcomes. When arguing is prominent, there are opportunities for actors with less institutional and material power to exert influence.

The spread of a transparency norm along with developments in information and communication technology, the third trend, may improve the publicity of global governance decision-making.

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<sup>45</sup> See Jordan and van Tuijl, 2006a; Scholte, 2011a; Slim, 2002, and especially Erman and Uhlin, 2010.

<sup>46</sup> See, among others, Jönsson and Tallberg, 2010; Payne and Samhat, 2004; Scholte, 2011a; Steffek and Nanz, 2008; Tallberg *et al.*, 2013.

However, some research shows that the intended beneficiaries of global governance are often poorly informed. This finding is less concerning, I argue, when we use a realistic standard of awareness. Even in developed democracies, we do not expect all citizens to be informed on all issues. Instead, we need decisions to be sufficiently transparent to be assessed by a number of actors with motivation and some expertise. The public in general needs to be aware of basic details about decisions that deeply affect them, such that they can seek greater information and take action if they desire. If similar expectations are applied to global governance it appears that there have been significant improvements in many global governance regimes, though there are still serious obstacles for intended beneficiaries to develop informed opinions regarding the IOs that affect them.

I illustrate each of these arguments with examples from global governance regimes today, ranging from the World Bank to the Global Fund to Fight AIDS, Tuberculosis and Malaria to UN peacekeeping operations. Not only are there important trends in opportunities for the mediated inclusion, there are practices and design elements of particular institutions that will be particularly fruitful or problematic. To identify these requires in-depth analysis of IOs, to see what practices of inclusion exist and what impact they have. The remainder of the dissertation provides such a study.

## **1.5 The Case Study: Victim Inclusion in International Criminal Justice**

The ICC is an important case study for investigating the capacity of IOs to promote justice for their intended beneficiaries and – less obviously – for examining issues of democratic legitimacy. The ICC, created through negotiations that culminated in 1998, is arguably the most significant IO to be created in recent decades. Many of its architects and supporters have claimed that it can provide justice for victims of humanity’s most terrible crimes, and that it is a legitimate creation of the international community rather than “victor’s justice” imposed by a few powerful states. However, scholars, practitioners and political leaders have criticized the

ICC for failing to promote justice for the actual victims of mass violence, and others have accused it of undermining democracy or lacking democratic legitimacy.<sup>47</sup>

This dissertation suggests how we might evaluate these competing claims. To do so requires conceptual work as well as empirical research. First, we must assess what justice for victims ought to mean and how to achieve it. Rather than leave those questions to scholars and practitioners, I argue that justice for victims also requires that victims' interests and perspectives be included in the design, oversight and operations of the ICC. Second, we must think carefully about the criteria of democratic legitimacy that should be applied to the ICC. I argue that the democratic legitimacy of the Court should not only be assessed according to its acceptance by democratic states (though that is important), but also by its capacity to promote or protect democratic capacities of individuals and polities in the global political system.<sup>48</sup> Furthermore, we must examine the democratic quality of decision-making processes by which international criminal laws and institutional rules are made (such as state negotiations to create the ICC) and the many sites of decision-making that implement these laws and rules (such as by the ICC's Assembly of State Parties or its Trust Fund for Victims). These decisions significantly affect victims, and they too must be assessed for victim inclusion.

In Chapter Five, I argue that the "victim of international crimes" is a social category constituted by international criminal justice, and that actors within the regime make claims about victims to promote their own authority or the authority of their institutions. However, being the object of this claim-making does not necessarily promote inclusion. To assess victims' inclusion, we need to look at those decision-making sites that significantly affect them, which include diplomatic and bureaucratic decision-making processes as well as judicial proceedings. We must also recognize legitimate restrictions on victim inclusion. For instance, key normative functions of

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<sup>47</sup> On the ICC's questionable capacity to promote justice for victims, see Branch, 2007; Clarke, 2009; Fletcher, forthcoming; Mamdani, 2010. On problems of democratic legitimacy, see Bolton, 2001; Goldsmith, 2003; Morris, 2002. See also the claims of African leaders that are discussed in Chapter Six.

<sup>48</sup> Questions about the democratic role of criminal justice institutions may strike some as unorthodox, since we often do not think of them as important *democratic* institutions. I argue otherwise in Chapters Five and Seven. See also Fichtelberg, 2006; Glasius, 2012.

criminal trials will be lost if the guilt and punishment of accused persons are decided according to victims' interests and preferences. Nevertheless, evaluating international criminal justice from the perspective of victims' inclusion prompts a critical reappraisal of its rules and practices, including those of trial processes.

Chapter Five also examines the negotiation of the ICC's Rome Statute, a constitutional moment in international criminal justice that transformed many of its rules, including those regarding victims. I identify civil society actors and state officials that advocated for provisions that they believed would benefit future victims. As a result of their advocacy, the Statute has several victim-specific provisions on matters of prosecutorial discretion, victim participation in proceedings, reparations, and sexual and gender violence, all of which create opportunities for the ICC to be more inclusive of diverse victims' interests and perspectives than could previous international criminal tribunals.

In Chapter Six I evaluate the mediated inclusion of victims in the ICC's interventions in Uganda and Kenya, and in doing so I examine the implementation of the Rome Statute's victim-related provisions. The two case studies identify different sites of decision-making that warrant inclusion and highlight the work of different types of victims' representatives. The ICC's intervention in Uganda provoked a backlash from representatives of victims and affected communities. They claimed that the Court undermined victims' interests in peace and preferences for local, restorative justice approaches. I examine these and other representative claims regarding victims, and their contribution to debates over the Prosecutor's policies for investigations and prosecutions. In the Kenyan situation, the ICC indicted several leading political figures and has faced serious opposition from the Kenyan government and some African states. I analyze victims' inclusion in a key diplomatic debate, when the UN Security Council voted on whether to suspend proceedings against Kenyan leaders. I also assess victims' inclusion in ongoing judicial processes, focusing on the work of ICC-appointed victims' legal representatives.

My analysis of ICC operations draws on over 100 interviews with diplomats, civil society actors and Court staff. It also draws on insights from focus groups with survivors of mass violence in

seven communities in Uganda and Kenya. Participants critically assessed their representation and their access to information about the ICC, and offered nuanced reflections on the strengths and weaknesses of the Court in providing justice. A principal complaint against the ICC by focus group participants was its failure to successfully prosecute people most responsible for international crimes or to provide significant reparations for victims. Inclusion mattered to them, but so did effectiveness.

The ICC's interventions in Uganda and Kenya paint complex pictures of victim inclusion, showing both strengths and weaknesses. Different types of victims' representatives have made competing claims about victims' interests and perspectives, and these actors have contributed in various ways to judicial, bureaucratic and diplomatic decision-making processes, though their influence is often limited. Furthermore, there were weaknesses in transparency and serious obstacles to victims' access to information about the ICC. The two case studies also show that while justice for victims is affected by deficits in victim inclusion, it is seriously compromised by problems of institutional efficacy and by factors external to the ICC.

## **1.6 Conclusion**

The final chapter explains the contributions that this dissertation makes to scholarship on international criminal justice, transnational advocacy and IO design, and democratic theory. It also addresses limitations of the dissertation and avenues for future research.

In brief, this dissertation contributes to scholarship in international criminal justice by proposing a novel approach to evaluate whether it provides "justice for victims." I argue that the ICC and other tribunals are more likely to do so if they are responsive to diverse insights and interests of victims and their communities. I claim that the Rome Statute provides the statutory basis for such responsiveness. My analysis of the ICC's operations reveals weaknesses in practices of victim inclusion, as well as significant deficiencies in the Court's basic effectiveness. As a result, victims face serious obstacles to make substantive use of the formal opportunities they have to address the justices they face.

On the debate over the democratic legitimacy of international criminal justice, I challenge the view that the ICC lacks democratic legitimacy whenever it acts without the pre-authorized or ongoing consent of democratic governments. The ICC, like other global governance institutions, should also be assessed according to whether it can promote democratic functions across state and sub-state polities. We must therefore look at the Court's impact, and not just its authorization. To date we lack persuasive evidence that the ICC deters violence, rehabilitates victims as political agents or improves the quality of democracy in states where it intervenes. We need more extensive and rigorous empirical research as the Court completes its first trials and implements victim reparations.

This dissertation's second contribution is to IR literature. My investigation of the principle of inclusion complements recent and productive engagements between IR and democratic theory. These include examinations of the democratic values of deliberation,<sup>49</sup> accountability<sup>50</sup> and transparency<sup>51</sup> in global governance. I also contribute to literature on transnational advocacy and IO design. I identify factors that influence whether civil society actors are likely to make strong claims to represent the intended beneficiaries of global governance, and I draw attention to other potential representatives that many IR scholars ignore. I also identify institutional design features that are likely to make IOs more or less inclusive, from transparency mechanisms to "gatekeeping" processes that determine access by non-state actors to decision-making.

More empirical research is needed to extend my assessment of the feasibility of including intended beneficiaries in global governance. My in-depth case study of the ICC identifies practices and situations that promote or undermine inclusion. However, the ICC is just one international organization, and it will likely differ from others in its relationship with its intended beneficiaries. In Chapter Seven, I discuss the limitations of the ICC as a case and propose future research avenues to generate more generalizable claims.

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<sup>49</sup> See Deitelhoff and Müller, 2005; Johnstone, 2011; Müller, 2004; Risse, 2004.

<sup>50</sup> See Ebrahim and Weisband, 2007; Erman and Uhlin, 2010; Grant and Keohane, 2005; Koenig-Archibugi and Held, 2005; Scholte, 2011d.

<sup>51</sup> See Florini, 2007; Grigorescu, 2007; Payne and Samhat, 2004.

There are also several criticisms of my approach to inclusion that warrant further consideration. These include tensions between inclusion and other normative principles, and the possibility that inclusion in global governance can sometimes undermine the capacities of constituencies or polities to seek justice or act democratically.

Finally, this dissertation makes several contributions to democratic theory. I propose a new, systemic approach to democracy in global politics. This approach addresses theoretical debates about the “boundaries” of democratic polities in an interdependent world, and it suggests the positive and negative impacts that global governance could have on democratic functions across multiple polities. I also develop the framework of mediated inclusion to suggest how constituencies of particular global governance institutions might be included in decision-making. Furthermore, I contribute to recent scholarship on political representation. I illustrate the capacity for actors to identify and mobilize transnational constituencies through acts of representation. I also propose a new typology of representative claim-making, which illuminates the different but complementary normative goods that representatives can advance.

My focus on inclusion in global politics is motivated by questions about how global governance might address or exacerbate injustices in the world. I argue that global governance institutions, to be more likely to promote justice, should be designed to be more inclusive of the people they aim to assist. I therefore use inclusion as a principle of institutional design. Above all, however, inclusion is a principle that should guide evaluations of social relations. As I hope to show, the principle of inclusion promotes a critical and questioning stance toward governance, even when governance claims to be acting in the name of justice.

## CHAPTER 2: JUSTICE AND DEMOCRACY IN AN INTERDEPENDENT WORLD

People's lives are buffeted, challenged and enriched by forces and interdependencies that cross state borders. We share vulnerabilities to climate change and nuclear war. We possess affinities with people scattered around the world who share our professions, religions, languages or hobbies. We also share governance. The citizens of other countries shape many of the rules that structure our lives. Foreign governments, transnational corporations, international organizations and other global governance actors make decisions that influence how we regulate our economic transactions, choose and conduct military operations, protect or exploit our natural environment, and treat our fellow citizens.

This global interdependency has significant but perplexing implications for democracy and justice. On the one hand, rules made by foreign governments and transnational actors often trump those made by our state governments, including governments that we have chosen democratically. On the other hand, global governance can sometimes improve the quality of democracy, such as by monitoring the conduct of elections or promoting rights to speech and association. Global governance can also help to address injustices. When individuals in multiple countries experience the same injustice or vulnerability, particularly when their state governments are unwilling or unable to address it, global governance may help. However, if rules and institutions are imposed on people, even if intended to advance justice, they can cause disempowerment and harm. It is thus a daunting but critical task to understand how we might promote justice and democracy in an increasingly interdependent world.

In this chapter I argue that *inclusion* is central to both justice and democracy in global governance. Inclusion, in brief, means that people have opportunities to understand, evaluate and influence governance decisions that affect them. Inclusion promotes three normative goods. First, people included in decision-making can promote their interests.<sup>52</sup> Second, those included

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<sup>52</sup> Following Mansbridge, I understand "interest" as including "ideal-regarding commitments as well as material needs and wants," and therefore as closely tied to identity (2003, 517 n. 6).

can improve the quality of decision-making by contributing their perspectives, experiences and expertise. In doing so they can enlarge the perspectives of other participants in decision-making, identify their errors and biases, and contribute to the identification of collective interests. Third, people included in decision-making can themselves be influenced by positions other than their own. Their understandings can be challenged and enlarged, possibly changing beliefs about personal and collective interests.

This chapter lays the normative groundwork for this dissertation by clarifying the centrality of inclusion to both justice and democracy, and by proposing a systemic model for evaluating inclusion in an interdependent world. Inclusion, I argue, is *instrumentally* related to justice, as greater inclusion in governance decision-making can contribute to more just outcomes for included groups. Inclusion is also *inherent to* democracy. In the following chapters I propose a framework for evaluating inclusion in global governance, and I use this framework to assess the inclusion of victims in international criminal justice.

In developing these arguments, I propose and apply conceptual tools to help us evaluate, and ultimately advance, the justice and democratic legitimacy of global governance institutions. These are issues of practical importance and, often, political contest. This contest can be illustrated in a brief preview of two cases that will be analyzed in Chapter Six. One case is the intervention of the International Criminal Court in Uganda. Some advocates for violence-affected communities argued that the ICC's actions imposed a harmful and unwanted form of governance rather than "justice." The claims put forward by these advocates provoked a debate about whether and how the ICC's policies might accommodate the interests and perspectives of victims. They also provoked a discussion about *whose* justice ought to matter in such conflicts.

The second case illustrates a challenge to the ICC's legitimacy on democratic grounds. The current President and Deputy President of Kenya were elected in 2013 despite facing criminal charges at the ICC for alleged roles in mass violence during and after the previous elections. The Kenyan leaders and their supporters have argued that the electoral victory rendered illegitimate the ICC's continued interference. Upon his victory, President Kenyatta announced: "We expect the international community to respect the sovereignty and democratic will of the people of

Kenya.”<sup>53</sup> That understanding of democracy, in which an electoral victory renders a global governance institution democratically illegitimate, differs from the conception I put forward in this chapter. As I will argue, global governance that impinges on the sovereignty of states – even states with elected governments – may nevertheless improve the quality of democracy within and beyond that state. Moreover, my approach foregrounds the interests and perspectives of the tens of thousands of victims of earlier election violence who continue to be marginalized and excluded in Kenyan politics. My approach thus forces us to ask whose perspectives on democratic legitimacy ought to matter most.

In short, I argue that those who face injustice should be part of the conversation about what justice is and how it should be pursued, and that democracy should be seen as a governance approach that empowers people to address the problems and forms of injustice that they collectively face.

My argument develops as follows. I begin in Section 2.1 by arguing that the inclusion of those who face injustice is critical to advancing justice in global politics. Inclusion is necessary because understandings of justice vary within and between societies. Justice must be discussed and negotiated rather than imposed. Furthermore, governance decisions that systematically exclude people are likely to produce injustice, as people have no way to ensure that their interests are promoted, their identities recognized, and that decision-makers are held to account.

In Section 2.2, I examine democracy in an increasingly interdependent world. The democratic principle of self-determination implies that people who are significantly affected by governance decisions ought to be able to contribute to decision-making. I argue that because people are increasingly affected by transnational interdependencies, democracy must become increasingly transnational as well. This is necessary to address the plight of transnational “communities of shared fate”— people whose lives are significantly and negatively affected by particular global rules or global institutions.<sup>54</sup> To develop this argument, I build on the work of contemporary

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<sup>53</sup> Perry, 2013.

<sup>54</sup> On “communities of shared fate,” see Held and McGrew, 2002; Williams, 2009.

democratic theorists who question the centrality of the state as the pre-eminent unit of democracy. In doing so I revisit fundamental assumptions of democracy and ask: Who ought to be included in what governance decisions, and what forms of inclusion are appropriate?

The globalized conception of democracy that I put forth requires a paradigm shift from the conventional understanding of democracy as a state regime type. As I argue in Section 2.3, we must think of democracy systemically.<sup>55</sup> To promote democracy, we must look at how institutions and processes work together to promote or undermine the three essential normative functions of democracy: empowering inclusion, promoting collective will-formation and enabling collective decision-making. The institutions and processes of state governments are important for democracy, but they must be considered as components of a system rather than in isolation. This systemic approach has two important implications for democracy in global politics. First, since what matters are the functions rather than the institutional forms of democracy, we need not try to replicate the institutions of democratic states at the global level. Second, a systemic approach allows us to consider whether and how institutions at different levels – global, regional, state and sub-state – might complement or undermine each other in advancing democratic functions.

In Section 2.4, I use this systemic approach to make several observations about the relationship between global governance and democracy in the global political system.<sup>56</sup> First, global governance institutions are sites of decision-making that warrant inclusion. They affect some people more than others, and can address or exacerbate justice for some more than others, and these facts must shape who is included in decision-making and through what means. Second, global governance can improve or undermine democratic functions in state and sub-state governance. One way it can do so is by affecting basic capabilities that shape individuals' democratic agency, such as security, health, education, social recognition, and the ability to communicate and associate with others. Global governance institutions also influence the

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<sup>55</sup> As I will clarify in Section 2.3, this form of “systemic analysis” is one that examines how different components of a system interact and contribute to its capacity to generate normative goods.

<sup>56</sup> By “global political system” I mean the totality of political relations within and across states.

governance rules of state and sub-state communities, and empower or constrain their ability to enact collective decisions. The section also identifies several important changes in global governance in recent decades, including developments in human rights, global civil society, information and communication technologies, and suggests that there is a burgeoning norm among international organizations of “democratic global governance.”<sup>57</sup>

Finally, Section 2.5 argues that addressing global injustices will often require transnational communities of shared fate be recognized or “constructed” as political constituencies and included in decision-making. I give the example of HIV/AIDS sufferers who faced insurmountable barriers to accessing treatment. Their predicament was caused by deficient government policies and social stigma within their own countries, but also by global governance of public health and of intellectual property with respect to pharmaceuticals. Many people with HIV/AIDS experienced immense harm and injustice because their interests and perspectives were excluded from a variety of decision-making processes. This predicament was addressed, in part, when different actors advocated on behalf of this community of shared fate and prompted decision-makers to recognize and act on its existence and its interests. In doing so, these advocates helped shift global governance of HIV/AIDS treatment. This illustration raises two central questions that will animate the dissertation: How are communities of shared fate constructed as political constituencies, and how might they be included global governance decision-making? At the heart of both questions, as I show in Chapter Three, are issues of political representation.

## **2.1 Justice and Inclusion**

If global governance is to advance justice, the inclusion of those who suffer injustice is critical. As I will argue, their inclusion is important both to the implementation of global governance policies and to identifying what justice *is*.

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<sup>57</sup> Dingwerth (2014) uses this term to describe the various democratic values and practices that are increasingly observed and demanded at global governance institutions.

Exclusion from decision-making frequently results in injustice. There is an extensive literature on the injustice suffered by groups who have been excluded from politics, such as women, ethnic minorities, the poor and the disabled.<sup>58</sup> The link between exclusion and injustice caused by global governance institutions has also begun to receive attention, in part because of the stark consequences of exclusion. For instance, the World Bank has provided funding to build dams that destroyed communities and displaced thousands of people.<sup>59</sup> Humanitarian organizations worked with the Ugandan government to keep civilians in displaced persons camps for years, a policy that contributed to catastrophic levels of insecurity, disease and deprivation.<sup>60</sup> United Nations agencies failed to provide aid as famine killed tens of thousands in Cambodia between 1979 and 1984: these Cambodians went unrepresented at the UN, while the deposed and exiled Khmer Rouge leaders continued to act as Cambodia's official representatives. A catalogue of all such incidents of harmful exclusion would be long and dispiriting.<sup>61</sup>

When people are included in decision-making they can raise their voices and demand assistance, redress or justification for their harms and grievances. They can make sure that their interests are considered rather than systematically ignored or damaged. They can hold decision-makers to account, exposing problems such as corruption and incompetence. As a result, those included in decision-making will be less vulnerable to exploitation and oppression.

When people who face injustice are included in decision-making, they can also make decision-makers aware of their own abilities and efforts to address injustice, thereby enabling institutions to work with rather than against them. This dynamic has been identified in several areas of global governance. For instance, much contemporary literature on economic development highlights the importance of bringing poor people into the design of assistance, because poverty

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<sup>58</sup> See, among others, Bohman, 2007; Fraser, 2009; Young, 2000, 2007.

<sup>59</sup> Dingwerth, 2005; Khagram, 2000.

<sup>60</sup> Branch, 2011; Dolan, 2009.

<sup>61</sup> As I will discuss in Chapter Four, however, many global governance institutions have adopted mechanisms to be more responsive to those people they affect, and have opened up to greater scrutiny and accountability by civil society organizations.

is significantly linked to social and political powerlessness.<sup>62</sup> Deveaux therefore argues that if poverty is understood as “a condition of social, economic, and political powerlessness that manifests as chronic vulnerability and disadvantage, then it *will matter* very much whether poor communities have a central role in determining their own needs and priorities, and in helping to devise reforms.”<sup>63</sup> Similarly, in the area of humanitarian protection, Baines and Paddon have shown how humanitarian actors that aim to protect civilians can increase people’s insecurity by undermining their ability to protect themselves.<sup>64</sup> The authors thus argue that the design of humanitarian protection should begin by engaging with civilians to understand their self-protection strategies.

Finally, inclusion and justice are linked because individuals, groups and societies have different understandings of justice. For that reason, Tully argues that justice is best determined through democratic practices of deliberation, consultation and accommodation rather than through “monological” acts of reasoning or law-giving.<sup>65</sup> Similarly, Fraser argues for a shift from monological to dialogical approaches to justice, since dialogical approaches “treat important aspects of justice as matters for collective decision-making, to be determined by the citizens themselves, through democratic deliberation.”<sup>66</sup> The ability to renegotiate the aims and standards of governance is critical in situations where deep agreement on principles of justice is lacking. This is certainly the case in global politics. Conceptions of justice differ between societies, and to impose an unwanted conception of justice on people can produce great injustice.<sup>67</sup>

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<sup>62</sup> For World Bank publications on the centrality of empowerment to addressing poverty, see Alsop *et al* (2006), or its three-volume study based on interviews with 60,000 poor individuals in many countries (Narayan and Petesch, 2002).

<sup>63</sup> Deveaux, 2013, 13.

<sup>64</sup> Baines and Paddon, 2012.

<sup>65</sup> Tully, 1995.

<sup>66</sup> Fraser, 2009, 28.

<sup>67</sup> At the same time, as Walzer (1994) argues, we can have culturally-specific and “maximalist” understandings of justice, but still be able to identify “minimalist” moral principles on which we can agree, and this agreement can be expanded on through ongoing interaction and collaboration.

Conversations or negotiations over justice are often controversial and, where differences exist, may be difficult to resolve. As Sen (2009) argues, it can often be easier and more productive to seek agreement on what particular injustices are and how to address them, rather than seeking agreement on and pursuing a final and “just” set of institutional arrangements or social relations. To give an example from my own work, in focus group discussions with survivors of conflict in Uganda, several groups shifted from individual claims that they each deserved assistance and reparations, to group consensus on those categories of victims who ought to be prioritized (people with permanent disabilities, women who had been abducted by the Lord’s Resistance Army and who bore children while in captivity, those whose family members were killed, and, above all, orphans and widows).<sup>68</sup> In short, while discussants did not agree on a single policy or normative principle, they did agree on the most pressing injustices that ought to be addressed.

While it may be easier to agree on existing injustices than on a theory of justice we should all follow, I do not argue that identifying injustices is uncontroversial. Relatedly, there will often be disagreement about *who* ought to be included in decision-making *because* they face injustice. However, in many cases we will be able to come to a rough consensus. Moreover, as I will argue in Chapter Four, there are specific categories of people who are the “intended beneficiaries” of certain global governance regimes and who ought to be included in decision-making. Such intended beneficiaries include refugees, victims of humanitarian disaster and victims of international crimes. I will also suggest practices and contexts that make their inclusion more likely.

Inclusion, I have argued, can help groups address injustices they suffer. In this way, inclusion is instrumentally related to justice. Situations of injustice can also undermine democracy, and the capacity of democratic processes to be inclusive.<sup>69</sup> When individuals or groups are oppressed and disregarded, then formally democratic processes and institutions may maintain or exacerbate these injustices. Furthermore, people who suffer from impoverishment, hunger, violence, social

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<sup>68</sup> See Tenove, 2013b, 22-23. See Chapter Six for views of focus group discussants on other issues.

<sup>69</sup> On this argument, see Bohman, 2005; Young, 2000. Similar arguments have been made about the relationship between democracy and human rights (Gould, 2004; Habermas, 1996).

stigma, or other adversities, will be constrained in their democratic agency, even if mechanisms of democratic participation are formally open to them. Unjust relations or a lack of basic capacities can therefore deform democratic processes, excluding those who ought to be included. This situation can result in a vicious circle of deepening injustice and declining democracy. A virtuous circle is also possible. When governance decision-making is made more inclusive of those who suffer injustice and vulnerability, governance can address those injustices and vulnerabilities and improve people's capacities to act as democratic agents. Thus, as Young argues, a key task for democratic thought and practice is to try to break vicious circles and promote virtuous circles of democracy and justice.<sup>70</sup> I return to opportunities for global governance institutions to promote such virtuous circles in Section 2.4.

## **2.2 Inclusion and the Demos Problem in a Globalized World**

While inclusion is instrumentally linked to justice, it is inherent to democracy. The fundamental normative conviction of democracy is that *the people should rule themselves*. However, the meaning of this statement differs significantly in an era of pervasive transnational interdependency. Under these conditions, how should we determine and justify boundaries of democratic inclusion?

To do so, we must confront limitations imposed by the conventional understanding of democracy as a form of government pursued by the inhabitants of a territorial state. In most modern Western political thought, as well as international law and diplomacy, people are divided into separate and self-ruled territories. The Peace of Westphalia, the origin of this system in myth if not in fact, held that a state should be free from outside interference into its territory (external sovereignty) and that the state government should be the highest authority within its territory (internal sovereignty). This idea of a unified sovereign with control over a territory and a people did not change when the government of many states shifted from unelected rulers to elected

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<sup>70</sup> Young, 2000, 35.

representatives. Popular sovereignty, the rule of the state by its people, became the regulative ideal even if it was often violated in practice. The institutions and philosophies of democracy and of the international order have thus developed together and are deeply entwined.

In the last two decades democratic theorists have begun to question whether the membership of a democratic polity (“*demos*”) must remain aligned with the borders of states. If that assumption is changed, we must reconsider who should constitute the *demos* and how to decide this inclusion in a democratically legitimate way. In an influential paper, Whelan (1983) referred to these issues as the “boundary problem” in democratic theory. He concluded that “democracy, which is a method for group decision making or self-governance, cannot be brought to bear on the logically prior matter of the constitution of the group, the existence of which it presupposes.”<sup>71</sup> Dahl concurred, claiming “we cannot solve the problem of the proper scope and domain of democratic units from within democratic theory.”<sup>72</sup>

Democratic theorists have nevertheless continued to debate the problem. I will describe key contributions to the debate and propose a synthesis. To do so, I interrogate each element of the fundamental democratic conviction that *the people should give rules to themselves*. I therefore address three questions: What rules or decisions should be made democratically, what kinds of groups can act as a “people” capable of giving themselves rules, and what types of contributions to rule-making count as democratic? Ultimately, I will argue that we must shift to look at systems – rather than states – as the essential unit of democracy.

### *What rules should be made democratically?*

Democratic theorists have frequently argued that we should be included in decisions that affect us. At the core of this precept is concern about incongruence between rule-making and rule-

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<sup>71</sup> Whelan, 1983, 40. In fact, we regularly impose “boundaries” around democratic inclusion within states, such as when we deny opportunities to vote or run for office to people such as children, prisoners or holders of foreign birth certificates. But such exclusions from democratic participation are themselves exposed to reconsideration and reform by democratic processes. More troubling are those decisions that set the boundaries of democratic inclusion with no opportunity for revision.

<sup>72</sup> Dahl, 1989, 207.

taking.<sup>73</sup> A mismatch between inclusion in decisions and affectedness by them violates self-determination, since those who follow rules but do not help make them are not giving rules to themselves. Similarly this mismatch can violate political equality, since people will be divided into the categories of those who make rules and those who take them. Assessments of affectedness should therefore play an important diagnostic role to indicate where inclusion in decision-making is *prima facie* warranted.

There is, however, considerable debate in democratic theory about the kinds of affectedness that generate the need for inclusion. For instance, while some conventional analyses focus entirely on inclusion in state legislative decision-making, feminist and participatory democrats have argued that people should be included in decision-making in many sites of rule-making, from workplaces to state bureaucracies to civil society organizations.<sup>74</sup> Democratic theorists who examine the issue at a transnational level have taken quite different positions on the kinds of affectedness that require inclusion. Some defend the “all affected interests” principle – that anyone whose interests will probably be affected by a decision should have a say in making it.<sup>75</sup> Others look for more significant affectedness. For instance, Fung argues that those with “regularly or deeply affected interests” should be included in decision-making.<sup>76</sup> Gould proposes that democratic inclusion is required in transnational decision-making that affects people’s human rights.<sup>77</sup> Fraser proposes the “all-subjected principle,” according to which people deserve inclusion in decision-making according to “their joint subjection to a structure of governance that sets the ground rules that govern their interaction.”<sup>78</sup> Abizadeh endorses this all-subjected principle and equates it with being “subject to a coercive and symbolic political power.”<sup>79</sup> Schaffer proposes a more stringent

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<sup>73</sup> Held, 1995, 16-17.

<sup>74</sup> See, among others, Barber, 2003; Pateman, 1970; Phillips, 1991.

<sup>75</sup> Goodin, 2007.

<sup>76</sup> Fung, 2013.

<sup>77</sup> Gould, 2004.

<sup>78</sup> Fraser, 2009, 65. Fraser further argues that no standard of affectedness can be decided *a priori* but must itself be the subject of democratic debate.

<sup>79</sup> Abizadeh, 2012, 878.

condition still, that democratic inclusion should be extended to those people subject to a law, which he defines as a rule that is “coercive, binding and enforceable on individual citizens.”<sup>80</sup> However, as Fung argues, such a focus on legislation is often too restrictive, since there are many other forms of governance that structure our lives, including decisions by administrative agencies, civil society associations and private organizations.<sup>81</sup>

In much of this literature, there is a tendency to see affectedness as negative, as an imposition and possibly a harm. But many of the rules that affect us and that order our relations with other people are empowering. Democracy entails opportunities for people to propose and generate new rules and not simply protect themselves against them. Furthermore, the rules that structure our lives not only affect our material interests but also our aspirational projects and the ways in which we are regarded by others and by ourselves.<sup>82</sup> We must also pay attention to these considerations when we track relations of affectedness.

The goal of congruence between affectedness and inclusion faces serious challenges when we attempt to put it into practice, particularly if we are concerned with all forms of affectedness. First, it is often difficult to figure out who was affected by a past decision, let alone predict who will be affected by a future decision. This difficulty is exacerbated when we look transnationally, where chains of causation are complex. For instance, the link between diamond sales in North America and civil war in Africa, or between mortgage policies in the United States and the livelihoods of toreadors in Spain, could not have been obvious at the time decisions were first made.<sup>83</sup> Second, whether someone is affected by a rule is a normative question as well as an empirical one. For instance, is someone in a poor country affected by the tax rate in a rich country? The answer to this question not only depends on whether increased taxes will lead to greater funding of foreign development assistance, but also whether we believe someone is

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<sup>80</sup> Schaffer, 2012, 338.

<sup>81</sup> Fung, 2013.

<sup>82</sup> On the politics of recognition and its relationship to other social goods, see Fraser, 1995; Taylor, 1994.

<sup>83</sup> On conflict diamonds see Campbell (2012). On the USA’s financial collapse leading to Spanish economic hardship and the decline of bull-fighting, see The Current, 2013.

“affected” by the failure of wealthy people to aid the poor.<sup>84</sup> Third, the link between affectedness and inclusion can lead to a recursive spiral, since who is affected by a decision will vary according to the decision’s outcome, and the decision’s outcome may be determined by who is included in making it. The result, argues Goodin, is a dilemma in which we are “unable to tell...who is entitled to vote on a decision until after that very decision has been decided.”<sup>85</sup>

A partial solution to these challenges, which I develop further below, is to place greater emphasis on inclusion in situations of significant and problematic affectedness. It makes sense to prioritize inclusion in decision-making sites where symbolic and coercive power is concentrated, as per Schaffer’s argument, without necessarily limiting our focus to the creation or enforcement of laws. For example, we are significantly affected by decisions by a factory that pollutes our drinking water as well as by the criminal laws our state enforces, and decision-making processes that govern both these issues ought to include us. We must also follow decisions by the International Astronomical Union about the names of stars, but these decisions are unlikely to be problematic for us and our inclusion is therefore unimportant.

One important implication of this focus on serious and problematic affectedness is that, in some circumstances, some people will have greater claims for inclusion in the same decision-making process than others. For instance, in the example above, those people whose drinking water will be affected by a factory may have a greater claim to inclusion on regulatory decisions than fellow citizens whose water is unaffected. That is a controversial approach, since democracy is often associated with the principle of equality. Certainly, democratic governance ought to treat people as *moral* equals, and a democratic polity ought to promote a general equality of opportunity for political inclusion of its members.<sup>86</sup> However, as I argued in Section 2.1, we have reasons to emphasize the inclusion of those people who suffer injustice because of governance decisions. Furthermore, if we see democratic agency as a means to address problems,

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<sup>84</sup> For more on this argument, see Schaffer, 2012, 325.

<sup>85</sup> Goodin, 2007, 52.

<sup>86</sup> For considerations of democracy as entailing moral equality and opportunities for political inclusion, rather than equality of political influence, see Christiano, 2003; Dworkin, 2003.

and not simply as a right to be distributed equally, then we will emphasize inclusion of those who share serious problems.<sup>87</sup> These considerations will be expanded below.

In sum, affectedness generates a prima facie democratic claim to be included in decision-making, in order to maintain one's individual self-determination. The more significantly one is affected, the stronger is that claim. It is clear that most people today are significantly affected by decisions made beyond their state borders. This situation prompts us to look for appropriate inclusion in rule-making, including transnational rule-making, and to seek to understand how individuals can feasibly be included in large-scale decision-making.

*What kind of group or "people" can act democratically?*

Democracy is conventionally seen as a state regime type. As a result, the "people" who give themselves rules are often equated with the citizenry of a state. However, as Abizadeh (2012) persuasively argues, we cannot simply accept the democratic legitimacy of this collectivity. Ethnic or cultural nations cannot be considered "pre-political" groupings that require no legitimation, since the membership and qualities of nations are produced and maintained through continuing political decisions. These political decisions can affect those produced as "insiders" and as "outsiders," and both groups should arguably have a say in making such decisions. Furthermore, there can be no democratic process that can once and forever determine the boundaries of a *demos*. The ongoing decisions and actions of a democratic polity may significantly affect outsiders and may make it intolerable for some to continue as insiders. Abizadeh thus argues that we must not found democracy on a fiction of a *demos* with fixed and legitimate boundaries.

While the nation-state cannot be accepted as the natural or pre-political unit of democracy, the importance of nation-states can be defended on functional grounds. Those who make this

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<sup>87</sup> The emphasis on democracy as collective problem-solving is at the heart of Dewey's influential approach (Dewey, 1991; Westbork, 2010). Dewey argued that individuals who share a problem and who seek to address it through their own actions are the basic associational unit of democracy, which he called a "public". The public, in short, is "an instrument through which problem-solving is socially coordinated" (Cochran, 2010, 325).

argument are usually concerned with practical considerations and, as I will argue, with possibilities for *collective* self-determination.

Song (2012) emphasizes these issues in her defense of the state as the appropriate *demos*. She does not dispute the democratic principle that there should be congruence between rule-making and rule-taking, but she nevertheless argues that the state is the fundamental social and institutional unit of democracy. States are necessary to provide the conditions that enable democracy, which she defines as “a collective decision-making process subject to the condition of equality.”<sup>88</sup> She defends this proposition with several arguments. First, she claims that states can protect rights and liberties needed for individuals to participate democratically, such as freedom of speech and assembly. Second, she argues that states can promote conditions under which these rights and liberties can lead to equality of political influence, such as access to information and some limits on economic inequality. Third, Song joins Rousseau and Kant, among others, in arguing that the size of a polity affects the quality of democracy. Polities that are too large cannot sustain meaningful participation by citizens.<sup>89</sup> Fourth, she contends that following the principle of affected interests would lead to very unstable *demoi*, since they would shift according to the issue being addressed. This indeterminacy about who should be included in decision-making would mean that “the lion’s share of democratic contestation would likely be devoted to determining who ought to have a say rather than to the policy issues at hand.”<sup>90</sup>

These arguments are based on empirical claims about the institutional requirements of democracy. In making them, Song ignores the actual diversity among states. It’s not clear that individuals in states with hundreds of millions of citizens have more influence over state

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<sup>88</sup> Song, 2012, 43.

<sup>89</sup> Similarly, Dahl (1999) argues that stretching democracy beyond the state will lead to people taking positions on increasingly complex issues about which they are increasingly poorly informed, and that individuals’ contributions to decision-making will be further watered down as the polity size increases. However, Dahl has also pointed out that there will always be a tension between maximizing “citizen effectiveness” as political participants, and maximizing the capacity of a political system to act on collective interests, and that no single ideal size for a democratic polity exists (Dahl and Tufte, 1973).

<sup>90</sup> Song, 2012, 56.

government decisions than would citizens in transnational *demoi*. Moreover, some states have greatly suppressed political rights and generated immense inequality among citizens. Indeed, the capacity for states to trample rights and equality helped *generate* much of the global governance that exists today, including the creation of international human rights law and international criminal tribunals in the wake of World War Two. Song is therefore only referring to highly-developed liberal democratic states, and perhaps ideal versions of these. Our world is not composed entirely of such states. Furthermore, if we want to theorize based on ideals, we might also want to look at the capacity of ideal villages, tribes or voluntary associations to promote rights and equality.

Song makes a further argument for the nation-state as a *demos* that deserves particular consideration. She claims that states can best generate the solidarity among members that is necessary for democracy. In doing so, she follows those who argue that the members of a *demos* must share values, language, identity, or other characteristics that are forged through a bounded community's association over time. For instance, liberal nationalists like Rawls and Kymlicka claim that liberal-democratic virtues can only be achieved in polities with significant consensus on political values and institutions.<sup>91</sup> Solidarity – or “affectivity” as some call it<sup>92</sup> – is arguably necessary for several reasons. Shared values, and perhaps a shared language, may be necessary for people to build mutual understanding and agreement on issues.<sup>93</sup> Furthermore, shared identity or moral concern is necessary so that “people give each other’s interests some noninstrumental weight in their practical reasoning.”<sup>94</sup> Doing so makes it possible for individuals to consider legitimate those decisions that promote the interests or justice claims of other people.<sup>95</sup>

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<sup>91</sup> Kymlicka, 2006; Rawls, 1999.

<sup>92</sup> List and Koenig-Archibugi, 2010.

<sup>93</sup> Calhoun, 2002; Habermas, 2001; Kymlicka, 2001.

<sup>94</sup> Song, 2012, 27.

<sup>95</sup> As List and Koenig-Archibugi (2010, 82-84) note, the debate over the importance of affectedness and solidarity in determining the membership of *demoi* is clearly illuminated in the contrasting positions of Held and Kymlicka on “communities of shared fate.” Held argues that people who are affected by problems that cross borders can be seen as communities of fate whose lives are bound together and who

Solidarity is important on functional grounds, I would argue, to reconcile individual and collective self-determination, such that individual members of a polity can see collective decisions as their own decisions. Many forms of solidarity can cause individuals to see themselves as part of a collective. These include shared history and identity, but also shared participation in important symbolic or affective events like community celebrations. Such forms of solidarity are not limited to democracies. Indeed, twentieth-century fascist regimes went to great lengths to convince individuals that their fate and freedom depended upon the fate and freedom of their nations.

Democracy provides two unique means for fashioning collective self-determination, and it does so by promoting collective self-determination through individual self-determination. One is political equality among members of the *demos*. Political equality among members makes collective decisions more likely to reflect an equal consideration of all.<sup>96</sup> Thus Rousseau famously argued that for individuals to be free at the same time that they adhere to the polity's rules, they have to act as political equals who share in the polity's collective will.<sup>97</sup> In other words, the "will" of the polity is formed from the wills of all citizens. The second democratic means to reconcile individual and collective self-determination is through communication and reciprocal reason-giving. Such processes bring citizens' perspectives into deliberation that in turn

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therefore need to seen "not only citizens of their own communities, but also of the wider regions in which they live, and of the wider global order" (1998, 241). Kymlicka challenges this notion, claiming that "what determines the boundaries of a 'community of fate' is not the forces people are subjected to, but rather how they respond to those forces, and, in particular, what sorts of collectivities they identify with when responding to those forces. People belong to the same community of fate if they care about each other's fate, and want to share each other's fate" (2001, 319-20).

<sup>96</sup> Dworkin (2003) argues that democracies don't require that all citizens have equal power in making decisions or equal influence over the outcome of decisions – indeed, we often want people we have elected or people with greater expertise to have more power and influence. Political equality on his account means that decisions are made in a way that treats all citizens with equal moral concern.

<sup>97</sup> Rousseau, 1978.

informs collective decision-making.<sup>98</sup> At the same time, these processes make it possible for decision-makers to explain and justify decisions to those who must follow them.

Song, following liberal nationalists, argues that the nation-state is best able to promote the conditions for solidarity and for communication and public reason-giving. But once again, those are empirical arguments that can be disputed. States can provide profoundly un equal opportunities for political influence or consideration, and may or may not encourage widespread and inclusive public deliberation.

In contrast to Song, Fung proposes a model in which the degree of affectedness is the primary determinant of demands to be included in collective self-determination. He writes:

This view envisions many overlapping circles of inclusion. Associated with every organization — government or other — is a set of individuals whose important interests are regularly (or deeply) touched by the decisions of that organization. Under the principle of affected interests, all individuals in that set should have some capacity to influence the decisions of that organization. Each individual is a member of many such sets because he is touched by the decisions of many organizations. Furthermore, these circles of inclusion around organizations and individuals must change over time as those organizations and individuals evolve.<sup>99</sup>

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<sup>98</sup> Habermas notes that the idea of self-determination – that citizens should “be able to understand themselves also as authors of the law to which they are subject as addressees” – was understood in social-contract theories according to “the categories of bourgeois contract law, that is, as the private free choice of parties who conclude a contract,” while on a discursive or deliberative model of self-determination, “the legal community constitutes itself not by way of a social contract but on the basis of a discursively achieved agreement” (1996, 449).

<sup>99</sup> Fung, 2013, 251.

These circles of inclusion extend across state borders.<sup>100</sup> While this model emphasizes the congruence between inclusion and affectedness, Fung pays much less attention to the need for collectivities to enact decisions. Furthermore, as I will discuss below, he accepts that inclusion can be achieved through very diffuse and low-intensity forms of influence.

To recap, when we question the kind of group or people whose members can give themselves rules, we must focus on both individual self-determination (can individuals influence rules that affect them) and collective self-determination (can people act collectively and see collective decisions as their own). The latter consideration leads us to examine conditions or functions for collective will-formation, including group solidarity, political equality and processes of communication and reason-giving. The state may support these conditions and functions, but state institutions may also undermine them. We must therefore hold open the possibility that other political institutions, including global governance institutions, can advance conditions necessary for democracy.

*What influence should people have over collective rules?*

Democracy requires that people give rules to themselves. We must therefore ask what counts as sufficient individual influence over collective rule-making. This question has important implications for the kind of polity that can act democratically. If people need extensive, direct influence over collective rules, then only very small and egalitarian polities can count as *demoi*. By contrast, if very diffuse and indirect influence is sufficient for democratic inclusion, then we can consider large, complex polities to be democratic.

Democratic theorists have taken different positions on this question. Some continue to focus on electoral representation as the *sine qua non* of democratic participation.<sup>101</sup> Schmitter and Miller both argue that states with significant overlapping interests could include each other's

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<sup>100</sup> Similarly, Bohman proposes that we abandon the search for the appropriate *demos* to capture democratic activity, and instead turn to a system of multiple, dynamic and overlapping *demoi* that address different decision-making areas (2007).

<sup>101</sup> Goodin, 2007; López-Guerra, 2005. Though when Goodin (2010) turns to the development of global democracy, he emphasizes the importance of democratic practices other than voting.

representatives in their legislatures, either by giving them a voice in deliberation but no vote or – in Schmitter’s proposal – by giving them some votes.<sup>102</sup> Others claim that democratic participation in decision-making entails a broader range of activities. Abizadeh argues that all members should be able to “engage in nonviolent practices of expression, contestation, negotiation, justification, and collective decision making.”<sup>103</sup> Tully argues that democratic participation should not be limited to peoples’ attempts to influence the decisions of institutions that act on them, but should also include cooperative action among members of a *demos*.<sup>104</sup>

Those who propose multiple, overlapping and shifting *demos* take an even broader view of democratic influence. Fung gives the clearest illustration of this approach. He suggests that those affected by a decision may influence it in four different ways: by direct actions (e.g. advancing a position in the decision-making process), by indirect actions (e.g. voting for a representative who will participate in decision-making), and by passive means that require no action at all, such as when one’s interests are promoted by existing laws (e.g. minimum wage laws influence employers on behalf of workers) or by social mores and habits (e.g. widespread belief in human dignity influences employers to treat workers humanely).<sup>105</sup> Fung states that people with affected interests may be included in decisions through any or all of these forms of influence.

Considered this way, the inclusion of those affected by decisions becomes much more plausible, though it may not appear to some as meaningful inclusion at all. Indeed, it is just such a watering-down of democratic participation that concerns many critics of global democracy. In Miller’s estimation, many forms of global democratic citizenship are a “ghostly shadow” of citizenship properly understood.<sup>106</sup>

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<sup>102</sup> Miller, 2009; Schmitter, 1997.

<sup>103</sup> Abizadeh, 2012, 881.

<sup>104</sup> Tully, 2013.

<sup>105</sup> Fung, 2013, 254-258.

<sup>106</sup> Miller, 2011, 2. See also Chandler, 2011.

However, such concerns about inadequate inclusion in decision-making are commonly raised in discussions of democracy within states as well. The citizen who votes in a national election has a negligible effect on the electoral outcome, and many citizens do not even participate in this low-intensity means of influencing government. Recognizing this fact, democratic theorists have identified many different forums where individuals can participate in democratic decision-making in both high-intensity and low-intensity ways.<sup>107</sup> Moreover, the idea that every member of a *demos* should actively influence every decision that affects them is unnecessary as well as unrealistic. Instead, as Warren argues:

At any given point in time, individuals should be able to activate those memberships that are problematic in ways that they can exert influence over the problematic effects—through argument, deliberation, protest, opposition, voting, bargaining, and so on. What this image of democracy suggests is that individuals should be able to divide and distribute their political labors in such a way that they can maximize self-determination.<sup>108</sup>

This argument aligns with my suggestion above that more significant and problematic affectedness generates a greater democratic claim to inclusion.

For a people to give themselves rules, not only must individuals be able to influence decisions but the collective itself must be able to take action. Collective self-determination thus requires that a *demos* can make and enact decisions. For some problems, collective action requires that the *demos* impose legitimate coercion on its members.<sup>109</sup> States often have considerable ability to make and enact decisions and to impose coercion, making them important units of democratic activity. But there is wide variation among states in their capacity to make and enact decisions, and high capacity states may be undemocratic. Moreover, other associations can make and enact decisions, including civil society organizations, villages, online communities and bureaucratic

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<sup>107</sup> Fung, 2006; Mansbridge, 1999a; Warren, 2002, 2009.

<sup>108</sup> Warren, 2010, 51.

<sup>109</sup> Mansbridge, 2012.

agencies. So, too, can the international community. However, a purely notional group cannot. For instance, all redheaded people cannot make and enact decisions together unless new social bonds and institutional capacities are created.

There will often be a tension between the capacity for individuals to influence decisions and the capacity for groups to make and enact them. If every member of a group participates in a discussion over an issue until they all agree on a single action, we may count this consensus decision-making as having a very high level of individual influence. But this approach to decision-making becomes unworkable as group size and issue complexity increase. Most collective goods we desire in complex societies cannot be achieved in this manner.

In sum, there are many ways that individuals can influence decisions that affect them, varying in the intensity of participation and the impact that an individual can have on collective decisions. There will be tensions or trade-offs between individual and collective self-determination. What counts as adequate influence in a democracy is highly contested among theorists, but all agree that the election of representatives to state government is but one of many mechanisms. Rather than seek the single appropriate form of influence that individuals should have over all decisions, it makes more sense to be agnostic about the form of inclusion, provided that people are able to become aware of and influence decisions that they deem most important or problematic. We must therefore examine the capacity for individuals to act through many different mechanisms in order to influence decisions at different decision-making sites.

*Conclusions on the demos problem: maximizing inclusion in global politics*

The debate over the boundaries of democracy is primarily a debate about when inclusion is required and what form it should take in order for governance to count as democratic. I will summarize some of the key claims and apply them to issues of transnational democracy.

*First*, democracy requires that there should be some congruence between the rules or decisions that shape peoples' lives and their ability to influence those rules and decisions. It is clear that most people today are significantly affected by decisions made beyond their state borders, which

prompts us to look for appropriate inclusion. It also prompts us to question whether such inclusion can be achieved if we treat the state as the fundamental democratic unit.

*Second*, democracy aims to promote both individual and collective self-determination.

Individuals must not only have the opportunity to influence collective decisions but must also be able to act collectively and see collective decisions as their own. Collective will-formation and decision-making may be achieved more easily in certain kinds of groups or polities, such as those with strong ties of solidarity, those that are capable of promoting equality and reason-giving, and those with sufficient institutionalization to enforce decisions. The nation-state, in the ideal, possesses such qualities and has high capacity for collective self-determination. In reality, however, many states are deficient in collective will-formation and decision-making. People belong to other collectivities that can promote congruence between affectedness and inclusion, and which are also capable of collective action.

Increasing global interdependence affects the distribution of these capacities for collective will-formation and collective decision-making. Public spheres and forms of solidarity cross borders, as seen in migration, multiple citizenships, worldwide consumption of American news channels and Bollywood films, and the expansion of cosmopolitan or transnational sectarian moral commitments, to name but a few. Such factors may challenge some processes of collective will-formation within states, but they don't necessarily undermine political equality or reason-giving among state citizenry. Importantly, the extension of public spheres and forms of solidarity beyond state borders can make democratic will-formation beyond the state more viable.

Global interdependence also affects capacities for collective decision-making. Global governance can reduce the ability of state governments to enact their own decisions, since governments are constrained by international rules or affected by decisions made by actors beyond their borders. State capacity to enact decisions can conversely be promoted by global governance, if states work together to shore up each other's internal and external sovereignty. At the same time, global governance that increases state sovereignty may limit the capacity for state and non-state to address collective problems, including through enforceable collective agreements.

There will often be tension between the extent of individual influence over decisions and the scope of affectedness that must be addressed. Individual autonomy could be maximized in small *demos* that are unaffected by external forces. But this is not the world in which we live. Large states exist, and because they do their citizens share extensive affectedness. Transnational affectedness also exists. Above all, the planetary resources that sustain human beings are exposed to many risks, including nuclear weapons, climate change and mass extinction. We require global collective action to address these and other species-wide threats. This is not to say that solving these problems requires all humankind to act as a unified political unit, but we do need to find ways to get things done at the global level.

*Third*, democratic theorists have proposed three different responses to the existence of transnational affectedness, each of which is inadequate on its own. One is to reduce the forms of transnational affectedness that act as “externalities” on democratic states. In this vein, Song argues:

Rather than asking, ‘How can we expand the *demos* beyond the nation and beyond the state to include all affected by or all subjected to a state’s policy?’ democratic theorists should be asking, ‘How can policy externalities be fairly addressed without jeopardizing the constitutive and instrumental conditions of democracy?’<sup>110</sup>

This proposal faces several difficulties. It is not clear how to oversee this reduction in externalities without overarching political management, which presumably should operate democratically. It also idealizes the state, which is equally capable of enforcing inequality and undermining political rights. Moreover, there are global problems that must be tackled collectively. For these reasons there must be collective action at a transnational level, and it is not clear how it can be democratically legitimate if democratic activity only occurs within state borders.

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<sup>110</sup> Song, 2012, 65.

A second response to the problem of transnational affectedness is to create one *demos* to rule them all – a world polity with a world government capable of pursuing collective action on a global scale and ensuring congruence between rule-making and rule-taking. This proposal has little political support.<sup>111</sup> It would also leave unaddressed many democratic deficits. The centralized power of world government would be extremely difficult to democratize, both in terms of individual influence over decision-making and processes of collective will-formation. For instance, the election of members of a global parliament, who would in turn make global rules, would provide very little ability for the billions of electors to influence their representatives, let alone the decisions of agencies created by those representatives. As Warren notes, when we scale up democratic models in which we elect representatives who then legislate on our behalf, “principal-agent control breaks down while powers are concentrated.”<sup>112</sup> The concentration of power, combined with the breakdown of principal-agent relationships with our representatives and the institutions they oversee, could dramatically decrease self-determination. Global collective action may be needed to address problems of global scale, but most democratic activity will need to occur in smaller polities.

A third response is to create myriad overlapping *demoi* within and across states.<sup>113</sup> Such an approach is capable of tracking affectedness with great sensitivity. However, those who propose these models may underestimate the conditions and institutions required for collective will-formation and enacting collective decisions. We cannot create myriad decision-making processes to address the diverse issues that affect us, and expect that these processes will secure the support and the enforcement needed for legitimate and effective collective action.

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<sup>111</sup> Though this support fluctuates. Weiss (2009) observes that in the pre- and post-WW2 era, there was much more support for world government or world federalism than exists now. He notes, “there once was a sizable group of prominent American supporters from every walk of life, reflected by resolutions passed by thirty of forty-eight state legislatures, supporting a U.S. response to growing interdependence and instability that would pool American sovereignty with that of other countries” (259). For consideration of the possible shifts toward institutions of world government, see Cabrera, 2012.

<sup>112</sup> Warren, 2010, 50.

<sup>113</sup> The leading proponent of this approach is Bohman, 2007.

While each of these proposals has limitations, each gets something right. We must certainly acknowledge the *de facto* importance of states for achieving many democratic goods. The stability, solidarity, and heavy institutionalization of the state make possible collective will-formation, collective decision-making and legitimate coercion, which enable significant collective self-determination. However, there are global public goods that require collective decision-making and enforcement at a global level, and for it to be democratically legitimate we need something *functionally* equivalent to a global *demos*, even if its institutional architecture is quite different from democratic states. Clearly, too, there need to be many subnational and transnational *demoi*, which may lack the extensive institutionalization of states but which enable subnational and transnational groups to address shared affectedness in ways that advance self-determination. *Demoi* will need to be created, reformed and democratized to address shifts in transnational relations and problems.

*Fourth*, to clarify this conceptual terrain I propose several distinctions. People belong to a “community of shared fate” when existing rules and institutions cause them to share an interest, identity, vulnerability or other form of affectedness. Because relations of affectedness are in theory infinite, it makes sense to focus on those that are most significant. The more profound or problematic this shared affectedness, the greater the moral claim for the group’s members to be included in decision-making that determines their shared fate. I discuss the recognition and inclusion of transnational communities of shared fate in greater detail below and in subsequent chapters.

A *demos* is a collectivity that links individual and collective self-determination, such that its members give rules to themselves. *Demoi* may be more or less democratic, according to the degree to which they promote individual self-determination and transform it through processes of inclusion and collective will-formation into collective self-determination. *Demoi* may also be more or less thick. A thick *demos* has members who share significant and multiple forms of affectedness. It will tend to have a more stable membership and to be heavily institutionalized, with significant capacity to make and enact collective decisions. A thin *demos* will have unstable membership, its members will tend to share limited affectedness and it will be lightly-institutionalized.

Democratic states are thus thick *demoi*, and a state government has extensive capacity to promote the individual and collective self-determination of its citizens. But the boundaries of a state in fact contain a constellation of many overlapping *demoi*, both thick and thin, including municipalities, provinces, civil society organizations, stakeholders of bureaucratic agencies, neighbourhoods and other associations. This constellation of *demoi* makes it possible for people to influence a wide variety of relations of affectedness. Smaller *demoi* can enable greater individual influence in collective decision-making on some issues, and larger *demoi* can address shared problems of wider scope. Individuals who belong to a constellation of *demoi* therefore have different memberships in many polities that they can activate to address problems.<sup>114</sup>

This analysis paints a complex picture of democracy. Because affectedness crosses state borders, so too must inclusion. Because inclusion must address diverse problems of varied scope, we need a great many democratic polities. And because these *demoi* differ in size, thickness, and functional demands, they will require different practices and institutions to promote individual and collective self-determination. While this model lacks simplicity, it better approximates the complexity and dynamism that we must grapple with in politics today.

States have been and will continue to be a key institutional assemblage to promote individual and collective self-determination in some areas of mutual affectedness. There must also be collective decision-making beyond the state to regulate interactions between smaller *demoi* and to address global-scale problems. Indeed, states have created extensive global governance infrastructures to do this. We therefore need to assess the interactions among different *demoi* to identify tensions, trade-offs and complementarities between them. We also need to analyze contributions that different institutions and practices might make to multiple *demoi*. We must therefore shift the frame of analysis of democracy away from a bounded state and toward a global political system.

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<sup>114</sup> Warren, 2010, 51.

### 2.3 From Demoi to Democratic Systems

There has been a recent turn to systems thinking in democratic theory.<sup>115</sup> A systemic analysis examines how different components of a system together contribute to its functioning. For instance, a systems analysis of an organism reveals how different organs and tissues contribute to functions like respiration or homeostasis. Mansbridge *et al* define a system as “a set of distinguishable, differentiated, but to some degree interdependent parts, often with distributed functions and a division of labour, connected in such a way as to form a complex whole.”<sup>116</sup> They and other democratic theorists are interested in the possibility for systems to promote important normative functions. Mansbridge *et al* develop the concept of a *deliberative system* to assess the interactions and overall functioning of deliberation at different sites, such as parliaments, courts, neighbourhood centres and news media. They propose that the normative aims of deliberative systems are to promote epistemic, ethical and democratic functions.

While most democratic theorists have turned to systemic approaches to analyze deliberative systems, Warren proposes a model for a *democratic system* in which deliberation is just one mechanism.<sup>117</sup> He argues that a democratic system ought to promote the functions of “empowered inclusion,” “communication and collective will-formation,” and “collective decision capacity.” I will explicate these three functions before explaining implications of a systemic turn to assessing democracy in global politics.

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<sup>115</sup> See, among others, Bohman, 2007; Dryzek, 2009, 2010; Habermas, 1996, 2006; Parkinson and Mansbridge, 2012; Warren, 2012.

<sup>116</sup> Mansbridge *et al.*, 2012, 4. In my analysis I emphasize how different components contribute to the functioning of the system, rather than how the system shapes the individual parts. To use Wendt’s formulation, I am emphasizing the system’s functioning as the dependent variable (produced by components) rather than treating the system as the independent variable that shapes its components (Wendt, 1999, 11-12). To be clear, I use this systemic approach as a heuristic for normative evaluation rather than to generate explanatory hypotheses.

<sup>117</sup> Warren, 2012.

### *Empowering inclusion*

Democracy enables individuals to influence those collective decisions that affect them. There are many means by which individuals can contribute to collective decision-making, such as running for office, voting for representatives, contributing to debate in public spheres, challenging policies in court, or mobilizing neighbours to work together on a shared problem.

These different forms of inclusion require basic individual and associational capabilities.<sup>118</sup> For instance, individuals must be protected from coercion or deprivation that would prevent their political participation. They require education – in the broadest sense – to know what forms of political action are available and how to pursue them if they desire. Education is also needed so individuals are not blind to their own exploitation or ignorant of how the rules that affect them are made, which can lead to harmful idealism, resignation or misery. For inclusion, people also require the *status* to participate in mechanisms to contribute collective decisions, such as the right to vote or run for office, or the right to register a complaint to a government agency or challenge a policy in court. At the minimum, people must be recognized as individuals with the moral right to have their interests and perspectives taken into consideration, such that formal or informal processes can be designed to promote inclusion.

Democratic activity does not only consist of individuals acting in relation to governance institutions but also acting in more direct association with other individuals. Indeed, it is through association that individuals come to recognize and pursue interests, aims and values. They can do so in diverse ways. They can band together to advocate, negotiate or protest at relevant sites of governance decision-making. Members of a democratic association can also solve their problems simply by acting in concert, rather than by appealing to governance institutions.<sup>119</sup> The capacity for individuals to enter and exit groups allows them to add their activity and status to a group, or

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<sup>118</sup> For instance, Saward argues that health and education are “regulative” spheres of activity in people’s lives, because “both involve conditions that can deeply constrain the capacity of anyone group or individual to prosper within other spheres (including politics)” (1994, 10). For a similar argument, and one that focuses on implications for global democracy, see Dingwerth, 2014.

<sup>119</sup> For more on cooperative democratic citizenship, see Tully, 2013.

withdraw them from it. More provocatively, it enables people to create, join or secede from *demos*. Certain polities hold together peoples who do not want to share collective self-determination. This is most apparent when empires and colonizers create borders that force peoples to be governed together. Mechanisms of exit are necessary.<sup>120</sup> It is often appropriate for there to be a high bar for exit, in order to avoid harm to those affected and to ensure the new polity is capable of cultivating individual and associational capacities.

A better democratic system is therefore one that empowers individuals to influence collective decisions that affect them. To do so, they require protection, education, status and opportunities for association, which enable them to influence decisions in relevant decision-making processes.

### *Collective will-formation*

People can give rules to themselves through collective action to the extent that individuals can understand and endorse such action. Democratic decision-making is therefore not just about aggregating preferences, though that is important, but also about making legitimate decisions together. As noted in the Section 2.2, collective will-formation can be promoted by a variety of means. Two distinctly democratic mechanisms of collective will-formation are political equality and public reason-giving. Under conditions of political equality, collective decisions are more likely to be made in ways that respond to the interests of all.<sup>121</sup> Communication and reason-giving can bring peoples' perspectives into collective decision-making processes and justify collective decisions to them. These two processes of collective will-formation therefore build on inclusion, since individuals must have their interests equally considered and have opportunities to participate in reason-giving.

In the voluminous literature on deliberation and democracy, there is considerable agreement that democracy requires deliberation in diffuse processes with widespread participation and also

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<sup>120</sup> For reflections on the importance of exit in democratic politics, see Keating, 2011; Warren, 2011.

<sup>121</sup> Christiano, 2003; Dworkin, 2003.

deliberation in authoritative sites linked to decision-making.<sup>122</sup> Thus, Dryzek argues that collective will-formation is promoted when discourses in “empowered spaces” (parliaments, town councils, courts and other decision-making bodies) are linked to and accountable to deliberation in “public spaces” (such as in the news media, among civil society groups, and between citizens who discuss public affairs).<sup>123</sup> This analysis has an important implication for analyzing a democratic system. The quality of diffuse public spheres may affect will-formation in many different *demoi* or sites of decision-making, but the connections between deliberation in diffuse public spheres and deliberation in authoritative sites is also important.

Collective will-formation is undoubtedly easier to achieve in small, stable polities with similar interests and thick forms of solidarity. In such cases the relationship between individual self-determination and collective self-determination is most clear. But processes of collective will-formation can operate even when collectives are large, indistinct and diverse, particularly through reason-giving that spans diffuse and authoritative sites of deliberation. A better democratic system is one that promotes people’s ability to bring different perspectives and interests into deliberations, promotes consideration of those who will be affected, and supports the explanation and justification of decisions to those affected by them.

### *Collective decision-making*

Democracy requires that individuals have the capacity to make and enact collective decisions. Sometimes this requires coercion, particularly when a small number of non-compliant actors can thwart the provision of a public good. As Mansbridge (2012) argues, although democracies need to provide citizens with opportunities to challenge and change rules, they must also be able to design and impose legitimate coercion. In general, democracies are able to enforce binding rules with less violence than other regime types, in part by transforming conflict into talk and into non-violent decision-making processes like voting. A better democratic system is one in which

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<sup>122</sup> See Benhabib, 1996; Chambers, 2003; Dryzek, 2010; Habermas, 1996, 2006; Mansbridge, 1999a; Parkinson and Mansbridge, 2012; Young, 2000.

<sup>123</sup> Dryzek, 2006, 2010.

polities or groups are able to make and enact collective decisions to address their collective problems.

### *Implications of a systemic approach*

A systemic approach to democracy has several important implications.

First, we cannot assess democracy based on a single institution or polity. Instead, different institutions contribute differently to democratic functions within the system, and do so in part through interactions with other institutions. To take an extreme example, a prison is a very undemocratic institution, but it may contribute to a democratic system by preventing or deterring some individuals from violating the individual protections and undermining the social trust required for democratic functioning. While democracy is often equated with competitive elections to create state governments, most people realize that democracy requires much more. Constitutional courts, expert commissions and other bodies of unelected experts can improve democratic decision-making. In recent years new innovative institutions have been theorized and created, such as deliberative mini-publics and participatory budget processes, to complement other democratic processes.<sup>124</sup> Different institutions and processes can interact together to promote democratic functions.

Second, the borders of the democratic system need not be the same as the borders of a state. We can choose the boundaries of a system to suit our analytical purposes. We may want to focus on democratic functioning in a sub-state unit, like a large city, with the proviso that many governance decisions and democratic opportunities exist outside of that frame and have an effect on what happens within it. The same can be said when we use state borders to frame a democratic system—citizens are affected by rules and have opportunities for inclusion beyond the frame, but those are temporarily bracketed to facilitate analysis. We can also assess the democracy of the global political system.

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<sup>124</sup> Fung, 2006; MacKenzie and Warren, 2012; Smith, 2009; Warren and Pearse, 2008.

Third, when we analyze democracy in the global political system, we should not only assess democratic functions within states. Instead, we should evaluate state and sub-state or transnational polities according to their contribution to democratic functions in the global political system. The governance activities of one *demos* can undermine or complement capacities for democratic functions in other *demoi*. For instance, strong collective will-formation and decision-making within individual states can make inter-state collective action difficult, should these states steadfastly resist international cooperation on issues of global scope.<sup>125</sup> But strong democratic states can also contribute to democratic functions in global politics. They can address many relations of affectedness through inclusive collective action. Furthermore, state governance may affect citizen capacities for democratic agency in global governance decision-making processes. States that promote individual and associational capacities for democratic agency will have citizens who are more likely to be able to contribute to transnational decision-making processes, and vice versa.

Fourth, global governance institutions can contribute to or undermine democratic functions in the global political system. The following section suggests how this might occur.

## **2.4 Global Governance and Democracy in the Global Political System**

Global governance rules and institutions can affect democracy in the global political system in two ways. First, they can introduce new sites of decision-making that affect people. If those sites of decision-making are not inclusive of the interests and perspectives of the people they affect, then they can undermine people's opportunities for self-determination. It is therefore significant that there appears to be an emerging norm of "democratic global governance," which has seen democratic values such as transparency, accountability, and participation figure more

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<sup>125</sup> This problem also exists in national federal systems when there are deep disagreements among sub-units, such as between Canadian provinces with different cultures and interests, and with strong provincial governments.

prominently in global governance decision-making.<sup>126</sup> Such developments are closely related to issues of inclusion in global governance of those people who face injustice – the focus of this dissertation.

Second, global governance can promote or undermine the three democratic functions in state and sub-state polities. I will briefly discuss the relationship between global governance and democratic functions in the global political system here, but a full treatment is beyond the scope of this dissertation.

### *Democratic developments in the global political system*

The rise of an inter-state system that promotes state sovereignty and state capacity contributed in many ways to democratic functions in the global political system. External sovereignty enabled relations of affectedness among citizens to thicken, because citizens were (to varying degrees) protected from outside intervention. Internal sovereignty concentrated this shared affectedness of citizens in decisions made by their state governments. These developments also increased the possibility for collective will-formation, such as through national solidarity, national public spheres and increasingly universal suffrage. Furthermore, over the last two centuries many state governments have become more inclusive and accountable to their citizenry, through elected representation and other means.

But the internal and external sovereignty of states also facilitated the development of very undemocratic governments, able to submit their subjects to extreme repression.<sup>127</sup> At the same time, the international system has not always promoted state sovereignty but often violated it. Great powers and aggressive states have extended their control over other peoples, and both colonialism and imperialism have often been justified under international law and practice.<sup>128</sup>

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<sup>126</sup> Dingwerth, 2014, 2. For other examinations of this development, see Bexell *et al.*, 2010; Payne and Samhat, 2004; Scholte, 2011a.

<sup>127</sup> As Keane puts it, the modern international system put “dangerous concentrations of the means of violence in state hands” (2004, 35),

<sup>128</sup> Anghie, 2007; Hurrell, 2007.

The shortcomings of the interstate system reached an apex in World War Two, which saw catastrophic violence within and between states. Since then global governance has steadily grown. The United Nations, international law, and many inter-governmental organizations now regulate state behaviour, challenging both external and internal sovereignty. In some cases these forms of state cooperation and global governance may advance democracy within states. For instance, international human rights law enables forms of pressure to be put on a state from both external and internal actors, to promote rights that contribute democratic functions.

In this new era of global governance, which has expanded since World War Two, global governance institutions have affected democratic functions in state and sub-state polities in several ways.

### *Empowering inclusion*

Individuals require protection, education, political status, and capacities to create and alter associations, in order to be included in decision-making. These have been affected by certain developments in global governance.

Basic individual protections, political rights and rights to association have been enumerated in international and regional human rights statutes, such as UN Declaration of Human Rights, the Convention on the Prevention and Punishment of the Crime of Genocide (1951) or the International Covenant on Civil and Political Rights (1966). However, there is considerable debate about the relationship between the existence of international human rights law and the practice and enjoyment of these rights.<sup>129</sup> Electoral monitoring by international organizations promotes the quality of electoral processes, though not in all cases.<sup>130</sup>

International criminal justice, which will be considered in depth in Chapters Five and Six, may be a global governance regime that contributes to capacities for democratic agency in the global political system. It targets forms of violence, such as genocide and crimes against humanity, that

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<sup>129</sup> See, among many competing views, Hafner-Burton, 2014; Hopgood, 2013; Sikkink, 2011.

<sup>130</sup> Kelley, 2012.

radically limit people's capacity to act as democratic agents. If international criminal justice can deter such violence, can remove those responsible from positions of authority, or can help rebuild the agency of victims of violence, it can enhance democratic activity across *demoi*.<sup>131</sup> However, its actual ability to do so is not clear, a problem considered further in Chapter Seven with respect to the ICC.

Some global governance institutions contribute to health, subsistence and education, such as the World Health Organization (WHO), the World Bank and the UN Educational, Scientific and Cultural Organization. As Dingwerth argues, these and other capabilities are necessary for people to make use of democratic processes in institutions at any level of governance. He thus claims, "clean water may be more important for global democracy than a UN People's Assembly."<sup>132</sup>

Opportunities for association have increased with the dramatic expansion of civil organizations, which act within states and across state borders. Diverse forms of civil society contribute to democratic governance within states.<sup>133</sup> There has also been an expansion of transnational advocacy networks, epistemic communities and international non-governmental organizations.<sup>134</sup> Civil society actors – and NGOs in particular – have been called the manifestation of "global people power."<sup>135</sup>

For all of these developments, the capacity for global governance to promote democratic agency cannot be assumed but requires empirical analysis. The situation of individual empowerment is

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<sup>131</sup> For the impact of the International Criminal Tribunal for the former Yugoslavia on democratization in Bosnia and Herzegovina, see Nettelfield, 2010. In a quantitative study, Olsen *et al* argue that international criminal trials have a positive impact on transitions to democracy, but only when combined with additional transitional justice mechanisms, such as domestic trials, truth commissions, or selective amnesties (Olsen *et al.*, 2010).

<sup>132</sup> Dingwerth, 2014, 2.

<sup>133</sup> Warren, 2001.

<sup>134</sup> Dryzek, 2006; Kaldor, 2003; Keck and Sikkink, 1998; Price, 2003.

<sup>135</sup> Annan, 1999.

complex and requires both overall assessments and examinations of specific global governance institutions. Gaventa and Tandon observe:

For some citizens, there are new opportunities for participation in transnational processes of action, resulting in the emergence of a new sense of global citizenship and solidarity. Yet for many other ordinary citizens, changes in global authority may have the opposite effect, strengthening the layers and discourses of power that limit the possibilities for their local action, and constraining – or, at least, not enabling – a sense of citizen agency.<sup>136</sup>

### *Communication and collective will-formation*

Global governance institutions can promote the quality of public discussion about important issues that face multiple polities. For instance, the WHO promotes discussion of best practices with respect to disease response and other public health issues, and various global environmental governance institutions – such as the Intergovernmental Panel on Climate Change – help coordinate epistemic communities to assess and analyze transnational environmental issues.

Keohane *et al* thus observe:

Multilateral institutions and networks offer forums in which proposals for solutions and “best practices” can be debated. The decentralized and divided structure of international organizations means, contrary to critics, that they generally meet higher standards of transparency and justification by reason-giving than most national systems.<sup>137</sup>

There is extensive analysis of developments in the global or transnational public spheres and the quality of deliberation within them.<sup>138</sup> Technological change has greatly expanded possibilities

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<sup>136</sup> Gaventa and Tandon, 2010, 4.

<sup>137</sup> Keohane *et al.*, 2009, 19.

<sup>138</sup> See, among others, Benhabib, 2006; Bohman, 1997; Castells, 2008; Dryzek, 2006; Fraser, 2007; Habermas, 1997; Mitzen, 2005; Tully, 2012.

of domestic and transnational public spheres. Transnational civil society actors can also promote communication and collective will-formation, by expanding the transparency and general public awareness of governance within and beyond states.<sup>139</sup> Some scholars have argued that improvements in information and communication technologies helped make it possible for transnational advocacy networks to contribute to advance neglected interests in international decision-making.<sup>140</sup> Much less clear is whether civil society and new informational technologies are supporting the processes of reason-giving that transform individual perspectives' and understandings, and that bring diverse perspectives into decision-making. To use Dryzek's concepts, while communication in the "public space" is greatly expanded, less clear is its deliberative credentials and the transmission between deliberation there and in the "empowered space" of authoritative decision-making.<sup>141</sup> Moreover, as will be discussed in Chapter Four, it may be that those in greatest need of global governance to address injustice have the least access to information and processes of public deliberation.

### *Collective decision-making*

Global governance can undermine collective self-determination by state and sub-state *demoi* by imposing rules on them that limit their capacities to make and enact collective decisions. However, global governance does not necessarily undermine the decision-making capacity of states and sub-state polities. Indeed, much international rule-making helps consolidate the state as a sovereign unit capable of enacting decisions in its own territory. At the same time, and sometimes in pushing in the opposite direction, global governance can empower sub-state polities to enact the decisions of their members. For example, the UN Declaration on the Rights of Indigenous Peoples promotes the rights of indigenous people "to autonomy or self-government in matters relating to their internal and local affairs" (Article 4), as well as their right "to maintain and strengthen their distinct political, legal, economic, social and cultural institutions" (Article 5).

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<sup>139</sup> For examples of this analysis, see Florini, 2000; Nanz and Steffek, 2004; Scholte, 2011a.

<sup>140</sup> Keck and Sikkink, 1998; Price, 1998.

<sup>141</sup> Dryzek, 2006.

In sum, global governance can promote or undermine democratic functions of empowering inclusion, collective will-formation and collective decision-making, through diverse effects on individuals or polities. The relationship between global governance and democracy is thus not definitional but requires extensive empirical analysis. Such analysis must identify both the extent of congruence between affectedness and inclusion by global governance decision-making processes, as well as the impact of global governance on democratic functions in the diverse polities that make up the political system of concern.

## **2.5 Communities of Shared Fate and Global Governance**

In the 1990s and 2000s, many people with HIV/AIDS who lived in poor countries were unable to access medication. I will briefly analyze this case to illustrate several arguments developed in this chapter. There were multiple reasons for the predicament of HIV/AIDS sufferers, including the low capacity of their state health agencies and social stigma around the disease.<sup>142</sup>

International rules on intellectual property laws were also a factor.<sup>143</sup> The global governance regime for intellectual property had been promoted by states (some more than others) and non-state actors (particularly some multinational corporations) to increase possible profits from innovations. These laws extend patent protections across state borders, making it illegal to manufacture a patented drug without licensing it from the patent holder. For HIV/AIDS medication, the price charged by pharmaceutical companies for patented drugs put them out of reach of most people with the illness.

Those people who had HIV/AIDS and who were unable to access medication therefore shared more than an illness. They also shared affectedness by some of the same rules and decision-making processes, including the international intellectual property regime and the policies of

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<sup>142</sup> Illife, 2006.

<sup>143</sup> Thomas, 2002.

pharmaceutical companies. However, for many years their shared predicament was not given serious attention in global governance decision-making.

To address their shared problem, HIV/AIDS sufferers and their advocates took a variety of actions. They shared information and assistance within local and transnational civil society associations. Local and transnational advocates mobilized to influence state policy, but many governments were unwilling or unable to provide drug treatment to all who needed it. Civil society groups, health experts, politicians and other actors lobbied international organizations, foreign development agencies and pharmaceutical companies to expand the number of recipients.<sup>144</sup> As a result, WHO policies changed.<sup>145</sup> State governments (especially G8 members) worked with the WHO, other UN agencies, private philanthropists and civil society to create the Global Fund to Fight AIDS, Tuberculosis and Malaria, which in 2002 began to give hundreds of millions of dollars to prevent and treat these diseases. In 2001, after an extensive transnational advocacy campaign, members of the World Trade Organization agreed to relax international rules on drug patents so that individuals in certain countries could have access to cheaper, generic drugs.<sup>146</sup>

These developments illustrate several arguments of this chapter. First, the HIV/AIDS sufferers unable to access treatment can be seen as a community of shared fate. Their lives were shaped by many of the same global governance rules and actors. However, their existence as a political constituency deserving inclusion in relevant decision-making processes did not simply exist, but had to be identified and promoted.

Second, members of the community of shared fate belonged to multiple polities. Many lacked full inclusion in their local and state governments, due their poverty, social marginalization,

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<sup>144</sup> Sell, 2001.

<sup>145</sup> Illife, 2006.

<sup>146</sup> Many advocates argued that this initial WTO agreement was insufficient, and activism has continued on issues of intellectual patents and the import and export of drugs to developing countries (Deere, 2008).

illness, and other factors. States with the highest rates of HIV/AIDS infections were often unable to address the problem, and global collective action was necessary.

Third, the transnational community of shared fate was initially neglected in global governance considerations. This lack of inclusion was linked to the group's lack of inclusion in state and sub-state polities. In short, there were democratic deficits in multiple polities that resulted in significant injustice. Over time, however, the transnational community of shared fate was identified, recognized, and increasingly had its interests addressed in global governance institutions as well as in state governments.

Fourth, the community of shared fate was constituted and empowered to a large extent through acts of representation. These representatives were sometimes themselves HIV/AIDS sufferers in poor countries, but often they were not. They ranged from experts at the WHO, to passionate state officials, to civil society organizations and activists. Different actors made different claims about the qualities of the constituency, with some characterizing HIV/AIDS as a result of moral or cultural proclivities, while others treated it purely as a health problem. Different representatives made such claims at different decision-making sites and governance institutions. Eventually this advocacy yielded significant results, with billions of dollars in aid flowing through the GFATM, with some change to international intellectual property rules, and with diverse policy changes at other international organizations, aid and development agencies, state governments, and other institutions.

In the next chapter, I propose a theoretical framework to help understand and analyze these processes of creating transnational constituencies and including them in global governance decision-making.

## **2.6 Conclusion**

Global interdependence provides opportunities and challenges for advancing justice and democracy. In this chapter, I argued that inclusion is central to both aims. To figure out how

global governance might improve justice and democracy, it will matter greatly whose justice and whose democratic empowerment we focus on. In this chapter, I argued that we ought to pay particular attention to the inclusion of transnational communities of shared fate whose members are significantly and negatively affected by global rules or global institutions.

Global interdependence problematizes our conception of democracy, and I argued that we must shift from thinking of democracy as a state regime type to thinking of democracy systemically. An analysis of democratic functions in the global political system reveals strengths and deficits. State governments currently play a critical role in promoting democratic functions. State citizens share extensive affectedness, and heavily-institutionalized states with democratic governments can empower citizens' capacities for inclusion and can promote collective will-formation and decision-making at a large scale. But state governments also frequently undermine individual and collective self-determination. Global governance institutions, human rights conventions, civil society organizations and other actors often seek to address these democratic deficits of states. Indeed, the most significant changes in global governance and international human rights law came in the wake of World War Two, after states had revealed their great capacity to extinguish democratic functions within their own borders and beyond. The systemic impact of these and other global governance institutions on democratic functions requires much more empirical analysis.

A more democratic global system is one in which communities of shared fate are less likely to be governed behind their backs in harmful ways. Such a system must support processes to recognize communities of shared fate and include them as constituencies in decision-making. A more democratic global political system must also support capacities for collective will-formation and decision-making, both at the level of global governance and within state and sub-state polities. Despite many positive developments in the global democratic system in recent decades, this is a tall order.

In the chapters that follow, I shift from this systemic analysis to focus on the inclusion of communities of shared fate at particular global governance institutions.

### CHAPTER 3: REPRESENTATION AND MEDIATED INCLUSION

The previous chapter argued for inclusion as an important normative principle for global governance. But what might inclusion in global governance look like? How can those communities of shared fate that are most in need of inclusion be recognized as political constituencies and empowered to contribute to global governance decision-making? In this chapter, I propose a theoretical framework to address these questions.

Inclusion is easy to imagine when decisions affect a small group, all of whose members can directly participate in decision-making. But global governance often affects large numbers of people spread across vast geographical areas. For logistical reasons alone, it will be impossible for all members of a transnational community of shared fate to participate directly in decision-making. Moreover, the very existence of a community of shared fate may not be recognized, either by its own members or by decision-makers. Political representation is necessary to address both of these challenges. Through acts of representation, actors can identify a community of shared fate that warrants inclusion, develop claims about the interests and perspectives of its members, and advocate for them in decision-making processes.

In this chapter, I propose the framework of *mediated inclusion* to show what inclusion in large-scale governance entails. The framework draws on democratic theory, and in particular on contemporary approaches to political representation that emphasize the importance of non-electoral representatives and the contribution that representatives make to “constructing” constituencies. The framework of mediated inclusion was also shaped by discussions with survivors of mass violence in Kenya and Uganda. In focus groups conducted in eight communities, I asked participants to identify and evaluate actors who represent victims of conflict.<sup>147</sup> These discussions alerted me to aspects of representation and inclusion that I might otherwise have neglected. Focus groups identified different roles that representatives can play,

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<sup>147</sup> These focus groups also addressed the appropriateness of the term “victims,” the forms of justice that victims desire, and the role that the ICC had and should play in promoting justice for victims. See Chapter Six, Section 6.4, for a discussion of findings from these focus groups, including reflections on forms of representation.

and discussants explained that their elected politicians were neither the most legitimate nor the most effective representatives of victims. Discussants also explained how deficits in access to information made it exceedingly difficult for them to evaluate decisions by the International Criminal Court or the activities of their own representatives.

The chapter will proceed as follows. In Section 3.1, I introduce the framework of mediated inclusion and locate it in contemporary debates in democratic theory about representation.

The next three sections explain the three elements of mediated inclusion. In Section 3.2 I discuss the first element, *representative claim-making*. To advance the interests and perspectives of constituency members, actors must be able to make strong claims to speak on their behalves. I argue that representatives can advance different normative goods for their constituencies and that their claims should therefore be assessed on different criteria. I call these different types of representation speaking *for*, speaking *as*, and speaking *about* constituencies.

In Section 3.3 I explain the second element of mediated inclusion, *opportunities for advocacy*. Representatives not only need to be able to make strong representative claims, they must be able to contribute to decision-making processes. To assess opportunities for advocacy, we evaluate two aspects of decision-making processes: first, the extent to which representatives can *access* the decision-making process and put forward their claims; and second, the extent to which decision-makers give appropriate *consideration* to these claims.

Section 3.4 examines the third element of mediated inclusion, *publicity*. People require opportunities to understand and evaluate the decisions that affect their lives. Publicity has two aspects: *transparency* and *public awareness*. Decision-making processes must be transparent, so at least some constituency members or their representatives can evaluate them. Not all constituency members need to assess the details of a decision-making process, but all should be aware of governance decisions that significantly affect them, and they should be able to communicate with others in order to develop opinions on important matters. Public awareness and diffuse processes of diffuse are thus necessary for inclusion.

If a constituency has representatives that can make strong claims on its behalf, if representatives have significant opportunities to advocate in decision-making, and if decision-making is carried out in a sufficiently public manner, then we can say that the constituency is included in governance. Even if constituency members do not directly participate in decision-making they will have opportunities to develop their political views and, as a group, influence decision-making. In doing so they can contribute to and endorse collective action, or they can better understand and challenge deficiencies in institutions and decisions.

The three elements of mediated inclusion promote the normative functions of democracy discussed in the previous chapter. Strong and responsive representation – which includes both representative claim-making and representatives’ opportunities for advocacy – works to empower inclusion. Publicity promotes collective will-formation. Robust representation can contribute to the ability of a polity to make and enact collective decisions, but does not necessarily do so. Collective decision-making requires processes to make decisive and legitimate decisions, and to ensure the compliance that is necessary to achieve collective action. These latter aspects of global governance are beyond the scope of this dissertation.<sup>148</sup>

Finally, in Section 3.5, I tackle the relationship between representation and the social construction of constituencies. Political representation can shape the opinions, interests and identities of constituency members. They can also bring constituencies into existence, such as when actors identify communities of shared fate that warrant inclusion. These constructivist aspects of representation can be productive but they also present a problem. How is representation to be evaluated when we cannot assume that constituencies have fixed and transparent interests that representatives should promote? I propose that representation be understood as a *conversation* between constituencies and their representatives over time. Representatives can put forward claims that may be persuasive to constituency members, and may thereby shape the constituency. At the same time, constituency members require

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<sup>148</sup> For alternate treatments of enacting global governance decisions, see Keohane, 2002b; Mitzen, 2013; Ostrom *et al.*, 1999. For different perspectives on compliance and effectiveness in international law see Chapters 19 to 24 of Dunoff and Pollack, 2012.

opportunities over time to authorize, hold to account, inform or challenge the claims representatives make for and about them. This conversation model can be applied to global governance decisions of very different scopes, from decisions about implementing policies that affect concrete groups to making rules that will affect very diffuse groups or groups that will exist in the future.

The framework of mediated inclusion can be used to clarify the strengths and limitations of different actors who represent communities of shared fate. It brings attention to opportunities and challenges that representatives face when they seek to advocate on behalf of these constituencies in different decision-making processes. It also highlights the importance of the communicative relationship between representatives and constituency members, as well as the publicity of governance decision-making. I examine the feasibility of this framework in Chapter Four, engaging with IR scholarship to explore actual practices and opportunities of mediated inclusion in global governance today.

### **3.1 Representation and Mediated Inclusion**

As I argued in Chapter Two, people who are excluded from decision-making are vulnerable to disregard, exploitation and other forms of injustice. People who are excluded from decisions that significantly affect them are also denied opportunities for self-determination, the principle that underpins democracy. Furthermore, when people are excluded from decision-making they are unable to contribute their insights and expertise to decisions, they cannot learn about the legitimate interests and perspectives of other parties, and they cannot participate in the identification of collective goods and understandings. Exclusion from decision-making thus weakens people's engagement in collective will-formation.

We must be realistic about what forms of inclusion are possible in complex governance regimes, especially since people affected by global governance institutions may be in situations that make political engagement difficult. Inclusion does not mean everyone participates, consents or gets their way. At the same time, we must ignore a common excuse for exclusion—that certain

people do not have the capacity or interest to contribute to political decision-making. This argument has a long and sordid history, from denying suffrage to justifying colonialism. Finally, rather than judging a process as inclusive or not, it is more helpful to recognize degrees of inclusion and exclusion. To improve inclusiveness we need to be clear about the goods inclusion should promote and the processes that can advance them.

Global governance decisions often affect large numbers of people spread across vast geographical areas, so the direct inclusion of affected persons in decision-making will be rare. Political representation is necessary. This is not unique to global governance; it is also fundamental to democracy in modern states. While democratic thinkers value the participation of individuals in collective decisions, there are neither enough resources nor sufficient time for all individuals to develop informed positions on all issues and advance them in all decision-making processes.<sup>149</sup>

Representation is not just a practical but regrettable substitute for direct participation. Political representation can improve the quality of political judgments, expand the viewpoints of political actors, and identify and mobilize groups of individuals who might not have recognized their shared concerns.<sup>150</sup> Political representation can also create opportunities for individual participation, such as when representatives engage with constituency members to solicit their opinions and insights. Plotke thus argues that “the opposite of representation is not participation. The opposite of representation is exclusion.”<sup>151</sup>

This is not to say that representation necessarily promotes inclusion. Representation can be done poorly, exploitatively or ineffectually. The following framework for *mediated inclusion* clarifies the elements needed for the goods of inclusion to be promoted through representation.

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<sup>149</sup> To illustrate this fact, Dahl notes that for each person in a community of 10,000 people to make a 10-minute contribution to a policy debate would require 208 work days of deliberation (2000, 107).

<sup>150</sup> For democratic theorists who develop these arguments see, among others, Disch, 2011; Urbinati and Warren, 2008; Young, 2000. As Plotke argues: “Representation is constructive, producing knowledge, the capacity to share insights, and the ability to reach difficult agreements. It entails a capacity for recognizing social relations in order to consider changing them” (1997, 31).

<sup>151</sup> Plotke, 1997, 19. See also Young, 2000, 124-5.

Mediated inclusion has three elements: representative claim-making, advocacy and publicity. I will briefly describe and illustrate these elements before considering them at greater length in subsequent sections. First, representatives must develop and justify claims to speak *for, as* and *about* constituencies. Second, representatives must have opportunities to meaningfully advocate for their constituencies in decision-making processes. Third, representation and decision-making must be carried out in a sufficiently public manner, giving some victims opportunities to understand and evaluate them. These processes do not occur at different times but are ongoing and impact each other. For instance, the quality of publicity can affect the responsiveness of representatives to their constituencies. Overall, the more robust these three elements, the greater a constituency's inclusion.

To illustrate the elements of mediated inclusion, and the construction of constituencies, I will briefly return to the example used at the end of Chapter Two. During the 1990s and 2000s, millions of people around the globe contracted HIV/AIDS and could not access or afford treatment. Many different actors – from medical experts to politicians to local activists – advocated these issues.

One advocate who played a major role in securing global recognition for this community of shared fate was Stephen Lewis, the United Nations Special Envoy for HIV/AIDS in Africa from 2001 to 2006. A reporter described his work this way:

He asks [people living with AIDS] over and over, ‘What can I do? What do you need that I can help with?’ ... This is how Mr. Lewis has reshaped the nebulous job of envoy. The AIDS patients can't get answers from the government on drug access, so Mr. Lewis will get the answers for them. He promises Western donors that he will tell senior government ministers of their concerns about a lack of political leadership on AIDS. He will find out why a starving village has had no shipments of food aid [from the World Food Programme].<sup>152</sup>

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<sup>152</sup> Nolen, 2003.

Although Lewis was appointed to his position, the strength of his *representative claim-making* primarily came from his ongoing consultations with individuals who had the disease, with other representatives of the group and with experts. These activities improved the epistemic robustness of his claims (his capacity to speak *about* the constituency's interests) and his regular encounters with HIV/AIDS sufferers gave them some opportunities to interrogate, challenge and inform his claims (improving his claim to speak *for* them). He was not an impoverished person with HIV/AIDS and thus could not to claim to speak *as* a member of the constituency.

Lewis had significant *opportunities for advocacy* in many decision-making processes, as the reporter describes. He had significant *access* to decision-making due to his UN-authorized position. His proposals frequently received *consideration* due to the authority delegated to him by the UN, but also due to his moral and expert authority,<sup>153</sup> and his advocacy strategies.

Through his actions, Lewis increased the *publicity* of governance. He used his position and authority to make more information available on decision-making processes, thereby improving their transparency. He also brought information to people with HIV/AIDS, through meetings and public speeches in communities affected by the disease, as well as by engaging news media.

Lewis did not simply transmit the fixed identity of this constituency, he helped shape understandings of who the constituency included and what characteristics its members had. For instance, he was “the first major figure to describe the face of the pandemic as female, noting that women now are the majority of infected people, yet also carry virtually all of the burden of nursing, care-taking and additional labour.”<sup>154</sup> This understanding of the constituency of HIV/AIDS sufferers would have a significant impact on how some international organizations – as well as some people with the disease – came to regard it. In short, he played a role in *constructing* the constituency.

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<sup>153</sup> Chapter Four discusses these and other forms of authority in greater detail.

<sup>154</sup> Nolen, 2003.

Before explaining the elements of mediated inclusion in depth, I will briefly describe how my approach is situated in recent scholarship on representation in democratic theory.

*Beyond the standard account of political representation*

Political representation occurs when one actor seeks to act for, stand for, or in some sense make present other actors in a political process.<sup>155</sup> Saward has helpfully proposed that the essence of representation is the act of making “representative claims.”<sup>156</sup> A representative claim is both an assertion about a particular constituency (such as its interests, values or other relevant characteristics) and a justification, sometimes implicit, about why the audience to the claim should accept the representative’s assertion.<sup>157</sup> Applied to an elected politician, we can say that when a member of parliament makes an assertion about a constituency (“the members of my riding support this legislation”) to her fellow parliamentarians, she implicitly justifies her assertion by the fact that the constituency elected her to office. The advantage of looking at representative claims rather than institutional roles is that we can understand and interrogate different kinds of claims made by a wide range of actors. We can assess the claims of elected officials about their constituencies. We can also interrogate the sense, legitimacy or usefulness of celebrities’ claim to represent Africans on matters of debt and trade,<sup>158</sup> or activists’ claims to represent nature and non-human animals.<sup>159</sup>

Not all representative claims are democratically legitimate. For instance, a dictator could tell his treasury department that the citizenry wish to fund his fleet of yachts, because the people’s will is manifest in his own desires. What, then, counts as *democratic* representation? The “standard

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<sup>155</sup> Pitkin, 1972.

<sup>156</sup> Saward, 2006, 2010.

<sup>157</sup> Saward’s full model has more moving parts than is necessary for the present analysis. In brief, he explicates a representative claim as follows: “A **maker** of representations (**M**) puts forward a **subject** (**S**) which stands for an **object** (**O**) which is related to a **referent** (**R**) and is offered to an **audience** (**A**)” (2006, 302, emphasis in original).

<sup>158</sup> Montanaro, 2012; Saward, 2009.

<sup>159</sup> Dryzek, 2000; Eckersley, 2011; Saward, 2010.

account” has four elements: that elected representatives act on behalf of their constituency (in a principal-agent relationship), that constituencies are formally-constituted units (often based on who inhabits a particular territory), that elections are necessary to promote the responsiveness of representatives to their constituencies, and that the political equality of citizens is significantly linked to universal suffrage.<sup>160</sup> In the last two decades, democratic theorists have challenged or added complexity to this standard account. They have also argued that representatives do not simply act for their constituencies, but play a role in shaping and even constituting them.<sup>161</sup> Democratic theorists have shown that many groups or issues will be systematically ignored if only territorial constituencies are represented. They have argued that non-elected or self-authorized representatives can contribute to democracy and can sometimes address political inequalities and exclusions.<sup>162</sup> These challenges to the standard model are particularly relevant for global governance, in which many transnational or sub-state groups have no opportunity for representation by elected officials.<sup>163</sup>

As a result of these challenges to the standard model, scholars have called for greater pluralism and flexibility when assessing the role and democratic legitimacy of representation. My framework of mediated inclusion builds on this literature. Along with other scholars, I draw on Pitkin’s influential claim that democratic representation means “acting in the interests of the represented, in a manner responsive to them.”<sup>164</sup> Responsive representatives can and often should take action without instructions from their constituency members, but should over time be answerable to their interests, perspectives and desires. Section 3.5 further explores what a responsive relationship between a representative and a constituency might entail.

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<sup>160</sup> Urbinati and Warren, 2008, 389.

<sup>161</sup> I return to the social constructivist nature of representation in Section 3.5 of this chapter.

<sup>162</sup> See Dovi, 2008; Montanaro, 2012; Saward, 2010.

<sup>163</sup> For those who make this argument see, among others, Dryzek and Niemeyer, 2008; Gould, 2009; Macdonald, 2008; Montanaro, 2012; Saward, 2011; Warren, 2009; Zürn and Walter-Drop, 2011.

<sup>164</sup> Pitkin, 1972, 209.

Furthermore, like Disch (2011) I argue that no single representative or representative claim can be “democratic,” since constituencies and standards for evaluation are continually changing—in part as a result of acts of representation. For that reason, it is important for political representation to occur in a system with sufficient opportunities for reflexivity and contestation by actors involved. That analysis contributes to the necessity for *publicity* in mediated inclusion.

Pitkin, Saward and Disch focus on the relationship between the represented and their representatives. They largely ignore another relationship that is necessary for inclusion: the relationship between a constituency’s representatives and decision-makers. If representatives cannot influence other actors in a decision-making process, they cannot advance the interests and insights of their constituencies. Dovi thus argues that the primary function of democratic representatives is to *advocate* for their constituency.<sup>165</sup> As I argue below, the mediated inclusion of a constituency requires that its representatives have meaningful *opportunities for advocacy* in decision-making processes that affect the constituency.

Deliberative democrats have also drawn attention to the quality of interaction among participants in decision-making processes. Dryzek refers to this as deliberation in “empowered spaces,” such as parliaments, town councils, courts and other decision-making bodies.<sup>166</sup> He argues that deliberative democracy requires that deliberation in empowered spaces be linked to and accountable to deliberation in “public spaces,” such as in the news media, civil society, and between citizens who discuss public affairs. Mitzen develops a similar argument and refers to these as the “horizontal” and “vertical” dimensions of deliberation and accountability.<sup>167</sup> In the horizontal dimension, actors express reasons for action to each other, make public commitments

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<sup>165</sup> Dovi, 2008. She further proposes that a *democratic* representative is a person who advocates in a democratic fashion, which means that they promote fundamental democratic institutions and aims. I find her argument persuasive but I do not expand on it here.

<sup>166</sup> Dryzek, 2010.

<sup>167</sup> See Mitzen, 2005, 2013. Mitzen’s arguments about vertical and horizontal dimensions of public spheres or public accountability draw primarily on Habermas (1996, 2006). As noted in Chapter Two, there is considerable agreement among theorists of deliberative democracy that deliberation should occur in diffuse processes with widespread participation and also in authoritative or decision-making sites.

and hold each other to account. Representatives who engage in this activity enjoy considerable *opportunities for advocacy*. In the vertical dimension, decision-takers seek to influence decision-makers and hold them to account. In my framework of mediated inclusion, the processes of *representative claim-making* and *publicity* contribute to this vertical dimension.

While my framework for mediated inclusion builds on this scholarship on democratic representation, I am not primarily interested in whether representation *counts* as democratic or not. Rather, I propose how representation can contribute to inclusion. I argue that to evaluate mediated inclusion we must analyze the relationship between representatives and their constituency members to assess the development and justification of representative claims; we must analyze the relationship between representatives and other parties in decision-making processes to assess their opportunities for advocacy; and we must analyze the publicity of decision-making in a system of communication and contest.

### **3.2 Representative Claim-Making**

Mediated inclusion requires that representatives make valid claims on behalf of constituencies. Representatives who misrepresent their constituencies will not promote their inclusion. Representatives can be evaluated on different normative criteria and can advance different goods for those they represent.

This section proposes how we should understand and evaluate claims by representatives to speak *for* and speak *about* a victim constituency, as well as the claim to speak *as* a member of that constituency.<sup>168</sup> These are ideal types of the relationship between representatives and

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<sup>168</sup> The terms “speaking for” and “speaking about” have been developed in democratic theory, including by Alcott, 1991. “Speaking as” a member of a group has also received extensive attention in democratic theory, though often called “descriptive representation” (discussed below).

Slim (2002) proposes the typology “speaking for,” “speaking about,” “speaking as” and “speaking with” when discussing the legitimacy of NGOs. I encountered his typology after developing my own. Slim’s

constituencies. Each has a different standard of legitimacy and enables representatives to make different contributions to advance victim inclusion (summarized in Table 3.1).

As I argue below, there is not a single best type of representation. Inclusion requires different types of representatives who interact with each other and contribute to decision-making at different sites and in different ways. The appropriate standards to evaluate representation will differ in different circumstances. For instance, the appropriate representation for a small and concrete constituency with relatively clear interests (such as a neighbourhood whose drinking water will be poisoned by a factory) will differ greatly from the representation of a large and heterogeneous constituency or a constituency whose members exist in the future rather than the present (such as future victims of international crimes<sup>169</sup>). Constituencies themselves bring to bear different expectations about how they ought to be represented.

As I will argue, representation ought to be evaluated as a conversation over time between representatives and constituency members, in which different actors contribute to the development and contest of representative claims.

People do not make different types of representative claims just because they think doing so is normatively correct, but also because doing so legitimizes or extends their own authority. To a significant extent, however, this authority comes from widespread recognition of the normative legitimacy of these claims. We thus need to be clear about the normative basis of different claims and the contributions they can make to inclusion.

### *Speaking for*

To speak *for* a constituency is to claim that the audience should treat the representative as the constituency speaking. It is a relational claim, to be evaluated by examining opportunities for the

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paper provides a thoughtful reflection on NGO legitimacy, but he does not develop his typology of representation, ground it in democratic theory, or explain the normative goods different types of representation might promote.

<sup>169</sup> For this example, see Chapter Five.

**Table 3.1: Ideal types of representative claims**

Type of representative claim	Standard of legitimacy	Contribution to inclusion
Speak <i>for</i>	Relational responsiveness to constituency	Agency of constituency members
Speak <i>about</i>	Deliberative validity of claim	Epistemic validity of decision
Speak <i>as</i>	Shared identity between constituency and representative	Recognition of constituency members

constituency to authorize representatives or hold them to account.<sup>170</sup> When authorized by their constituencies, representatives are empowered to act on their behalf in certain political processes or to advance certain goods. Representatives are accountable to constituencies for the way in which they use the authority that has been conferred on them.

Mechanisms of authorization and accountability provide opportunities for individual constituency members to exercise agency over and through their representatives' actions. Authorization and accountability promote the responsiveness of a representative and provide opportunities for constituency members to exert their agency. When *authorized* by their constituencies, representatives are empowered to act on behalf of the constituency in certain political processes or to advance certain goods. Authorization is usually conditional, in that representatives have constraints or expectations attached to their ability to act on behalf of constituencies. Representatives are *accountable* to constituencies for the way in which they use the authority that has been conferred on them. Accountability mechanisms make representatives answerable for their actions and make it possible to limit or revoke representatives' abilities to act on behalf of their constituencies.<sup>171</sup> Elections are a familiar mechanism of authorization

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<sup>170</sup> See Macdonald, 2008; Pitkin, 1972; Urbinati and Warren, 2008.

<sup>171</sup> These mechanisms to enforce responsiveness are necessary, in part, because people often gain material and social benefits from speaking for others. As Alcoff cautions, "the practice of speaking for others is often born of a desire for mastery, to privilege oneself as the one who more correctly understands the

(when constituents vote for representatives) and accountability (the opportunity to re-elect or reject a representative in future elections). But non-electoral mechanisms of authorization and accountability exist in domestic and global politics.<sup>172</sup>

Different mechanisms provide different opportunities for constituency members to exert agency, which in turn leads to stronger or weaker claims by representatives to speak *for* them. The greater the active ongoing support by constituency members, the stronger the claim by a representative to speak *for* them. For instance, representatives who mobilize a large segment of a constituency to actively endorse their claims – such as by joining demonstrations that support the representative or by becoming members of her organization – illustrate a strong degree of authorization. By contrast, one-time consultations with a small sub-set of a constituency is a weak mechanism, since there is little opportunity for constituency members to authorize particular claims or hold the representative to account for subsequent actions. However, ongoing consultations with a representative can provide opportunities for agency, even if constituency members lack formal mechanisms to authorize or hold the representative to account. For instance, in Chapter Six I give the example of lawyers who are appointed by the ICC to represent large groups of victims of crimes. Although these lawyers are primarily accountable to ICC judges, they nevertheless demonstrate significant responsiveness to their constituencies through regular consultations.

### *Speaking about*

Representatives who advocate for a constituency make claims about the qualities of that constituency, including the interests of its members and the effects that different policies will have on them. The claim to speak *about* a constituency is valid or not depending on the content of the claim rather than the representative's relationship to the constituency. A claim about a

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truth about another's situation or as one who can champion a just cause and thus achieve glory and praise" (1991, 29). This does not mean we should not let others speak for us, but we should be attentive to the effects of such practices or claims.

<sup>172</sup> For analyses of authorization and accountability by non-electoral mechanisms, see Grant and Keohane, 2005; Macdonald, 2008; Saward, 2010.

constituency is justifiable on epistemic grounds. Claim-makers draw on forms of legitimacy such as their recognized expertise in an epistemic community or the methods used to inform claims. Claims to speak *about* a constituency can be evaluated on deliberative criteria, in which they are assessed together with competing claims in processes committed to reasonableness, mutual justifiability and non-coercion.<sup>173</sup>

High quality claims to speak *about* constituencies can be information-rich and relevant to policymaking. By contrast, mechanisms of authorization and accountability are often low in information and do not provide detailed positions on complex issues. A vote for a politician is paradigmatic—it signals general support rather than a policy prescription. But when unmoored from mechanisms of authorization and accountability, claims to speak *about* a constituency can be problematic.<sup>174</sup> Those who speak *about* constituencies can make self-serving claims or claims that harm constituency members when applied in practice—the familiar dangers of voice appropriation and technocracy. Claims to speak *about* a constituency can also fail on epistemic grounds, since knowledge claims are always fallible. Finally, there is necessarily a normative basis to claims about group interests, which epistemic claims cannot resolve.

To speak *about* a constituency in a decision-making process is not always recognized as political representation, but it often functions as such. Speaking *about* a constituency in a decision-making process introduces a representation of that community that may displace others, and it often includes assumptions about the political and moral aspirations of the constituency.

### *Speaking as*

In addition to speaking *for* and *about* a constituency, it is possible for a representative to justify his or her claims by speaking *as* a member of that constituency.<sup>175</sup> We commonly turn to people

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<sup>173</sup> These standards are drawn from scholarship on deliberative legitimacy. See Habermas, 1996; Mansbridge *et al.*, 2010; Young, 2000.

<sup>174</sup> See Alcott, 1991; Mansbridge, 2003

<sup>175</sup> In democratic theory, representation based on the shared qualities of representative and constituencies is referred to as “descriptive representation” (Mansbridge, 1999b; Pitkin, 1972).

with a particular ethnic identity, gender or experience and expect them to speak on behalf of those who share the identity or experience. The legitimacy of a representative who can speak *as* a member of such a group is based on their authenticity as a group member and the extent to which members of the group identify with them.

Representatives who speak *as* members of a social group can be responsive to group members or provide expertise on a topic, like other representatives who speak *for* and *about* the group, but they can make several further contributions that non-members cannot make.<sup>176</sup> First, group members who are given the authority to speak in a decision-making process can promote the group's *recognition*—the extent to which those who share an identity are valued as members of a larger community.<sup>177</sup> This recognition is particularly important for constituencies that have suffered from marginalization and exclusion. A member can promote the group's recognition by being publicly acknowledged and meaningfully included in a decision-making process.

Second, members of a social group may have important insights about a group's predicament and the actions needed to address it that non-members are unlikely to possess. In other words, sharing an identity or experience may generate unique epistemic insights. This contribution partly overlaps with claims to speak *about* the group, but it recognizes that some insights may require particular forms of experience or social position to be understood, and that such positions may not be supported by a traditional epistemic community.<sup>178</sup>

Representation by members of a group may play other roles in some situations. For instance, in some Ugandan communities, traditional justice practices require public acknowledgements of

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<sup>176</sup> See Alcoff, 1991; Phillips, 1996; Young, 2000.

<sup>177</sup> For examinations of the politics of recognition and its relationship to other social goods, see Fraser, 1995; Honneth, 1996; Taylor, 1994.

<sup>178</sup> For this argument, see Shklar (1990) on the role of victims' experiences in justice, Young on how the perspectives and insights of those who face domination are essential to "public objectivity" (2007, 148), and Harding (1991) on "standpoint epistemology." Various scholars, from pragmatist philosophers to science and technology scholars have shown that practical knowledge and embedded social perspectives can make critical contributions to understanding and solving social problems. See, among others, Collins and Pinch, 1998; Dewey, 1997; Hacking, 1983.

guilt and expressions of forgiveness by victims or their families. In my focus group discussions among survivors of conflict in northern Uganda, several discussants therefore argued that victims ought to be present at ICC trials in order to hear and assess perpetrators' responses, and possibly to make an expression of forgiveness.<sup>179</sup>

### *Competing claims by representatives*

For constituency members to be included in decision-making, they require representatives who can contribute to their agency and recognition, and who can improve the epistemic quality of decision-making. Constituencies therefore require representatives who can make strong claims to speak *for*, *as* and *about* them. Very rarely will a single representative be able to make strong claims in all these dimensions. In practice, constituencies will be represented by multiple and competing representatives with different strengths and weaknesses.

A diversity of representatives is valuable for three reasons. First, with multiple representatives available, constituency members may have opportunities to select or support those who better advance their views. Second, different representatives can bring different perspectives and expertise to bear, and can challenge or improve claims made by other representatives. In doing so they can rectify each other's deficits. Third, different types of representatives may have different opportunities to contribute to different decision-making processes, as will be discussed in Section 3.3.

Not only can we assess individual representative claims, we can also assess ongoing interactions among representatives and their constituencies. Young proposes that representation should be understood as a relationship between representatives and constituency members, in which there are "moments" when constituency members can authorize or hold to account their representative.<sup>180</sup> Because these moments are spaced out over time, there are opportunities for the representative and constituency members to seek to persuade each other about the qualities of

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<sup>179</sup> See Chapter Six, Section 6.4 for more.

<sup>180</sup> Young, 2000, 125-133.

the constituency and the positions the representative should take. This ongoing conversation makes it possible for representatives to play a role in constructing the constituency by making claims about it, but also gives constituency members a chance to support, reject, or seek to alter claims made on their behalf. This conversation framework requires significant communication between representatives and the represented, in order to enable processes of authorization and accountability, and also opportunities for constituency members to understand, learn from, and criticize or accept representative claims. Publicity is therefore crucial.

Young's framework is helpful but must be expanded in two ways. First, the conversation does not only occur between a representative and the constituency members, but it also engages other actors who claim to speak *for*, *about* and *as* that constituency. These actors will have different justifications for their representative claims, emphasizing their legitimacy on relational or identity or epistemic grounds. Some representatives will be better than others at promoting agency, epistemic validity and recognition in decision-making. Second, in addition to assessing particular representatives of a constituency, we need to look at relations among constituency members and their various representatives as a system. A better system of representation is one in which different actors are able to provide multiple points for constituency members to have input into decision-making, and in which representatives are able to address each others' deficits.<sup>181</sup> For instance, representatives with strong relational claims to speak *for* a constituency can have the quality and epistemic robustness of their positions improved by interactions with representatives with strong claims to speak *about* the constituency on an issue area.

To give a brief illustration, in Chapter Six I examine the representation of victims and violence-affected communities in northern Uganda. In that chapter I compare three advocates for victims, each of which has a different source of legitimacy. One is an association of indigenous religious leaders with longstanding community roles who have relatively strong claims to speak *for* a subset of northern Ugandans. Another is a team of foreign academic researchers who conduct large-scale opinion surveys of northern Ugandans. In doing so they presented snapshots of the

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<sup>181</sup> For an exploration of different forms of representation in a representative system, see Mansbridge, 2003.

preferences of these communities to decision-makers. A third victims' advocate is an international human rights organization, which makes claims *about* the interests of victims and affected communities, drawing on their legal expertise and research in other countries rather than responding directly to Ugandan victims' views. In the years after the ICC intervened in Uganda, I argue, the overall representation of victims was improved by the interactions among these and other representatives of victims. Together they created a nuanced portrait of the constituency in question. Here, as in many cases, the formation of representation claims is best served by a system of diverse and competing representatives.

The legitimacy of representative claims is never completely settled. Representatives need ongoing authorization, accountability and engagement with constituencies to speak *for* them, and epistemic claims must face ongoing challenge and competing claims. However, better or worse claims to speak *for* and *about* constituencies can be identified. Situations in which there is a deficit of responsiveness in representation can be diagnosed, and mechanisms or institutional design elements can be created to improve the quality of speaking *for*, *as* and *about* constituencies.

### **3.3 Opportunities for Advocacy**

The second process required for mediated inclusion is advocacy in decision-making. The quality of claims that representatives make on behalf of constituencies only matters if representatives can contribute to relevant decision-making processes. Advocacy – as I use the term – takes place among parties in a decision-making process, rather than between representatives and their constituencies. Opportunities for advocacy are significantly affected by the rules and practices of the decision-making process itself, although individual advocates' strategies and expertise also play a role. To assess advocacy, we look for opportunities for representatives to *access* decision-making processes, and for evidence that their claims receive appropriate *consideration*.

Access and consideration do not necessarily mean that advocates for a constituency determine the outcome of a decision-making process. Representative claims about a constituency may be

weak or unpersuasive. The interests and perspectives of one constituency often must be balanced with those of other constituencies. There may be established rules and principles in a regime or institution that exist for functional reasons, and so cannot be reformulated to suit the desires of a particular constituency.<sup>182</sup> There are also limitations imposed by factors such as organizational capacity and political context. Nevertheless, the inclusion of a constituency requires that their representatives can question these various factors, propose alternative actions and demand justifications for decisions.

*Access* for representatives of a constituency is primarily an issue of standing. Representatives can be denied access entirely, they may be invited to provide information from time to time at the discretion of decision-makers, they may have a guaranteed right to contribute on a subset of issues, or they may be full participants with equal status to other decision-makers. In Chapter Four, I further explain these different forms of access, and I show that international organizations vary widely in their practices of including representatives of affected groups. I also argue that, in general, there has been a significant increase in access to international organizations by civil society actors functioning as representatives.

The role of gatekeeping over decision-making is thus critical. Gatekeepers significantly affect which actors can contribute to decision-making and how. This gatekeeping role can have positive or negative effects on the representation of those significantly affected by governance decisions. Gatekeepers can negatively affect inclusion by selecting representatives with weak representative claims or by causing such representatives to be responsive to the gatekeepers rather than their constituencies. However, gatekeepers can also improve the quality of representation by setting expectations and criteria for representatives, by facilitating their advocacy, and sometimes by shaping their interactions with their constituency. In Chapter Six I give an example of such gatekeeping. The ICC appoints legal representatives for victims, and ICC judges determine the extent to which these representatives can contribute to particular judicial proceedings. The staff

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<sup>182</sup> For example, criminal justice requires that accused persons have a strong defense and that judges impartially assess evidence, regardless of whether victims would prefer a conviction. This argument is extended in Chapter Five, Section 5.2.

and judges at the ICC also decide on performance criteria for victim representatives and choose whether to provide them with adequate resources to regularly consult with victims and update them on proceedings. Thus, while the lawyers consult with victims and make submissions on their behalf, the ICC judges and staff to a large shape the victims' representatives' opportunities for advocacy and the quality of their representative claims.

Even when representatives are granted access to a decision-making process, they may not have their claims appropriately considered. What counts as "appropriate" must be determined on a case-by-case basis. For instance, weak representative claims may not deserve significant consideration, since they may not reflect the interests and perspectives of constituency members. Constituencies that are not significantly affected by a decision also may not warrant significant consideration. The claims of representatives may not be appropriately considered if the representatives lack the communicative style or institutional standing needed to make other parties pay attention to or accommodate their claims. Representatives may also lack resources needed to develop positions or advance them in bargaining. For these and other reasons, even representatives with strong claims to speak *for*, *as* or *about* constituencies can still fail to promote mediated inclusion.

For the constituencies that this dissertation focuses on, consideration of their interests and perspectives will be more likely to happen when their representatives contribute to decision-making processes that are responsive to persuasion and reason-giving. Scholars have referred to such decision-making processes as following a logic of "arguing" rather than "bargaining" or "coercing."<sup>183</sup> Refugees, victims of crimes and the global poor will usually lack material resources to incentivize or coerce decision-makers. Chapter Four will identify factors that are more or less likely to cause global governance decision-making processes to be determined by a logic of "arguing."

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<sup>183</sup> Elster, 1999; Müller, 2004; Risse, 2000. The comparison between "arguing" (processes of reason-giving) and "bargaining" (processes in which actors pursue established and fixed interests, often by mobilizing material and social resources) are further described in Chapter Four, Section 4.3.

Different contributions to decision-making processes are possible. Representatives of constituencies can help *frame* decision-making processes, alerting decision-makers to the existence of a constituency of affected persons, identifying problems they face, and proposing appropriate norms or decision-making processes to address them.<sup>184</sup> Representatives can make *epistemic contributions* to decision-making, adding their expertise and insights to considerations about appropriate policies. By being publicly acknowledged in a decision-making process, a representative can contribute to the social *recognition* of constituency members. As argued above, constituency members who speak *as* representatives are particularly important for promoting recognition. Representatives can promote the *interests* of constituency members in the above ways, as well as by bargaining, strategic use of rhetoric and procedural rules, and strategic alliances with other actors.

Different representatives will be better at making some contributions rather than others. Clearly, the quality of representative claims to speak *for*, *as* or *about* a constituency is important. For instance, a representative with strong claims to speak *about* a constituency can contribute to aspects or processes of decision-making that address epistemic disagreements, while a representative speaking *as* a constituency member can promote social recognition by speaking in a public and symbolically-resonant process. The mediated inclusion of a constituency will therefore often be better served by having several complementary representatives of a constituency rather than looking for a single ideal representative.

### 3.4 Publicity

The third element required for mediated inclusion is publicity.<sup>185</sup> People require opportunities to understand and evaluate the decisions that affect their lives. Thus, for a constituency to be

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<sup>184</sup> Transnational advocates tend to have greater success in issue creation and agenda-setting than in bargaining (Keck and Sikkink, 1998; Price, 2003).

<sup>185</sup> Publicity has been widely recognized as an essential quality for democracy (Young, 2000; Arendt, 1998). For democracy to function, write Gutmann and Thompson, “The reasons that officials and citizens

included in governance decision-making, its members must be aware of decisions that are particularly important or controversial for them. At least some of its members should be able to learn about and assess the processes and arguments that lead to decision outcomes. Finally, constituency members must also be able to engage in diffuse processes of communication and reason-giving that enable them to develop opinions on matters that significantly affect their lives. Publicity therefore has two dimensions: *transparency* and *public awareness*.

Decision-making must be significantly *transparent* for constituency members – or their representatives – to assess the process by which decisions were made, and to evaluate the various arguments or positions put forward.<sup>186</sup> If decisions are made in secret, decision-makers cannot be held to account. Transparent decision-making is also required to assess the extent to which decision-makers consider claims made by representatives, in order to determine whether these claims influenced an outcome and why they did or did not. Furthermore, transparency generally improves the quality of deliberation among decision-makers, by exposing arguments and positions that are self-interested, false or otherwise unjustifiable to a broader public.<sup>187</sup>

To assess transparency, we must ask whether constituency members or their representatives can access the information they need to evaluate a decision.<sup>188</sup> When assessing transparency, we therefore look at whether actors can ask for and receive information, rather than looking at the amount of information decision-makers have made public. In large-scale governance, it is not realistic to expect that all constituency members will be able to evaluate information about decision-making processes. Some effort and expertise may be required to access and interpret this information. At the same time, the barriers to accessing this information must be low enough for at least some constituency members and their representatives to evaluate it.

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give to justify political actions, and the information necessary to assess those reasons, should be public” (1996, 95).

<sup>186</sup> Grant and Keohane (2005) thus argue that sufficient information about decisions by power-wielders is necessary for accountability, and MacDonald states that there must be “transparency mechanisms...to facilitate rigorous stakeholder evaluation of the performance of public political agents” (2008, 186).

<sup>187</sup> Habermas, 1996; Young, 2000.

<sup>188</sup> Grigorescu, 2007.

Importantly, representatives as well as decision-makers should be transparent. Constituency members must be able to understand and evaluate the claims put forward in their names.

There can be justifiable limits to transparency. Certain decisions must be made confidentially, for a variety of reasons. For instance, financial regulators must keep certain decisions secret to avoid giving unfair advantage to some actors; courts must withhold details about criminal cases to protect the safety or wellbeing of witnesses and victims; and legislators and security officials must keep some details confidential to prevent attackers from exploiting that information. Furthermore, evidence suggests that deliberation can sometimes be improved by keeping negotiations confidential.<sup>189</sup> Individuals may be less willing to change their position in response to the arguments of others if outside audiences will criticize or sanction them for such shifts. As will be discussed in Chapter Four, public negotiations among state representatives are less likely to feature deliberation when their governments or citizenry hold strong, pre-established preferences on an issue.

However, the default position ought to be that decision-making should be transparent.<sup>190</sup> Even when there are justifiable limits on transparency, there can be mechanisms to mitigate secrecy. For instance, decision-making can be scrutinized by trustworthy but independent actors, such as when judges review decisions by security officials to temporarily abrogate the rights of citizens who may be planning violence. Decisions can be made public at a later date, when doing so will not cause harm or undermine the policy. Finally, policies of secrecy themselves should be made public and exposed to criticism and accountability.

The second dimension of publicity is *public awareness*. To be included in decision-making, constituencies must be aware of governance decisions that will significantly affect their lives. People also require opportunities to develop their understanding and opinions about important issues, in part by being able to engage with and contribute to broader discussions.

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<sup>189</sup> Checkel, 2001; Elster, 1999.

<sup>190</sup> For an in-depth discussion of justifiable exceptions to publicity in democratic decision-making, see Gutmann and Thompson, 1996, 95-127.

This second dimension of publicity requires that constituency members are able to participate in diffuse processes of communication, reason-giving, and access to information. Democratic thinkers conceive of these processes as constituting “public spheres” or “deliberative systems.” Regarding the latter, Mansbridge writes:

If a deliberative system works well, it filters out and discards the worst ideas available on public matters while it picks up, adopts, and applies the best ideas. If the deliberative system works badly, it distorts facts, portrays ideas in forms that their originators would disown, and encourages citizens to adopt ways of thinking and acting that are good neither for them nor for the larger polity. A deliberative system at its best, like all systems of democratic participation, helps its participants understand themselves and their environment better.<sup>191</sup>

This is, undoubtedly, an aspirational target. There is a growing literature on the quality of transnational public spheres, and the very uneven access to communication flows in them.<sup>192</sup>

In Chapter Four I discuss general trends in publicity in global governance decision-making, focusing on the transparency of decision-making by international organizations. I also examine global inequalities that affect public awareness, including issues of literacy and access to information and communication technologies. In Chapter Five, I examine issues of transparency and deliberation in the negotiations to create the Rome Statute of the International Criminal Court, and in Chapter Six I evaluate the transparency and public awareness of several important decisions made in relation to the ICC’s operations in Uganda and Kenya.

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<sup>191</sup> Mansbridge, 1999a, 221.

<sup>192</sup> See, for example, Fraser, 2007; Tully, 2012.

### 3.5 The Role of Representation in Constructing Constituencies

Political representation can shape the understandings and interests of constituency members themselves, and in doing so they play a role in constructing constituencies. In this section I explain the constructivist nature of representation and address several implications for identifying and including communities of shared fate.

While it may seem desirable for representatives to simply transmit the stated preferences of constituency members, this is neither possible nor desirable, for several reasons. First, representatives must be able to take some actions without receiving instructions from their constituency, in order to draw on their own expertise and contribute to dynamic decision-making processes.

Second, empirical research shows that most people lack clear or stable preferences on most issues.<sup>193</sup> Indeed, to assume that people know their interests and can articulate how they should be promoted on all issues is to assume that ignorance and deception do not exist and that learning and transformation are impossible. In some cases other people know our interests better than we do, especially in areas where they have particular experience and expertise.

Third, representatives cannot simply act on the transparent interests of constituencies, since these interests are contestable and dynamic.<sup>194</sup> Indeed, representation itself plays a role in changing them. Representation does “not simply allow the social to be translated into the political,” notes Urbinati, but “facilitates the formation of political groups and identities.”<sup>195</sup> This realization has

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<sup>193</sup> Disch (2011) and Mansbridge (2003) survey some of this empirical research and explore its implications for democratic representation.

<sup>194</sup> Representation should instead be seen as an aesthetic act, argues Saward: “If an electoral district or constituency’s interests were transparent, patently evident, singular and obvious, to most people, then a representative could simply ‘read off’ those interests and act on them... [Since this is not the case], the ‘interests’ of a constituency have to be ‘read in’ more than ‘read off’; it is an active, creative process, not the passive process of receiving clear signals from below” (2010, 310).

<sup>195</sup> Urbinati, 2006, 37.

contributed to what can be called the “constructivist turn” in scholarship on political representation.<sup>196</sup>

Political representatives shape constituencies in several ways. Representatives can persuade constituency members to see themselves and their political context differently. Representatives can influence the governance of constituencies, which can in turn affect peoples’ practices and self-understandings. Not only can representatives play a role in shaping the interests and understandings of members of a *given* constituency, they can also propose the existence of *new* constituencies that deserve inclusion. The constitution of new constituencies is important when groups affected by governance do not fit within the existing array of recognized constituencies. As argued in Chapter Two, this situation frequently arises in global governance.

The role that representatives play in constructing constituencies is important when actors seek to identify and mobilize communities of shared fate. As I argued in Chapter Two, a community of shared fate exists when its members share a significant degree of affectedness or vulnerability, as a result of being the subject of shared governance. There are, indeed, infinite numbers of communities of shared fate, which range greatly in the depth of affectedness and thus the need for inclusion. For instance, all people allergic to avocados are a community of shared fate with less pressing need for inclusion in global governance than are civilians who fall under the protection mandate of the UN’s Department of Peacekeeping Operations. While communities of shared fate can be identified to a degree by empirical analysis, they do not exist simply as natural kinds. As Williams argues, communities of shared fate are actively created through acts of imagination and persuasion, and she therefore likens representatives to “storytellers”:

Through [storytellers’] words and their actions, they attempt to persuade other parties to these relationships that the connections between them are real and that their actions have real consequences for others. Moreover, they seek to persuade

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<sup>196</sup> For scholars who make this argument, see among others Disch, 2011; Montanaro, 2012; Saward, 2010; Urbinati and Warren, 2008; Young, 2000.

others that these consequences can be brought under some form of rule aimed at a common good.<sup>197</sup>

In other words, transnational communities of shared fate can be evoked and brought to bear in political decisions through acts of representation.

### *Challenges of constructivist representation*

When a community of shared fate becomes activated as a political group, its members can come to share even more affectedness—their fate becomes more entwined. This is a common phenomenon in governance: a new identity is proposed, certain characteristics of the identity are emphasized over others, people come to recognize others or themselves as belonging to the identity category, and policies are developed and targeted at members of the category. In critical literature on global governance, these processes are often cast in a negative light. For instance, scholars criticize the fact that global governance emphasizes certain qualities of people designated as refugees or victims of international crime, and targets them according to these narrow constructions.<sup>198</sup> Similarly, some scholars who recognize the constructivist nature of representation emphasize the harm and disempowerment it can cause. For instance, Bourdieu asserts that when a spokesperson claims to speak on behalf of a group it should be seen as “usurpatory ventriloquism,” since “it is more or less true to say that it is the spokesperson who creates the group.”<sup>199</sup>

It is certainly true that the creation of new social categories for governance can expose people to unwanted or harmful affectedness. But the constitution and governance of new social categories can also be seen as necessary *democratic* processes, which can enable communities of shared fate to have their affectedness recognized and addressed.<sup>200</sup> The constitution and governance of

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<sup>197</sup> Williams, 2009, 43.

<sup>198</sup> Barnett and Finnemore, 2004, Ch. 4; Clarke, 2009; Owens, 2011.

<sup>199</sup> Bourdieu, 1991, 211.

<sup>200</sup> As noted in Section 2.2, this process is fundamental to Dewey’s influential approach to democracy (Cochran, 2010; Dewey, 1991).

new social categories is more democratic to the extent that representation and decision-making are inclusive of constituency members. With greater inclusion, individuals who are represented and governed as a social category will have opportunities to seek to be governed differently or governed less.

The constructivist nature of representation does not mean that people must always defer to others to articulate their interests. Such a view denies people's agency and situated knowledge, and endorses a paternalism that lends itself to the misrepresentation and exploitation of the represented. The "conversation" framework for assessing representation, introduced in Section 3.2, suggests how representatives can shape a constituency while also being responsive to it. As I argued, representatives can seek to persuade constituency members about their claims, and in doing so can shape the constituency. At the same time, constituency members require opportunities over time to authorize, hold to account, inform or challenge the claims made for and about them.

This approach is pertinent when actors seek to represent communities of shared fate that do not yet exist or that have not yet been recognized as political constituencies. This situation frequently arises when new governance institutions are being created. For instance, as I discuss in Chapter Five, in negotiations to create the ICC, advocates for victims' rights were lobbying for victims who did not yet exist, as the Court would only be able to prosecute future crimes.

Representatives of unrecognized or future constituencies cannot be expected to make strong claims to speak *for* or *as* constituency members. Instead, they will primarily make claims to speak *about* them.

While global governance decision-making may sometimes affect notional or diffuse groups, they often affect narrow and concrete groups. Examples include the residents of a particular refugee camp, inhabitants of communities next to a proposed dam, or the persons who were the victims of a particular set of international crimes. For such decision-making processes, it is feasible to have representatives who can make strong claims to speak *for* or *as* constituency members.

Mediated inclusion thus needs to be promoted and assessed in different ways for decision-making processes with different scopes. When decisions affect extremely large and diverse or hypothetical groups, we may be tempted to say that responsive representation and mediated inclusion cannot exist. However, the conversation model developed above provides another perspective. It allows us to say that the representation of such groups is a statement in a conversation that can be responded to at a later time – perhaps much later – and in different forums. A long gap in the conversation may result in great discord in representative claims made about the large, notional group when general governance rules are designed, and claims made smaller, concrete groups that will be targeted in the implementation of those rules.

Global governance rules and institutions are continually pulled between universalism and particularity. They are created through collective agreements that often demand equal treatment, they generate bureaucratic logics to treat all cases or individuals similarly, and when they make legal rules they require generality as a criterion of legal validity.<sup>201</sup> However, when applied, these rules and institutions affect particular and concrete groups. In such cases, contestation of past claims about the constituency, and contestation of the governance regime itself, are to be expected. This contestation may seek to shape the application of general norms or rules to particular groups and cultures, which scholars have referred to as adaptation, localization or vernacularization of global governance.<sup>202</sup> There are, however, limits to the extent to which general laws, rules or norms can be adapted to fit particular groups in particular circumstances, and either acceptance or exit become necessary.

One means to address this problem is to draw on the principle of subsidiarity.<sup>203</sup> From the perspective of inclusion, issues or conflicts are often best addressed by as small a community as

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<sup>201</sup> See Abbott *et al* (2000) or Brunnée and Toope (2010) for different accounts of the importance of generality to international legal norms.

<sup>202</sup> For adaptation see Wiener, 2008. For localization see Acharya, 2004. For vernacularization, see Merry, 2009.

<sup>203</sup> For examples of the use of the subsidiarity principle to improve democracy in global governance, see Held, 2004; Young, 2000, 2007.

possible, which allows greater agency by individuals in collective decisions. However, if that polity cannot resolve its conflicts, or if others have a legitimate stake in the issue, then the level of decision-making should be kicked up to a more comprehensive level. The result is a multi-level system in which the level of decision-making is used to balance responsiveness to particular communities and the demands of broader collective action.

In sum, the constructivist nature of representation makes it possible to identify and activate communities of shared fate as constituencies. However, it also makes responsive representation a challenge, particularly when constituency members do not exist or do not recognize themselves as belonging to a constituency. I examine these issues in subsequent chapters. Chapter Four argues that many global governance regimes construct constituencies of “intended beneficiaries,” social categories that become key to legitimacy claims by global governance actors. In Chapter Five I show how the category of the “victims of international crimes” came to exist during the 20<sup>th</sup> century, and I examine how the interests of future victims were advocated for in the negotiations to create the ICC. In Chapter Six I show, drawing on discussions with survivors of violence in Uganda and Kenya, that members of a constituency may disagree with their representatives about who should belong to the constituency.

### **3.6 Conclusion**

This chapter has proposed the theoretical framework of mediated inclusion to show how we should evaluate the inclusion of affected persons in large-scale governance. Mediated inclusion requires that representatives develop and justify claims about constituencies that advance the agency, interests and recognition of constituency members; that representatives have opportunities for access and consideration in decision-making processes; and that there is sufficient publicity such that constituency members have opportunities to evaluate, understand and criticize or support decision-making that affects them.

This framework can be used to evaluate the inclusion of people who are the intended beneficiaries of global governance regimes, such as refugees, the global poor and victims of

international crimes. The next chapter draws on IR scholarship to identify practices, institutional design features or conditions in global governance that might promote the mediated inclusion of these intended beneficiaries.

## CHAPTER 4: INCLUDING INTENDED BENEFICIARIES IN GLOBAL GOVERNANCE: TRENDS AND CHALLENGES

Today, international organizations (IOs) provide legal protection and temporary asylum for refugees, justice for victims of international crimes, humanitarian aid to victims of natural disasters and humanitarian protection to civilians in the midst of conflict.<sup>204</sup> These organizations often seek to provide assistance, protection and justice when citizens' state governments are unable or unwilling to do so. These organizations, and the global governance regimes they belong to, have been celebrated for contributing to the humanitarian or cosmopolitan development of humankind. They have also been criticized for disempowering or harming the very people they claim to assist. For instance, humanitarian agencies in Bosnia, Ethiopia, Rwanda, Sri Lanka, Uganda and elsewhere have been accused of exacerbating conflict, creating displacement camps where people suffer from rampant disease and violence, and reducing civilians' capacities to take actions to protect themselves.<sup>205</sup> As I discuss in the next two chapters, international criminal tribunals are accused of taking actions that disempower or harm some victims, and of providing a form of justice that many victims may not desire.

Why might global governance regimes fail their intended beneficiaries? Many advocates, scholars and practitioners argue that this can occur when institutions are unresponsive to intended beneficiaries' interests and views. This lack of responsiveness not only threatens the effectiveness of these regimes, it also violates our democratic values. Barnett has made these arguments with particular incisiveness in his probing analysis of global humanitarian

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<sup>204</sup> As noted in Chapter One, IOs are just one form of global governance institution, a category that can also include public-private regulatory bodies, multi-national corporations, and non-governmental organizations. The normative and theoretical work of Chapters Two and Three applies to global governance institutions broadly. However, in this chapter, I will focus on possibilities for constituencies of concern to be included in decision-making by and about IOs.

For works on the issues of democratic legitimacy and inclusion in of private and semi-private global governance institutions, see Bäckstrand, 2006; Bernstein, 2004; Dingwerth, 2005; Fung, 2003; Koenig-Archibugi and Held, 2005; Palazzo and Scherer, 2006.

<sup>205</sup> For some of the analysis of these cases, see Baines and Paddon, 2012; Branch, 2011; Dolan, 2009; Eriksson, 1996; Rohde, 2012; Verdirame and Harrell-Bond, 2005.

governance. Barnett shows that IOs and civil society organizations help define what humanitarian action is and who deserves assistance, and they derive considerable authority by claiming to act on behalf of those in need. At the same time, these organizations are often unresponsive and unaccountable to those they govern. Barnett has characterized this problematic relationship between global governance institutions and intended beneficiaries as “undemocratic liberalism,”<sup>206</sup> “paternalism,”<sup>207</sup> and a form of imperialism.<sup>208</sup> Other scholars have taken this argument even further, claiming that international organizations reduce the people they govern to the political status of “bare life.”<sup>209</sup>

Many global governance actors have acknowledged these shortcomings. Indeed, Barnett notes that some IOs and many humanitarian organizations emphasized the goals of participation by and accountability to those they assist.<sup>210</sup> For instance, UN agencies and IOs like the World Bank and International Monetary Fund regularly consults with civil society organizations and have dramatically improved the transparency of their work. Many international human rights bodies now allow individuals to file complaints or request investigations, rather than leaving this power to states.<sup>211</sup> International organizations and civil society organizations frequently practice forms of stakeholder consultation and seek feedback from project recipients. Dingwerth thus proposes that there is an emerging norm of “democratic global governance,” whereby global governance institutions “are confronted with the normative claim that their decision-making structures should adhere to democratic values such as inclusiveness, transparency or accountability.”<sup>212</sup>

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<sup>206</sup> Barnett and Finnemore, 2004.

<sup>207</sup> Barnett, 2011a, 2011b, 2012.

<sup>208</sup> Barnett, 2011a, 221.

<sup>209</sup> See, among others, Agamben, 1998; Clarke, 2009; Owens, 2011.

<sup>210</sup> Barnett, 2011b, 126-7; 2012, 516. Many others have observed the increasing prominence of accountability, transparency, participation and transparency in global governance, including Carothers and Brechenmacher, 2014; Ebrahim and Weisband, 2007; Erman and Uhlin, 2010; Steffek and Hahn, 2010.

<sup>211</sup> Alter, 2006.

<sup>212</sup> Dingwerth, 2014, 8.

Could this norm and its associated practices address the concerns put forward by Barnett and others? To answer this question, we need a clear framework to assess the inclusion of intended beneficiaries in global governance. To date, such a framework is lacking in IR scholarship. While there has been extensive analysis of accountability and transparency in global governance, these studies rarely focus on accountability and transparency to intended beneficiaries in particular.<sup>213</sup> This research is useful, but it does not get at the central problem of this dissertation.

In this chapter, I first clarify the place of “intended beneficiaries” in global governance regimes. I argue that social categories of intended beneficiaries – such as refugees, victims of international crimes and the global poor – are key constitutive elements of certain regimes. For that reason, claims about intended beneficiaries are central to claims about the legitimate authority of global governance regimes and the actors within them. Intended beneficiaries thus figure prominently in authority contests in global governance.

I then use the framework of mediated inclusion to investigate opportunities to include intended beneficiaries in decision-making by and about IOs. I do so by examining each of the three elements of mediated inclusion: representative claim-making, opportunities for advocacy and publicity. I draw on existing IR scholarship to examine practices that affect each of these elements, focusing on inter-state deliberation about IOs and internal decision-making by IOs.

For each element of mediated inclusion, there are promising trends as well as significant challenges. In brief, the rise of global civil society has introduced a new category of actors – primarily non-governmental organizations – capable of making representative claims on behalf of the intended beneficiaries of global governance. However, the hope that NGOs would make strong representative claims on behalf of intended beneficiaries is challenged by research on NGOs’ actual behaviour and the obstacles they face. A second trend that has increased hopes for meaningful advocacy on behalf of intended beneficiaries is the increased openness of inter-state deliberations and IO decision-making to non-state actors. However, research suggests that non-

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<sup>213</sup> See, for example, Avant *et al.*, 2010; Buchanan and Keohane, 2011; Ebrahim and Herz, 2007; Grant and Keohane, 2005; Macdonald, 2008; Scholte, 2011d.

state actors frequently lack opportunities to contribute to key decisions, and the input they provide may not generate meaningful influence. Finally, the publicity of global governance has undoubtedly improved due to the transparency norm that emerged in the 1980s. However, many decision-making processes remain secretive or poorly documented. Furthermore, even when sufficient information is made public, intended beneficiaries themselves may not be able to access it.

These challenges do not make the mediated inclusion of intended beneficiaries a utopian aspiration, however. Instead, research on these obstacles helps us identify practices or conditions that might make mediated inclusion better or worse. To elaborate this argument, I will provide examples from global governance regimes today, ranging from economic development to humanitarianism to international criminal justice.

Overall, I argue that broad trends in global governance have improved possibilities for the mediated inclusion of intended beneficiaries, even if inclusion often remains weak. I do not claim that this trend will continue. Indeed, I assume that practices to expand inclusion are hard-won achievements, and that they will always face opposition from some states and non-state actors that would prefer not to yield control to others, including the very constituencies that IOs are intended to benefit.

This chapter does not provide an exhaustive survey of practices of inclusion or explain why practices have been adopted or rejected. Instead, it seeks to provide a rough map of opportunities and challenges for inclusion. By looking at the very different practices of different global governance regimes, we should be able to identify practices that are particularly fruitful or problematic. To do so will require in-depth analysis of particular regimes, as well as further comparative analysis across regimes. In Chapters Five and Six I will provide an in-depth study of the inclusion of victims of international crimes in the creation and ongoing operations of the International Criminal Court.

#### 4.1 The Intended Beneficiaries of Global Governance

In this section I explain the place of intended beneficiaries in global governance and argue that we ought to pay particular attention to their inclusion in decision-making. By highlighting the social construction of categories such as refugees, the global poor and victims of international crimes, we can better understand the dangers posed by their exclusion and misrepresentation. While some scholars focus entirely on the negative implications of social construction, I argue that creating new social categories in governance can be a desirable political process, particularly when the group of concern is included in decision-making.

By “intended beneficiaries” I refer to the social categories that governance regimes focus on to provide assistance. Not all global governance institutions have clear intended beneficiaries but a significant subset does. For instance, the UN High Commissioner for Refugees (UNHCR) had a budget of \$5.3 billion in 2013 to assist over 50 million forcibly displaced persons.<sup>214</sup> UN international peacekeeping missions in the Democratic Republic of Congo, Sudan, Mali and elsewhere have a mandate to protect civilians, and currently have a budget of \$7 billion and employ over 115,000.<sup>215</sup> The Global Fund to Fight AIDS, Tuberculosis and Malaria (GFATM) has dispensed nearly \$25 billion in assistance since it was created in 2002, and in doing so has helped treat or prevent illnesses for tens of millions of people.<sup>216</sup> International criminal tribunals are currently investigating and prosecuting crimes that affected several million people in a dozen countries. There are also issue areas that affect smaller populations of intended beneficiaries, such as the development of international legal protections for people with albinism.<sup>217</sup> In addition

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<sup>214</sup> Forcibly displaced people include refugees, internally-displaced persons and asylum seekers (UNHCR, 2014). The figure for the UNHCR’s budget comes from <http://www.unhcr.org/pages/49c3646c1a.html>. All figures in this chapter are in US dollars.

<sup>215</sup> See <http://www.un.org/en/peacekeeping/resources/statistics/factsheet.shtml>. (Accessed 19 November 2014).

<sup>216</sup> See <http://portfolio.theglobalfund.org/en/Home/Index>. (Accessed 19 November 2014).

<sup>217</sup> See ongoing work on discrimination against people with albinism by the UN Human Rights Council at <http://www.ohchr.org/EN/HRBodies/HRC/AdvisoryCommittee/Pages/AttacksAgainstPersonsWithAlbinism.aspx>. (Accessed 20 November 2014).

to these regimes with narrow categories of intended beneficiaries, other regimes have diffuse groups of intended beneficiaries but sometimes target particular, narrow groups for certain projects. For instance, World Bank programs to address global poverty frequently target specific communities for assistance. What unites all these cases is that IOs target particular populations for assistance and they derive authority from doing so.

There are four reasons for including intended beneficiaries in global governance decision-making. The first is to promote justice. Most moral frameworks hold that the harm, suffering, vulnerability or injustice experienced by some people generates a normative obligation to assist them. Indeed, as Sen (2009) argues, even competing theories of justice can agree on situations that are particularly unjust, such as when people lack basic capabilities and opportunities to pursue their own welfare. Furthermore, it is also frequently recognized that actors with greater functional capacity to address harm and suffering have a greater moral responsibility to do so. Bukovansky *et al* thus argue that, in global politics,

special responsibilities *ought* to be assigned to those states and nonstate actors with the relevant capabilities to make the biggest difference to alleviating the plight of those who are most vulnerable to particular global or transboundary risks, and who are therefore entirely or largely dependent on action or inaction by the capable agents.<sup>218</sup>

In many situations states are unable or unwilling to address the extreme vulnerability or plight of their citizens. Thus, global governance makes moral sense to address certain injustices. Actors who recognize a moral obligation to assist groups often do not recognize an obligation to include them in decision-making. As Barnett (2011b) points out, global governance from colonial civilizing missions to contemporary humanitarian governance has often been paternalistic. As I argued in Chapter Two, we have reason to believe that the inclusion of those who face injustice can make governance more likely to address their injustices.

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<sup>218</sup> Bukovansky *et al.*, 2012, 222, italics in original.

Second, in addition to a moral obligation to promote justice, we have a further moral obligation to include people in governance decisions that significantly affect them. This obligation comes about reactively: because decisions are being made that impact a group, its members should be included. The normative obligation here is the fundamental democratic conviction, elucidated in Chapter Two, that we should not be governed behind our backs. That chapter further argued that the greater the intensity of affectedness, the greater the need for inclusion. Because intended beneficiaries are the targets of global governance regimes, they are often significantly affected—positively if the regime is working well, negatively if it is not.<sup>219</sup>

To be clear, the intended beneficiaries of a global governance regime are not the only people who can be significantly affected by it. For instance, perpetrators of mass violence are significantly affected by international criminal justice—they may be identified, publicly scrutinized and possibly incarcerated. They are not the intended beneficiaries, however, and there are good normative and practical arguments not to include them in decision-making. To take a less extreme example, global commodity traders may be significantly affected by regulations that stabilize food prices for food insecure populations, in addition to the people facing starvation who are the intended beneficiaries of the World Food Programme. The commodity traders are an example of “stakeholders” in global governance. Stakeholders are affected by global governance decision-making and may have a legitimate claim to be included, but this claim does not have the normative urgency of claims by intended beneficiaries.<sup>220</sup>

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<sup>219</sup> Furthermore, intended beneficiaries often need international assistance *because* their own state government is not inclusive of their interests and perspectives. Intended beneficiaries will therefore not be represented by their government in international rule-making. Another, more direct route of inclusion in global governance is thus needed.

<sup>220</sup> Stakeholder inclusion may not promote the interests of intended beneficiaries because they may have different interests. However, stakeholders are often included in decision-making because their buy-in is necessary for governance to work. This realization is key to a “realist” account of legitimacy, which focuses on the acceptability of governance to all affected by it (Macdonald, 2012). Note that intended beneficiaries are a subset of the stakeholder category.

Third, governance may be more effective if intended beneficiaries are included. Their insights may clarify problems and obstacles, improve the epistemic robustness of decision-making and policy design, and improve policy implementation and institutional accountability.

The fourth reason to focus on the inclusion of intended beneficiaries is because of their prominence in authority contests in global governance. As I will explain below, representative claims about intended beneficiaries are frequently used to justify the authority of global governance regimes and actors within them. Claims about intended beneficiaries' interests and perspectives thus matter because of their centrality to competition over legitimacy in certain global governance regimes. The framework of mediated inclusion can help us understand and critique these competing claims.

#### *Constructing governance, constructing intended beneficiaries*

Many global governance regimes are unthinkable without their intended beneficiaries, because the practices of these regimes both require and produce the social categories to which intended beneficiaries belong. This co-constitution of governance regimes and their intended beneficiaries has two important implications, which this section will address. First, claims about intended beneficiaries are often linked to the authority of regimes and the actors within them. Second, because claims about intended beneficiaries contribute to the ways in which individuals are understood and governed, the quality of these claims can significantly impact their lives.

Refugees, victims of international crimes and other intended beneficiaries are social categories that are constructed by global governance regimes. These social categories are constitutive of certain regimes. For instance, a refugee regime without refugees, or international criminal justice without victims of international crimes, are impossible. These social categories are thus constitutive rules of the regimes. Constitutive rules “define the set of practices that make up any particular consciously organized social activity—that is to say, they specify *what counts as* that activity.”<sup>221</sup> The constitutive rules of governance regimes also construct those who have the

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<sup>221</sup> Ruggie, 1998, 871. On the distinction between constitutive and regulative rules, see Rawls, 1955; Searle, 1995.

authority to provide assistance. For instance, Barnett has described in detail the co-constitution of actors in the refugee regime. The UNHCR and other actors help define the problem that forced migration poses to the international community and the way that states and other actors ought to respond to that problem. In doing so they help determine who count as refugees and how such people are treated.<sup>222</sup> As the UNHCR and other global governance actors compete to frame the problem of forced migration, they also put forward their own authority to address it. Similarly, loan officers and development economists are constructed along with the global poor who require international development assistance, and the international criminal justice regime produces the roles of judges and prosecutors as well as victims.<sup>223</sup>

Many actors promote the authority or necessity of global governance regimes by emphasizing the existence and moral desert of a particular type of intended beneficiaries. For instance, when Keck and Sikkink (1998) look at paradigmatic historical cases of transnational activism, they argue that the campaigns were driven by moral arguments about the intended beneficiaries – slaves, women without suffrage and women subjected to footbinding or circumcision.<sup>224</sup> In Price's (1998) analysis of the creation of a ban on anti-personnel landmines, he shows that advocates highlighted the predicament of landmine victims in order to win supporters and challenge opponents. He writes that statistics on victims, "combined with personal testimony and graphic images of land mine victims, brought to the foreground an issue that became not only highly publicized but also had a galvanizing effect on recruiting converts to the cause."<sup>225</sup> Similarly, as will be discussed in subsequent chapters, advocates for international criminal justice frequently highlight the suffering and moral desert of victims of international crimes.

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<sup>222</sup> See Barnett, 2011b; Barnett and Finnemore, 2004, Ch. 4.

<sup>223</sup> The international criminal justice regime also contributes to the social construction of perpetrators. Individuals who might otherwise be seen as committing merely political acts or domestic crimes are constructed as violators of laws of the international community. For more on the social construction of perpetrators of international crimes, see Mamdani, 2010; Nouwen and Werner, 2010; Sagan, 2010.

<sup>224</sup> These campaigns all faced opponents who made competing claims about intended beneficiaries. For instance, Keck and Sikkink note that the campaign against female circumcision in Kenya failed in part because the Kenyan government successfully argued that circumcision was essential to the identity of Kikuyu women.

<sup>225</sup> Price, 1998, 623.

Not only are claims about intended beneficiaries central to promoting the authority *of* global governance regimes, they are also key to authority contests among actors *within* regimes. When organizations and individual actors compete over resources and authority, they frequently claim to have superior expertise, political standing or moral legitimacy to act on behalf of intended beneficiaries. I will explore the forms of authority of actors in global governance, and their relationship to different types of representative claims, in Section 4.2.

Intended beneficiaries are necessary for certain global governance regimes to exist. At the same time, these intended beneficiaries are social categories produced *by* global governance. Much scholarship has highlighted the social construction of different types of intended beneficiaries, including refugees,<sup>226</sup> trafficked persons,<sup>227</sup> climate refugees,<sup>228</sup> the “global poor”<sup>229</sup> and victims of international crimes.<sup>230</sup> By using these social categories, global governance actors can identify a population, produce knowledge about its members, mobilize concern or pity or apprehension regarding them, help them, control them and otherwise govern them. For instance, the international legal framework of the refugee regime specifies the qualities that determine whether people are refugees and distinguishes them from other displaced or migrating people. To be labeled as a refugee changes how one is treated by many institutions and individuals. Furthermore, people may come to understand themselves as refugees, thereby shaping their sense of themselves and their place in a community or country.

Because of their impact on individuals, it matters greatly how social categories are represented. At the same time, as noted above, actors can make authority claims through their representations of intended beneficiaries. This can lead actors to represent intended beneficiaries in ways that will promote the actors’ own aims and interests. Doing so can lead to inefficient, unwanted or

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<sup>226</sup> Barnett, 2011b; Haddad, 2008; Hurrell, 2011; Zetter, 1991

<sup>227</sup> Hahn, 2010

<sup>228</sup> Bettini, 2013; Hartmann, 2010

<sup>229</sup> Roy, 2010.

<sup>230</sup> Dixon and Tenove, 2013; Fletcher, forthcoming; Haslam and Edmunds, 2013; Hirsch, 2010; Kendall and Nouwen, 2013; Letschert and van Dijk, 2011

even harmful governance for intended beneficiaries themselves. This danger has been shown in IR scholarship on different regimes. For instance, in her study of advocacy for civilian protection during war, Carpenter (2005) shows that advocates strategically emphasized the plight of “innocent” and “vulnerable” women and children because doing so made it easier for them to gain consent and funding from states and donors. Carpenter argues that this advocacy strategy was ultimately harmful because it shifted attention away from male civilians, a significant subset of the population of intended beneficiaries of civilian protection. Along similar lines, Bettini (2013) argues that actors who promote the social category of “climate refugees” have misrepresented the actual people who may be displaced, both by mischaracterizing the situation they will likely be in (i.e. most will not be displaced across state borders but will migrate within their country, and very few will fit the legal definition of a “refugee”) and by depicting them as victims who do not have or deserve political agency.

Indeed, concern about representation of intended beneficiaries as “victims” is common in scholarship on global governance. For instance, Mamdani contends that international human rights discourse often reduces a complex political situation to “a morality tale unfolding in a world populated by villains and victims...[where] the perpetrators are so evil and the victims so helpless that the only possibility of relief is a rescue mission from the outside, preferably in the form of a military intervention.”<sup>231</sup> Along the same line, Barnett argues that the discourse of humanitarian governance “produces two kinds of actors: those who are subjects, who are good, who are expected to prevent human suffering, and who have the tools of emancipation; and those who are objects, whose humanity is to be secured or restored, and who are judged incapable of helping themselves.”<sup>232</sup> Similar accusations concerning the representation of victims in international criminal justice will be examined in the following chapters.

Scholarship on the social construction of intended beneficiaries frequently argues that the victim label and other constructed categories will disempower or harm individuals while empowering

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<sup>231</sup> Mamdani, 2009, 67.

<sup>232</sup> Barnett, 2011b, 112.

global governance actors. Such concerns are valid. But the construction of social categories should not be seen as necessarily negative. As I argued in Chapter Two, it can be desirable to have political processes that identify a group whose members share a problem, that emphasize the qualities they share, and that target group members for governance, while at the same time mobilizing these members for political participation. It is this last element that distinguishes the productive, democratic construction of social groups from social construction that is disempowering. If members of a group can be empowered to contribute to claims made on their behalf and can challenge harmful representations, then the social construction of a group can facilitate political mobilization and collective problem solving. In other words, inclusion is key to whether the construction of social categories of intended beneficiaries is negative and politically disabling or positive and empowering.

I now turn to the question of whether it is possible for the intended beneficiaries of global governance to be included in decision-making by and about IOs.

## **4.2 Who Can Represent Intended Beneficiaries?**

This section and the two that follow will analyze possibilities for the mediated inclusion of the intended beneficiaries of global governance in decision-making. This section examines representative claim-making.

For intended beneficiaries to be included in global governance, they need actors to make valid representative claims on their behalf. Who can legitimately do so? Much IR scholarship has assumed that state governments are the only actors capable of representing populations in international politics. However, in many cases governments will be poor representatives of intended beneficiaries. Predatory states, failed states, and states involved in civil war often cannot credibly represent the interests of their citizens in global governance decision-making, and are particularly unlikely to be responsive to those citizens who may require international assistance. Such groups are frequently marginalized within national politics, and state governments are frequently unwilling or unable to help them. Even functioning democratic states

may fail to advance the interests of intended beneficiaries of global governance. Intended beneficiaries *within* democratic states are likely to be marginalized populations with little influence over their state governments, and particularly their governments' foreign policy, while intended beneficiaries who live in foreign states frequently have their interests disregarded or significantly discounted by democratic and undemocratic governments.<sup>233</sup> Even if state governments do seek to represent intended beneficiaries, they may do a poor job of promoting their interests and concerns in global governance decision-making due to long chains of delegation that link the state government to intended beneficiary constituencies.<sup>234</sup>

The rise of global civil society has created a new category of actors that can represent the intended beneficiaries of global governance. Many commentators have argued that civil society actors can speak on behalf of sub-state or transnational groups whose predicament warrants moral concern and action.<sup>235</sup> These global civil society actors – NGOs in particular – have been called the manifestation of “global people power”,<sup>236</sup> the constituent actors of a cosmopolitan public sphere,<sup>237</sup> and the voice of those affected by global governance, in particular “those marginalized groups of stakeholders that face the greatest obstacles to political participation.”<sup>238</sup> However, as the number, influence and governing activity of NGOs has increased, so have questions about their legitimacy.<sup>239</sup> Jordan and van Tuijl argue that the demand for NGO accountability has been growing since the late 1990s, and “one of the most succinct and powerful expressions levied against NGOs is ‘who do you represent?’”<sup>240</sup> In an oft-quoted article that

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<sup>233</sup> See Buchanan and Keohane, 2011, 414-18.

<sup>234</sup> Hawkins *et al* (2006) refer to this as “agency slack” in the delegation of state-based authority to transnational actors. See also Buchanan and Keohane, 2011; Warren, 2010.

<sup>235</sup> See, among others, Florini, 2000; Keck and Sikkink, 1998; Scholte, 2004; Willetts, 1996.

<sup>236</sup> Annan, 1999.

<sup>237</sup> Habermas, 1997.

<sup>238</sup> Nanz and Steffek, 2004, 334.

<sup>239</sup> See, among others, Anderson and Rieff, 2005; Bolton, 2000; Charnovitz, 2006; Maloney, 2008b; Slim, 2002.

<sup>240</sup> Jordan and van Tuijl, 2006b, 3.

illustrates this concern, *The Economist* demanded to know “who elected Oxfam.”<sup>241</sup>

Furthermore, critics claim that for various reasons NGOs are likely to be poor representatives of intended beneficiaries. Some scholars have gone so far as to argue that international NGOs should not even be evaluated as representatives, but should be assessed on other criteria entirely.<sup>242</sup> Given these challenges to the representative role of NGOs, it can seem as if no actor exists that can make valid claims to represent intended beneficiaries in global politics.

In this section I engage with recent IR literature to make a different argument. First, I point out the lack of conceptual precision about what it means to be a good representative. Existing scholarship frequently lacks clarity about the normative functions of representation and fails to acknowledge that different types of representation promote different goods. The framework developed in Chapter Three distinguishes the normative goods and standards of legitimacy that correspond to speaking *for, as* and *about* constituencies, and drawing on these distinctions helps us to avoid holding actors to inappropriate standards. Second, recent literature on NGOs does a good job of showing why they are often poor representatives of constituencies of concern. At the same time, this research can help clarify the types of NGOs and the conditions are more likely to yield good representation. Finally, it is often assumed that only civil society organizations can represent intended beneficiaries, ignoring practices of representation by actors such as diplomats and IO staff. These and other actors can make important contributions to representation, and can be assessed according to their capacity to speak *for, as* and *about* constituencies of concern. Greater conceptual clarity therefore allows us to build on existing empirical work to better understand the factors that affect representative claim-making by NGOs and other actors.

#### *Conceptualizing representation: speaking for, as and about*

Mediated inclusion requires that representatives make valid claims on behalf of constituencies. In Chapter Three I proposed that we should understand and evaluate claims by representatives to speak *for, as* and *about* constituencies. These are ideal types of representative claims, developed

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<sup>241</sup> The Economist, 2000.

<sup>242</sup> See, among others, Charnovitz, 2006; Rubenstein, 2014.

by drawing on democratic theory.<sup>243</sup> Each ideal type has a different standard of legitimacy and enables representatives to make different contributions to the inclusion of a constituency of concern.<sup>244</sup> Furthermore, as I will argue later in this section, different types of representation can contribute to different forms of authority that actors can mobilize.

In brief, to *speak for* a constituency is to claim that the audience should treat the representative as the constituency speaking. It is evaluated by examining opportunities for the constituency members to make representatives responsive to them and their views. Representatives with strong claims to *speak for* constituencies contribute to the agency of constituency members.

The claim to *speak about* a constituency is valid or not depending on the content of the claim and is thus justifiable on epistemic grounds. High quality claims to speak about constituencies can be information rich and relevant to policymaking. Claims to *speak about* constituencies can be justified by the methods used to inform claims or the claimants recognized position in a relevant epistemic community.

Finally, representatives can make claims to *speak as* a member of a constituency. Their legitimacy in doing so is based on their authenticity as a group member and the extent to which members of the group identify with them. A constituency member can promote the group's recognition by being publicly acknowledged and meaningfully included in a decision-making process. In contexts where longstanding injustice has caused constituency members to distrust political institutions, their representation by a fellow constituency member may increase the institution's legitimacy in their eyes.

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<sup>243</sup> These ideal types can be further specified in particular situations by drawing on the standards of represented constituencies themselves. See Chapter Six, Section 6.4) for an analysis of the relationship between these ideal types and the normative expectations of survivors of mass violence in Kenya and Uganda.

<sup>244</sup> As I argued in Chapter Three, actors do not make different types of representative claims just because it is normatively right, but because doing so can often legitimize or extend their own authority. We thus need to be clear about the normative basis of different claims and the contributions they can make to inclusion. I clarify the relationship between forms of authority and representative claims later in this section.

For constituencies of concern to be included in global governance decision-making, they usually require multiple types of representative claims to promote different normative goods. They may need opportunities to exert their agency in order to advance their preferences and indicate positions with majority support. They frequently need expert knowledge to identify what interests are at stake and how these may be promoted in complex policy areas. They may need constituency members themselves to participate, to promote a group's recognition or trust in decision-making process. We therefore want constituencies to be represented by different kinds of representatives rather than a single ideal representative. When there are multiple and competing representatives, they can challenge or improve claims made by other representatives, and they can offer diverse claims that constituency members may choose to support or reject.

This complex picture of representation is rarely the framework used in IR scholarship. In many cases, what it means for an actor to be a good representative is simply undefined. When it is defined, commentators frequently focus on a single type of representation. For instance, *The Economist's* question "who elected Oxfam" only focuses on NGOs' capacity to speak *for* constituencies. By contrast, Charnovitz (2006) argues that NGOs should only be evaluated according to the quality of their ideas rather than their relationships to constituencies. In other words, he focuses only on what I call their capacity to speak *about* constituencies. Differently, when Scholte (2012) analyzes civil society inclusion in IMF decision-making in Sub-Saharan Africa, he focuses on the capacity of civil society organizations to speak *as* rural, female, or economically disadvantaged individuals. Each of these analyses focuses on a single dimension of representation and ignores others.

Several IR scholars have developed typologies that recognize multiple forms of legitimacy for representatives. For instance, Slim (2002) argues that civil society organizations claim to "speak as," "speak with," "speak for" or "speak about" those who suffer from poverty or human rights violations.<sup>245</sup> This typology is helpful and several other scholars, such as Stein (2008), have

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<sup>245</sup> As I noted in Chapter Three, I developed my typology of speaking *for*, *as* and *about* from literature in democratic theory, rather than from Slim's typology. Slim's proposal, while helpful, is a sketch that is neither theoretically nor empirically elaborated.

drawn on it. But Slim does not clarify the normative goods that these different types of representation can advance, nor does he propose standards to evaluate them.

Other scholars have suggested typologies for the different functional roles that NGOs can play, and identified representation of constituencies of concern as just one possible role. These typologies, which will be discussed below, helpfully underline the fact that NGOs do not only act as representatives. But they do not help us evaluate NGOs according to the different roles they can play when and if they do act as representatives.

Finally, some authors have argued that we should stop evaluating NGOs as representatives of constituencies of concern in global politics, since they either do a poor job of representation or have other, more important functions.<sup>246</sup> For instance, Rubenstein (2014) proposes that international NGOs should be evaluated according to whether they abuse their “quasi-governmental power” rather than according to their legitimacy as representatives. To support this argument, she contends that many international NGOs do not characterize themselves as representatives.<sup>247</sup> She also argues that other actors can make stronger representative claims about constituencies of concern. While it is true that international NGOs do more than represent constituencies and that their other roles should be assessed according to different normative standards, we should still evaluate NGOs as representatives when they contribute to decision-making processes by making claims about a constituency. International NGOs frequently play this role of *de facto* representatives and ought to be assessed as such. Moreover, by paying attention to different types of representation, we can evaluate NGOs and assess the kinds of normative goods they can promote on behalf of constituencies. For instance, if many international NGOs are not responsive to intended beneficiary constituencies, as Rubenstein asserts, they can still play an important representative role by speaking *about* constituencies’

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<sup>246</sup> Anderson and Rieff, 2005; Charnovitz, 2006.

<sup>247</sup> That generalization may not hold. For instance, in Kuyper’s (2014) analysis of 51 civil society actors that participate in the development of an international treaty on intellectual property rights, he finds that 34 made explicit claims to represent constituencies and a further 13 made implicit claims to do so.

interests and how to achieve them.<sup>248</sup> International NGOs can also help facilitate constituency members to speak *as* representatives in global governance decision-making, by assisting their participation in decision-making processes. Greater conceptual clarity about different forms of representation and their standards can help us better identify when and how NGOs can act productively as representatives, when they fail to do so, and when other actors are preferable.

*When are NGOs good representatives?*

Once we have clarified that civil society actors can represent constituencies of concern in different ways, we need to understand factors that influence the quality of their representative claims. Recent IR research helps identify such factors. This research examines various civil society actors, including epistemic communities and transnational social movements, but I will focus on the extensive research on international NGOs. Several key insights can be identified.

First, NGOs play different functional roles, which include but are not limited to acting as representatives. While that observation may seem obvious, it has been overlooked by some scholars. Furthermore, the functional differentiation of NGOs has a significant impact on the type and quality of representative claims they might make. Different typologies have been proposed to capture this functional differentiation. For instance, Hahn (2010) distinguishes among those NGOs that primarily deliver services, those that advocate for social purposes and those that advocate for particular constituencies. Brown *et al* (2012) distinguish between “constituent-based” (focusing on advocacy for a particular community), “movement-based” advocacy (advocating for broader movements such as women’s empowerment or indigenous rights), and “mission-based” advocacy (such as Greenpeace’s promotion of environmental protection). Bob (2005) distinguishes between transnational “solidarity organizations” that are closely engaged with their constituencies of concern and “advocacy organizations” that promote principles or policies. In broad strokes, these typologies distinguish NGOs that primarily engage

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<sup>248</sup> Indeed, Rubenstein’s illustrative cases conflate different types of representation. She does not distinguish between expert reports by NGOs speaking *about* policies and their impacts from claims by NGOs to speak *for* constituencies’ preferences. Without such distinctions, applicable standards of legitimacy are unclear or confused.

in service delivery from those that focus on advocacy, and among advocacy-focused NGOs they distinguish between advocacy for principled positions and advocacy for specific constituencies.

This functional differentiation will affect whether NGOs are likely to make robust representative claims to speak *for*, *as* and *about* intended beneficiaries. Only NGOs that advocate for particular constituencies are likely to make strong representative claims to speak *for* their constituencies of concern. Service-oriented organizations and advocates of principles may make strong claims to speak *about* policies that can advance particular goods for a constituency, but may be unresponsive to constituency members and their expressed preferences. For instance, in Chapter Six I show how Human Rights Watch – an advocacy NGO that promotes particular rights and legal principles – made weak claims to speak *for* war victims in northern Uganda but strong expert claims to speak *about* victim interests by drawing on relevant legal expertise and social scientific research. Furthermore, some civil society organizations can support constituencies so that their members have greater opportunities to speak *as* representatives. For instance, an organization like the Green Belt Movement in Kenya promotes the capacity of rural women to mobilize within and beyond their communities on social and environmental issues.<sup>249</sup>

A second set of findings on international NGOs shows how their funding, organizational structure and competitive environment influence their behaviour.<sup>250</sup> Research into these influences can help identify factors that promote greater capacity for organizations to speak *for*, *as* and *about* constituency members. For instance, many NGOs are attentive to the preferences of donors, which can include states, private foundations and individuals. As a result, the interests of constituencies from the global South often receive less attention, since most funding comes from states and foundations in the North.<sup>251</sup> Competition for funding can sometimes lead to conflict between institutional security and an organization's mission or desired relationship with a

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<sup>249</sup> Michaelson, 1994.

<sup>250</sup> Key studies include Anheier and Themudo, 2002; Bob, 2005; Brown *et al.*, 2012; Cooley and Ron, 2002; Hopgood, 2006; Jordan and van Tuijl, 2006a; Maloney, 2008b; Martens, 2006; Ron *et al.*, 2005; Scholte, 2011a.

<sup>251</sup> See, for instance, Bob, 2005; Branch, 2011; Brühl, 2010; Scholte, 2012.

constituency of concern. For instance, Cooley and Ron (2002) show how intense competition among aid NGOs for donor funding in the Democratic Republic of Congo in 1995 led to large amounts of aid going to suspected Hutu genocidaires. Even when the NGOs realized the harm that this could cause to conflict victims, their intended beneficiaries, the NGOs' scramble for funding caused them to remain involved and keep quiet about problems.

Organizational practices also shape NGOs' relationships to constituencies.<sup>252</sup> For instance, formal rules that encourage the internal democracy of NGOs, such as federation structures in which constituency-based subunits have a strong say, can promote the capacity of actors to speak *for* constituencies. For instance, Shack/Slum Dwellers International is a federation of national associations of people who advocate for – and often are – the urban poor. National associations elect most members of the NGO's governing board.<sup>253</sup> By contrast, NGOs' legitimacy to speak *about* the interests of constituencies of concern is not dependent on its internal democracy, but rather on its independence from forces that distort epistemic claims.<sup>254</sup>

Third, research shows that many transnational NGOs include few voices of constituencies of concern in their advocacy and policy development, despite longstanding criticism and attempts to address the problem. This results in fewer opportunities for constituency members to speak *as* representatives. While there are many causes of this deficit, several include the “professionalization” of civil society organizations (which limits access to those who lack the requisite qualities, such as an elite education and knowledge of socialized codes of conduct), and cultural exclusions of certain speakers and forms of speech.<sup>255</sup> NGOs have developed a variety of

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<sup>252</sup> Organizational form also has a strong impact on the kind of advocacy NGOs can pursue (Brown *et al.*, 2012; Wong, 2012).

<sup>253</sup> For more on this organization, see Brown *et al.*, 2012.

<sup>254</sup> Steffek and Ferretti (2009) make a similar suggestion in their analysis of the different NGO roles (and corresponding expectations for legitimacy) as “watchdogs” promoting the public accountability of global governance institutions, and “deliberators” promoting the epistemic quality of decision-making.

<sup>255</sup> Bell and Coicaud, 2007; Maloney, 2008a. Spivak writes that NGOs from the global South tend to feature the voices of the urban elite, who are believed to be necessary to “state a problem intelligibly and persuasively for the taste of the North, in itself proof of a sort of epistemical discontinuity with the ill-educated rural poor” (2004, 531).

policies and processes to try to remedy this situation. For instance, the Justice and Reconciliation Project in northern Uganda, which is primarily funded by European states, is run and staffed by northern Ugandans. One of its main projects is to empower women affected by civil war to contribute to transitional justice policy-making.<sup>256</sup> The World Fair Trade Organization, a certification and advocacy organization that aims to improve the livelihoods for marginalized producers in global markets, has annual meetings in there are elections of members of its governing board, including the president.<sup>257</sup> The majority of members who participate in these elections are Southern producers, the intended beneficiaries of the organization.

These and other researching findings highlight factors that limit or promote NGOs' capacities to make different types of representative claims. Such research identifies tendencies, not ironclad rules. In-depth studies reveal that organizations frequently shift in their roles and relationships to constituencies of concern, and that individuals at similar organizations can make stronger or weaker representative claims. Chapters Five and Six provide examples of individuals doing so.

#### *Looking beyond NGOs for representation of intended beneficiaries*

Scholarship on the inclusion of sub-state and transnational constituencies in global governance tends to focus on civil society actors and NGOs in particular. However, these are not the only actors capable of advocating for the intended beneficiaries of global governance. This section identifies other actors that can do so and calls for further research on their impact and on the quality of their representative claims. There are two general means by which actors come to represent intended beneficiaries in decision-making by and about IOs: they are either "self-appointed" or "institutionally-designated."

*Self-appointed representatives* advocate for a constituency of concern without a formally-mandated role to do so. They can be contrasted to elected politicians in legislatures or state governments at the UN. Actors frequently become self-appointed representatives of intended

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<sup>256</sup> See McClain, 2012.

<sup>257</sup> Ullrich, 2011.

beneficiaries because they have the opportunity and inclination to do so, rather than because they can make particularly strong representative claims. Bono is an exemplary case of the self-appointed representative. When he advocated for the interests of impoverished Africans to G7 states, he did not do because he was authorized and accountable to this constituency, nor was he a recognized expert in economic development policy. It is not only celebrities who are self-appointed representatives. So are academics, religious leaders, and other civil society actors including NGOs, when they decide to advocate for a particular constituency in the absence of a formal political relationship or identity affiliation to that group. Examples range from North American academics campaigning on behalf of Palestinians or black South Africans,<sup>258</sup> to Human Rights Watch advocacy for the Dalit caste in India,<sup>259</sup> to American evangelical Christians lobbying governments and IOs on behalf of people in Darfur and South Sudan.<sup>260</sup>

State officials, including diplomats, take on roles as self-appointed representatives when they champion the interests of constituencies beyond their own states' borders. For instance, William Hague used his role as British Foreign Minister to push for policies to address sexual violence in war zones, advocating within the UN and other IOs, lobbying other governments to do a better job of prosecuting perpetrators, and devoting UK resources to help survivors of sexual violence.<sup>261</sup> To take another example, Allan Rock, Canada's former Ambassador to the UN (2004-6), championed the issue of child soldiers in countries including Uganda and Sri Lanka.<sup>262</sup>

In Chapter Five I give examples of state officials acting in part as self-appointed representatives on behalf of the rights of future victims. In some cases, diplomats act on the instructions of their

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<sup>258</sup> Bakan and Abu-Laban, 2009.

<sup>259</sup> Narula, 1999.

<sup>260</sup> Mamdani, 2009.

<sup>261</sup> On Minister Hague's engagement in the issue of sexual violence in conflict, see Beaumont-Thomas, 2014. In 2014 he paired with actor Angelina Jolie to chair the high-profile Global Summit to End Sexual Violence in Conflict.

<sup>262</sup> Ambassador Rock later acted as a UN special adviser, and led fact-finding missions to countries including Sri Lanka (Office of the Special Representative of the Secretary-General for Children and Armed Conflict, 2006).

own governments when they advocate for foreign constituencies of concern, while in other cases they do so on their own initiatives, based on personal inclination or sense of moral obligation.<sup>263</sup> In yet other cases, state officials advocate for a transnational constituency because many of their own citizens belong to it. For instance, the former president of the Maldives, Mohamed Nasheed, campaigned in global forums as a representative for people who will be harmed by climate change, and particularly those who inhabit small island developing states.<sup>264</sup> In doing so he advocated for his own citizens as well as populations of other small island states.

In comparison to self-appointed representatives, who must push to gain access to a decision-making process, *institutionally-designated* representatives are installed in a decision-making process the institutions themselves. They have formal mandates to advocate on behalf of constituencies of concern. A wide range of institutionally-designated representatives of intended beneficiaries can be seen in IOs today. For instance, one of the 20 voting positions on the governing board of the GFATM is designated for a representative of individuals affected by HIV/AIDS, tuberculosis or malaria. The UN Secretary-General regularly appoints Special Envoys and Special Representatives, some of who advocate for particular categories of intended beneficiaries.<sup>265</sup> The UN peacekeeping mission in the Democratic Republic of Congo recruits “community liaison assistants” to inform their decision-making about local peacekeeping operations.<sup>266</sup> The ICC funds and assists lawyers to act as representatives of victims of crimes in judicial proceedings.<sup>267</sup> These different positions were ostensibly created to improve the

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<sup>263</sup> This claim was made to the author in numerous formal interviews and informal discussions, with diplomats at the UNSC and the ICC’s Assembly of State Parties. See Appendix for List of Interviewees.

<sup>264</sup> Nasheed helped to strategically frame the moral and political stakes of climate change, and helped broker a deal between developed and developing states at the Copenhagen meeting of state parties to the UN Framework Convention on Climate Change (Jaschik, 2014).

<sup>265</sup> For instance, the position of Special Envoy for people with HIV/AIDS in Africa was discussed in Chapter Three. Other examples include the UN Secretary-General’s Special Representative for Children and Armed Conflict, or the Special Representative on the Human Rights of Internally-Displaced Persons.

<sup>266</sup> Weir and Hunt, 2011.

<sup>267</sup> This role is further discussed in Chapter Six.

inclusion of intended beneficiaries in decision-making. However, there has been little systematic evaluation of their impact or the quality of their representative claims.

Both self-appointed and institutionally-designated representatives can have positive or negative effects on the inclusion of intended beneficiaries. Self-appointed representatives such as NGOs, celebrities, moral leaders and diplomats of foreign countries often possess forms of authority or status that can give them access decision-making processes and influence with decision-makers. Institutionally-designated representatives usually have formal standing to advocate in IO decision-making processes. Both types of representatives can improve inclusion by contributing the interests and perspectives of intended beneficiaries to decision-making processes that might otherwise have excluded them. However, they can also undermine the inclusion of intended beneficiaries if they make poor quality representative claims or displace representatives who could make stronger claims. This can occur because their opportunity to act as representatives is primarily determined by factors other than their quality as representatives. Self-appointed representatives frequently draw on other forms of status or authority, such as celebrities who trade on their fame, or NGOs that are valued by donors but lack appropriate expertise or relationships to constituencies. Because institutionally-designated representatives are authorized by and accountable to the IO that employs them, they may not be responsive to their constituencies, or they may lack qualities needed to be effective or legitimate representatives.

Critical attention must therefore be paid to the quality of claims by self-appointed and institutionally-designated representatives to speak *for*, *as* and *about* intended beneficiaries. Table 4.1 illustrates a variety of actors who may represent the intended beneficiaries of global governance, including civil society organizations. It also suggests the tendencies for these actors to make strong or weak representative claims of different types. As can be seen, among these diverse actors, very few can make strong claims to speak *for* intended beneficiaries. Self-appointed and institutionally-designated representatives rarely have strong mechanisms of authorization and accountability that can ensure their responsiveness to constituencies of

**Table 4.1 Actor types and capacity to speak for, about and as constituencies of concern**

<b>Actor type</b>	<b>Speak For</b>	<b>Speak About</b>	<b>Speak As</b>
Diplomat or state official	<i>Weak</i> Authorized by and accountable to own government rather than to intended beneficiaries.	<i>Variable</i> Can access expert knowledge but rarely have expertise.	<i>Rare</i>
International advocacy NGO	<i>Often weak</i> Research suggests they are primarily authorized by and accountable to donors or organization membership.	<i>Strong</i> Often have significant expertise, but tend to make claims that support the organization’s mission, which can compromise epistemic validity.	<i>Rare</i>
Community-based organization (CBO)	<i>Variable</i> Have ongoing relationships with constituency of concern, but may not be accountable to them. Internal democracy is important.	<i>Variable</i> Often have practical knowledge but frequently lack legal or technical expertise.	<i>Common</i>
Academic	<i>Often weak</i> Authorized by and accountable to academic institution. But some researchers partner with constituency of concern.	<i>Strong</i> Often have expertise and independence necessary to make robust epistemic claims, though may not provide policy-relevant research.	<i>Rare</i>
IO-designated representative	<i>Variable</i> Authorized by and accountable to IO, but can engage in practices of consultation and feedback to constituency of concern.	<i>Often strong</i>	<i>Rare</i>
Member of constituency of concern	<i>Variable</i> May or may not be authorized and accountable to fellow victims.	<i>Variable</i> Has perspectival and practical insights, but knowledge claims may not apply to wider constituency.	<i>Yes</i>

concern. Few of these actors can make claims to speak *as* intended beneficiaries, either.<sup>268</sup> A variety of different actors tend to have considerable technical expertise or – in the case of

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<sup>268</sup> These tendencies may not apply to particular cases. For example, there are diplomats who can *speak as* victims of international crimes, and victims of international crimes who have gone on to become experts in human rights law or transitional justice.

diplomats – have access to such expertise. However, their capacity to speak *about* the interests and perspectives of intended beneficiaries may be compromised if the quality of their epistemic claims is distorted by their pre-existing policy or advocacy commitments.

### *Representation and authority*

Research suggests that NGOs and other non-state actors influence global governance through the exercise of authority. Actors with authority are able to induce others to defer to their judgment.<sup>269</sup> Authority entails consent or acquiescence, but it may be buttressed by coercion or incentivization. We assess *legitimacy* according to a normative standard. For instance, I have proposed normative standards for three types of representation, and their legitimacy can be evaluated against those standards. An actor possesses *authority* when an audience accepts his or her legitimacy and therefore defers to his or her judgment.<sup>270</sup> Authority is therefore an intersubjective quality. If an actor makes a principled claim to legitimacy that is not accepted by an audience, the actor will not have authority with that audience.

Barnett and Finnemore (2004) propose that global governance actors can mobilize four types of authority: *delegated*, *expert*, *moral* and *rational-legal* authority. These forms of authority can be the result of an actor's relationship to a category of intended beneficiaries. For instance, they argue that UNHCR has delegated authority because states have authorized it to address the problem posed by refugees; it wields expert authority by claiming to possess specialized knowledge about refugees and the assistance they need; and it has moral authority by virtue of its humanitarian mission to help a vulnerable group and by claiming to speak on their behalf.

My approach to authority builds on the framework of Barnett and Finnemore and introduces several modifications: I dispense with the category of rational-legal authority, add the category

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<sup>269</sup> Barnett and Finnemore, 2004, 29.

<sup>270</sup> Along similar lines, authors sometimes distinguish between “normative legitimacy” and “sociological legitimacy” or “descriptive legitimacy” (see, for instance, Buchanan and Keohane, 2011; Bodansky, 2012). Sociological or descriptive legitimacy refers to whether a particular audience *believes* an individual or institution to be legitimate, which determines whether the actor's authority is accepted.

of representative authority, clarify their category moral authority, and link these categories to my typology of representative claims.

An actor has *representative authority* when it is accepted that the actor speaks in the place of a particular group and is responsive to that group. Representative authority therefore results from an audience's acceptance claims to speak *for* a constituency. To return to Barnett's example, the UNHCR will have representative authority to the extent that other actors believe that the organization is authorized by and responsive to refugees.

Representative authority is distinct from delegated authority. Delegated authority is bestowed on an institution or individual to play a particular role. An actor may be delegated to play the role of representing a group, but the group itself may not recognize that authority. To take an extreme example, the Spanish King and his jurists drew up legal documents for explorers to read to the indigenous peoples they met in the New World, declaring them to be subjects of Spain and the Pope.<sup>271</sup> The Spanish King and Queen and the Pope delegated to the explorers and subsequent colonists the authority to rule the indigenous inhabitants they encountered and to represent the inhabitants' interests to the Spanish government. Needless to say, these colonists were neither authorized by nor responsive to these inhabitants, and could not make claims to speak *for* them.

Representative authority and delegated authority are both forms of political authority, in that they originate in actors' claims to be acting on behalf of others. Schematically, representative authority "rises up" from a direct relationship with a constituency, while delegated authority is "handed down" from a government or institution. Thus, the UNHCR has delegated authority granted by states to address refugees' issues, and it has representative authority when it is

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<sup>271</sup> Brown explains this legal document, known as the *Requirement*: "[It] began with an account of the history of the world, with particular emphasis on the key role in the salvation of humanity assigned by Christ to Peter and his successors, the purpose of which is to build up to the point at which Pope Alexander VI (better known as Roderigo Borgia) in 1493 assigned the relevant part of the New World to Spain for conquest and the propagation of the faith. Then two requirements are placed upon the Indians—from this the manifesto took its usual name, the *Requirement*—first to acknowledge the authority of the Church, Pope and King and Queen of Spain, and then to allow the faith to be preached" (2000, 203).

believed to be authorized by and accountable to refugees themselves. The UNHCR has greater authority in situations when it can mobilize both delegated *and* representative authority.

Actors have *expert authority* when an audience accepts that the claims they make draw on relevant expertise. According to Bauman, “the essence of expertise is the assumption that doing things properly requires certain knowledge,” which only certain actors possess.<sup>272</sup> If an actor uses this expertise to promote the interests or perspectives of a constituency of intended beneficiaries, that actor can be said to make a claim to speak *about* that constituency.<sup>273</sup>

*Moral authority* comes from the characteristics of individuals and the arguments they make. It is exemplified by figures such as Archbishop Desmond Tutu, who combine a personal history of moral action with fluency in moral argumentation. A lack of vested interests in an issue or position can contribute to the moral authority of one’s claims. Moral authority can also derive from speaking *as* a person who has suffered an injustice or harm, as can be seen by advocates such as Holocaust survivor Elie Wiesel and former child soldier Ishmael Beah. One can have moral authority without making strong representative claims to speak *for* a constituency, such as when Archbishop Tutu uses his moral authority to advocate against tar sands development in Canada, which he does not do on behalf of a particular group. One can also make strong claims to speak *for* intended beneficiaries without having moral authority, such as lawyers who act on the instructions of indigenous communities or crime victims in court cases.

Actors frequently possess multiple forms of authority, and in varying degrees. In Chapter Five I use this typology of authority to examine advocates for victims’ rights in negotiations to create the ICC.

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<sup>272</sup> Bauman, 2000, 196.

<sup>273</sup> There can sometimes be a conflict between expert authority – which is partly grounded on the objectivity of experts and frequently aspires to disinterestedness – and the use of expert authority to speak on behalf of the interests of *particular* constituencies. See Barnett and Finnemore on the questionable status of “disinterested” expert authority at the IMF (2004, 68-71).

### *Final observations*

Different types of actors can act as representatives of intended beneficiaries in a wide variety of decision-making processes. To assess the inclusion of intended beneficiaries, we must critically evaluate the quality of representative claims by these actors. The existing literature on the representation of intended beneficiaries has suffered from several flaws. First, it has frequently failed to recognize the different types of representation that exist, which promote different normative goods and have different standards of legitimacy. We need to build on IR research to better understand the factors that make NGOs more or less likely to make strong claims to speak *for*, *as* and *about* intended beneficiaries. Second, we need more research on the quality of claims by other types of actors, both self-appointed and institutionally-designated. To contribute to these research aims, the next two chapters will analyze different actors that have represented victims in the creation of the ICC and in its ongoing operations in Kenya and Uganda.

### **4.3 Can Representatives for Intended Beneficiaries Influence Global Governance Decision-Making?**

The second element of mediated inclusion is advocacy. Strong representative claims are important, but those claims only matter if they contribute to relevant decision-making processes. Many different decision-making processes affect how IOs treat their intended beneficiaries. These include inter-state negotiations to create or reform IOs, decisions by IO secretariats about institutional aims and policies, and decisions by IO staff about the operation of particular programs. Meaningful advocacy requires that representatives have *access* to relevant decision-making processes and that their claims receive appropriate *consideration*. This section examines conditions and practices that lead to better or worse access and consideration of representative claims regarding IOs' intended beneficiaries.

According to some understandings of international politics, meaningful advocacy by representatives of intended beneficiaries is entirely utopian. On this view, governments make all significant decisions in global governance, and so such representatives would not be “at the

table” for decision-making. Furthermore, this view holds that state governments do not advocate for the interests of materially- or politically-weak groups such as refugees or the global poor. While it is certainly true that state governments are key players in global governance, and that intended beneficiaries are often constituencies that lack certain forms of leverage in global politics, other IR research findings suggest that meaningful advocacy for intended beneficiaries is sometimes possible. This section will examine two of them. First, non-state actors have increasingly had access to global governance decision-making, which challenges the state-centric model and introduces actors who can be at the table to represent intended beneficiaries. Second, global governance decisions can be made through persuasion, reason-giving and normative argumentation, as well as through coercion or self-interested bargaining. In such cases, representative claims on behalf of “weak” constituencies – such as the intended beneficiaries of global governance – are more likely to have significant influence. These two areas of IR research do not disprove the central role of state governments and state interests in global governance. However, they suggest practices and conditions that might yield more meaningful opportunities for advocacy on behalf of intended beneficiaries.

#### *Access by non-state actors to global governance decision-making*

For representatives of intended beneficiaries to contribute to decision-making processes they must have access to them. When might this be possible? If global governance decision-making was entirely made by state governments or IO bureaucrats, only institutionally-designated representatives and self-appointed state officials could advocate on behalf of intended beneficiaries. As noted above, however, such actors often have limitations to the quality of their representative claims. It is therefore significant that civil society actors have played an increasing role in both inter-state negotiations and IO decision-making in recent decades.<sup>274</sup>

Diplomatic conferences and negotiations have long included civil society actors. For instance, NGOs participated in the 1889 state diplomatic conference on the Repression of African Slave

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<sup>274</sup> This is part of a general shift in global governance from a model of “executive multilateralism” (Zürn, 2004) to complex governance with input from non-state actors as well as states. See Avant *et al.*, 2010; Jönsson and Tallberg, 2010; Scholte, 2011a; Steffek and Hahn, 2010; Steffek and Nanz, 2008.

Trade, in the First and Second Hague Peace Conferences (1899 and 1907), and in the conferences to create the League of Nations and the United Nations.<sup>275</sup> However, activity by NGOs has intensified as NGOs have become more prevalent. The number of transnational NGOs has increased from six in 1854 to over 60,000 in 2008.<sup>276</sup> Studies suggest that NGOs played a critical role in recent negotiations, ranging from environmental treaties to the antipersonnel landmine ban to the ICC's creation.<sup>277</sup>

International organizations increasingly allow non-state actors to participate in their internal decision-making. Research by Tallberg *et al* (2013) on the opening up of IOs is particularly persuasive. Looking at 50 international organizations and 298 sub-bodies between 1950 to 2010, they find that increased access by non-state actors to IO decision-making “pervades all issue areas, all policy functions, and all world regions.”<sup>278</sup> Today, it is rare for an IO to completely deny non-state actors the opportunity to contribute to or at least scrutinize decision-making.

While the trend toward expanded access by non-state actors is clear, there is great diversity in access to inter-state negotiations and IO decision-making. Access can fall at different points in a continuum:<sup>279</sup>

- *Full participation.* Non-state actors are present and capable of contributing to all relevant decisions. This usually takes the form of a seat on governing boards of IOs. Non-state actors are almost never full participants in inter-state negotiations.
- *Limited participation.* Non-state actors are guaranteed the opportunity to contribute to a sub-set of decisions during inter-state deliberations or within an IO. Their contribution is often limited to the design or implementation of particular policies or projects, rather than

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<sup>275</sup> Charnovitz, 1997.

<sup>276</sup> Davies, 2008.

<sup>277</sup> For this argument see, among others, Betsill and Corell (2008) on environmental negotiations, Glasius (2006) on the negotiation of the ICC, and Price (1998) on the negotiation of the Mine Ban Treaty.

<sup>278</sup> Tallberg *et al.*, 2013, 2.

<sup>279</sup> This typology is similar to one put forward by Jönsson and Tallberg (2010, 5-8).

to major political or institutional decisions. Actors do not simply provide information but engage in deliberations or formal-decision-making.

- *Consultation.* Non-state actors are invited, at the discretion of decision-makers, to contribute to particular decision-making processes. The contribution is often limited to providing information or proposing arguments to decision-makers, rather than participating in formal decision-making. Tallberg and Jönsson note that consultative arrangements “allow NGOs to follow negotiations, circulate papers, and sometimes even address the parties, but never to take part in formal decision-making.”<sup>280</sup> They observe that consultation is increasingly channeled through civil society advisory bodies.
- *Observation.* Non-state actors can scrutinize decision-making but cannot contribute to it. Observation may occur through physical attendance in a decision-making process, such as sitting in the gallery of the UN Security Council or the plenary of inter-state negotiations. Observation may also occur through guaranteed access to records of decision-making processes.
- *No access.* Non-state actors cannot observe or contribute to decision-making. Decision-makers may later release information about decision-making, at their own discretion.

Table 4.2 gives examples of different levels of access by representatives of intended beneficiaries.

What factors determine the extent of access by non-state actors? Several general observations can be made, most of which draw on research on civil society organizations. First, civil society organizations are most often granted access to observe or provide information to decision-making processes. They rarely have formal status to significantly contribute to decision-making. When civil society actors do formally participate in decision-making, they tend to do so in lower

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<sup>280</sup> Tallberg and Jönsson, 2010, 7.

**Table 4.2: Examples of access by non-state actors to global governance institutions**

<p><i>Full participation</i></p> <ul style="list-style-type: none"> <li>• On the global board of GFATM, one of 20 voting positions is given to a representative of individuals and communities affected by HIV/Aids, tuberculosis or malaria.</li> <li>• The Governing Body of the International Labour Organization is made up of 14 representatives of workers and 14 representatives of employers, along with 28 representatives of state governments.</li> </ul>
<p><i>Partial participation</i></p> <ul style="list-style-type: none"> <li>• Many recent judicial bodies offer opportunities for submissions or complaints by NGOs or individuals. Examples include courts in the area of trade, human rights, and arbitration.</li> <li>• International secretariats frequently operate complaints procedures that allow private parties and organizations to bring to their attention potential infringements of regime rules. Two examples are the complaints procedures managed by the European Commission and the Secretariat of the North American Agreement on Environmental Cooperation.</li> <li>• The ICC allows victims, usually through a legal representative, to make significant contributions to judicial proceedings that affect them.</li> </ul>
<p><i>Consultation</i></p> <ul style="list-style-type: none"> <li>• Over 3,500 NGOs have been granted “consultative status” by the UN’s Economic and Social Council. These organizations can attend and speak during meetings of ECOSOC and its many subsidiary bodies.</li> <li>• The World Trade Organization organizes public forums to engage civil society on particular topics, circulates some position papers, allows civil society to attend (primarily to observe) Ministerial Conferences, and secretariat staff meets informally with civil society to discuss some issues.<sup>281</sup></li> </ul>
<p><i>Observation</i></p> <ul style="list-style-type: none"> <li>• The UN Framework Convention on Climate Change grants non-state actors the opportunity to observe meetings of the Conferences of the Parties, and subsidiary meetings.<sup>282</sup> They may also be able to make interventions at the discretion of the chairperson.</li> <li>• The African Commission on Human and Peoples’ Rights grants observer status to NGOs, enabling them to attend all opening and closing sessions, obtain documentation, and (in some circumstance, and with approval from the Chairman) make a presentation to the Commission.</li> </ul>
<p><i>No access</i></p> <ul style="list-style-type: none"> <li>• The Bank for International Settlements helps state central banks to manage their foreign currency reserves. It is “remarkably old-fashioned in its technocratic opaqueness and inaccessibility.”<sup>283</sup></li> </ul>

<sup>281</sup> Williams, 2011, 115-119.

<sup>282</sup> Article 7.6 of the UNFCCC states that “[a]ny body or agency, whether national or international, governmental or non-governmental, which is qualified in matters covered by the Convention...may be so admitted unless at least one third of the Parties present object.”

<sup>283</sup> Steffek, 2010, 81.

level policy questions rather than in decisions about the mandate, budget or fundamental rules of IOs. However, this does occur, as in the case of the International Labour Organization and the GFATM.

Second, civil society actors have higher levels of access to IOs in some policy fields – such as development, environmental protection and human rights – and lower levels of access in others, such as security and finance.<sup>284</sup>

Third, different IOs give different amounts of access to civil society as a result of both internal and external pressures. International organizations tend to give greater access to civil society organizations when they need civil societies' functional expertise and implementation capacity, such as for implementing community development projects or monitoring human rights performance. Certain IOs, and the UN in particular, have entrenched norms of civil society participation that affect access across institutional sub-units and decision-making sites.<sup>285</sup>

International organizations face pressure by civil society to grant greater access. On the other hand, states sometimes push IOs to limit access to civil society when doing so may have high input costs or may weaken national security.<sup>286</sup>

Which civil society actors have access to global governance decision-making? States and IOs set the criteria and processes that determine which organizations can participate and what that participation entails. Here, too, we find extensive variation. For instance, the UN's Committee on NGOs decides whether NGOs are granted "consultative status," a process that is relatively transparent and to a significant extent does not discriminate against NGOs based on their political stance or country of origin.<sup>287</sup> Scholte (2012) shows that while IMF officials in sub-Saharan Africa have a mandate to consult civil society in policy-making, they rarely chose to

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<sup>284</sup> Steffek, 2010; Tallberg *et al.*, 2013.

<sup>285</sup> Martens, 2005, 2011.

<sup>286</sup> Steffek, 2010; Tallberg *et al.*, 2013.

<sup>287</sup> However, as Martens notes, "China and Cuba have sat on the NGO Committee for decades and have thereby blocked the applications of [NGOs] who are critical of their policies" (2011, 48).

meet with organizations made up of rural, female, or non-professional staff. Hahn (2010) shows that when negotiating a UN Protocol to prevent trafficking, key states granted greater access (and consideration) to NGOs that took particular policy positions. Troublingly, this meant that an NGO that was contested by actual trafficked persons was significantly involved in the negotiations, while an association of individuals who would be directly affected by trafficking laws did not participate. The most extensive research on NGO access to global governance focuses on participation in decision-making by the World Bank.<sup>288</sup> These and other studies find that there is systematic discrimination against participation in global governance institutions by civil society groups that are based in the global South, or that challenge market-based economic development, or that focus on certain issues such as land rights or access to food.<sup>289</sup>

Gatekeeping by IOs and states over who can access decision-making processes has important implications for the mediated inclusion of intended beneficiaries.<sup>290</sup> It can undermine the quality of representation if access is biased toward non-state actors who make weaker representative claims, or if gatekeeping distorts representation by shifting the authorization and accountability of representatives away from their constituencies and toward the gatekeepers themselves. Some studies have identified tendencies for NGOs to be co-opted by engaging with international organizations.<sup>291</sup> However, we lack comparative research that focuses on how different gatekeeping processes may affect the quality of representative claims by actors.

Taken together, these findings have several implications for advocacy for intended beneficiaries. First, despite the general trend toward increased openness in global governance decision-making, most access leads to contributions of restricted scope, frequently limited to forms of consultation. Guaranteed standing for non-state actors in state negotiations and in IO decision-making may

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<sup>288</sup> See, among others, Ebrahim and Herz, 2007, 2011; Woods, 2007.

<sup>289</sup> Hanegraaff *et al.*, 2011; Johns, 2004; McKeon, 2010; Michael, 2004; Scholte, 2011c.

<sup>290</sup> See also Carpenter (2010) on gatekeeping in transnational advocacy. Carpenter analyzes gatekeeping of issues in the “transnational issue pool” (205) and I focus on gatekeeping of participants in decision-making processes, but our two accounts overlap in the mechanisms and effects of gatekeeping.

<sup>291</sup> See, for instance, Dany, 2014; Scholte, 2011c.

lead to greater likelihood of meaningful advocacy, but it is rare. For that reason, advocacy for intended beneficiaries by self-authorized state officials and by institutionally-designated representatives – categories of actors with guaranteed access to decision-making processes – is important. As argued earlier, further research on these types of representatives of intended beneficiaries is needed.

Second, the opening up of global governance decision-making is “Janus-faced,” as Dany argues (2014). It can provide opportunities for representatives of intended beneficiaries, but it can also lead to co-optation or the weakening of representative claims, as NGOs take policy positions that are generally in line with IO expectations. More research is needed, in particular research that links issues of access to the quality of representative claims.

Third, formal access does not necessarily mean that representatives have a significant impact on policy. The authority, resources and strategies that particular representatives bring to bear are also important. Many non-state actors will lack institutional capacity, social status or bargaining resources that are required to substantially influence policy. In other words, the quality of their normative or epistemic claims may not determine their influence. However, as the next section argues, research suggests that persuasion and reason-giving can be influential in global governance decision-making under certain conditions.

#### *Arguing and bargaining in global governance*

For representatives of intended beneficiaries to contribute to decision-making, they not only require access to decision-making processes but decision-makers must consider their claims. In other words, access or formal standing does not necessarily translate to influence over decision outcomes. A lack of consideration can occur when other participants in the decision-making process have more resources for bargaining, bribing, manipulating and coercing decision-makers. Representatives of constituencies of concern will frequently have fewer such resources. It therefore matters greatly whether resources or reason-giving determine outcomes in global governance decision-making. In the last two decades there has been extensive research on this

issue, particularly from scholars interested in deliberation or communicative action.<sup>292</sup> This research is sometimes described as the analysis of “arguing” and “bargaining” in decision-making.<sup>293</sup>

Research on deliberation in global governance is frequently driven by the normative conviction that decisions will be better if they are arrived at through processes of reason-giving in which participants may change their preferences, and in which decision outcomes are not simply determined by the distribution of status or material power. Risse (2000) refers to this mode of action as following a “logic of arguing” and contrasts it with neo-utilitarian approaches in IR that assume actors follow a “logic of consequentialism.” He also differentiates it from a “logic of appropriateness,” explored by many constructivist IR scholars, in which actors take positions based on pre-existing normative expectations of identity types.

Like early constructivist scholarship on the role of norms, early scholarship on deliberation argued for the desirability of deliberation and tried to prove that it did sometimes occur in international politics. In doing so, scholars were forced to be clearer about what counted as arguing rather than bargaining. It became clear that logics of arguing, appropriateness and consequentialism rarely exist in pure forms but are usually mixed together.<sup>294</sup> Subsequent research aimed to identify factors or conditions that could explain when arguing would make a significant contribution to decision processes and outcomes. Several findings of this research are important for the inclusion of intended beneficiaries because they suggest factors that inform whether representatives of weak constituencies may influence outcomes. These factors include:

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<sup>292</sup> See, among others, Deitelhoff and Müller, 2005; Dryzek, 2006; Johnstone, 2011; Linklater, 2007; Mitzen, 2005, 2013; Müller, 2004; Risse, 2004; Risse and Kleine, 2010. This issue first gained prominence among German IR scholars contributing to the journal *Zeitschrift für Internationale Beziehungen*, and is thus sometimes referred to as the “ZIB debate” (Risse and Kleine, 2010).

<sup>293</sup> See Ulbert *et al.*, 2004.

<sup>294</sup> Deitelhoff and Müller, 2005.

- *Reason-giving is ubiquitous.*<sup>295</sup> Argument occurs in many different decision-making processes, and is not just a technique of those with limited material power. State officials, bureaucrats and even leaders of armed insurgencies sometimes engage in deliberation and have their preferences transformed.
- *Deliberation does not require actors committed to communicative action.* A logic of arguing can explain outcomes even when many individual participants are not open to the force of better arguments. Risse gives the example of a courtroom:

Irrespective of the motivations of the defence lawyers or the prosecutors, both sides have to engage in legal reasoning and discourse in order to persuade the audience of a third party – the judge and/or the jury – that their respective standpoint is correct. This is precisely why very elaborate procedures are in place to insure that judges and juries are open-minded and are prepared to be persuaded.<sup>296</sup>

As a result, several scholars have analyzed scope conditions and institutional contexts that tend to expand the role played by argument in decision-making, including the following:

- *Institutional norms matter.* Negotiation procedures and institutional norms can create opportunities for persuasion through different mechanisms, such as having neutral chairpersons or privileging authority founded on expert or moral legitimacy.<sup>297</sup> Some have argued that legal decision-making in global politics is more likely to be deliberative,<sup>298</sup> although others claim that international legal norms can limit action by non-state actors.<sup>299</sup>

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<sup>295</sup> See, for example, Crawford, 2009; Ulbert *et al.*, 2004.

<sup>296</sup> Risse, 2013, 342.

<sup>297</sup> Risse and Kleine, 2010 Lewis, 2010.

<sup>298</sup> Johnstone, 2011.

<sup>299</sup> Hurd, 2011.

- *Transparency of decision-making processes can help or impede deliberation.* The transparency of negotiations matters, but in different ways.<sup>300</sup> When participants in negotiation are uncertain about the preferences of relevant audiences, they may be more likely to engage in reason-giving in open rather than secret negotiations. By contrast, when participants know the preferences of relevant audiences – such as when government officials know that their domestic public backs a particular position – then these participants will stick to those preferences rather than engage in arguing.<sup>301</sup> In such cases, negotiations behind closed doors are more likely to be deliberative.
- *The credibility of speakers matters.* Arguments put forward by those with particular forms of legitimacy have a greater capacity to persuade.<sup>302</sup> The form of legitimacy varies between decision-making processes and includes technical expertise, impartiality or long service in pursuit of a good cause.
- *It is possible to create consequential moments of arguing within processes otherwise dominated by bargaining.* This can be achieved by significantly re-framing issues, such as by contributing new knowledge or re-characterizing the normative stakes of negotiations. For instance, Deitelhoff (2009) shows convincingly that there were “islands of persuasion” among long stretches of bargaining in the negotiations to create the ICC. These periods of arguing, in which actors’ preferences and interests appeared to markedly change, were intentionally cultivated by an alliance of middle powers and non-state actors.<sup>303</sup>

Risse (2000) claims that the logic of arguing is more likely to occur in certain phases of negotiations – particularly during early or pre-negotiation phases, when issues are put on the agenda and participants develop “common knowledge” about issues.

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<sup>300</sup> Lewis, 2010; Risse and Kleine, 2010; Stasavage, 2004.

<sup>301</sup> Checkel, 2001.

<sup>302</sup> Ulbert *et al.*, 2004.

<sup>303</sup> For more on this analysis of the negotiations to create the ICC, see Chapter Five.

Taken together, this research suggests that representatives of intended beneficiaries may be able to mitigate their lack of material or coercive resources under conditions that encourage decision-making that significantly follows a logic of arguing. Such conditions include institutional norms or chairpersons that promote reason-giving and claims based on expertise and normative argument, and the strategic use of transparency and confidentiality. Research also suggests qualities and strategies of representatives for intended beneficiaries that may be more effective in influencing decision-making. In Chapter Five, I will show how such factors contributed to the negotiation of victim-related provisions in the ICC's founding treat. My analysis reveals that in that case, in addition to factors that improved the deliberative quality of negotiations, advocates for victims rights also required state allies with the status and resources needed to bargain effectively with other states.

#### *Final observations*

For intended beneficiaries to be included in global governance, their interests and perspectives must influence decisions that significantly affect them. This section did not propose a standard of appropriate influence, which must be assessed on a case-by-case basis. Instead, I identified practices and conditions that make meaningful advocacy for intended beneficiaries more likely.

For representatives to advocate for intended beneficiaries, they need access to relevant decision-making processes and due consideration of their claims. There are certainly obstacles to achieving access and consideration. However, we can identify circumstances that improve opportunities for advocacy. Many of these are elements of institutional design, such as criteria used to grant access to non-state actors, the formal standing that civil society or institutionally-designated representatives have in decision-making processes, and procedures that encourage reason-giving among decision-makers. Representatives of intended beneficiaries who want to promote their constituencies' inclusion thus need to push for these and other elements of institutional design *of* decision-making processes, as well as promoting their constituencies' interests and perspectives *in* decision-making processes.

#### 4.4 Publicity: Global Governance Transparency and Public Awareness

The third element of mediated inclusion is publicity. When decision-making is public, individuals can be aware of decisions that affect them, and they or their representatives have opportunities to evaluate decision-making and hold it to account. Furthermore, if constituency members can observe, comprehend, and possibly contribute to a decision-making process, they are more likely to identify collective interests with other affected groups and – if decision-making is inclusive – they may come to see the decision as *collectively* made.

To achieve these goods, two elements of publicity are necessary: *transparency* and *public awareness*.<sup>304</sup> *Transparency* means that those not party to a decision-making process can determine the different positions put forward and the process or reasoning that led to an outcome. Some effort and expertise may be required to access and interpret this information. It is not expected that all people will seek to do so, but constituency representatives and actively engaged constituency members ought to have the opportunity. *Public awareness* means that people significantly affected by a decision-making process will be alerted to that fact, enabling them to seek more information or take action if they wish. Public awareness also requires that people can participate in diffuse processes of communication— i.e. a public sphere – that makes it possible for them to develop and improve opinions on matters of public concern.

The publicity of global governance has undoubtedly improved in recent decades. Most IOs have responded to pressure to be more transparent and adopted practices to allow interested groups to observe or learn about their decision-making. Dramatic changes in information and communication technologies have greatly expanded possibilities to improve public awareness. However, questions remain about whether these developments actually improve the inclusion of intended beneficiaries of global governance. The transparency of state deliberation and IO

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<sup>304</sup> As argued in Chapter Three, transparency and public awareness correspond to a distinction in scholarship on deliberative democracy between publicity in authoritative sites of decision-making and publicity in more diffuse public spheres or “deliberative systems” (such as Dryzek, 2010; Habermas, 1996). A similar distinction is frequently raised in empirical studies of global governance institutions (Dingwerth, 2014; Grigorescu, 2007; Nanz and Steffek, 2004).

decision-making is selective, and some key decisions that affect intended beneficiaries remain opaque. Furthermore, despite advances in information and communication technologies, the intended beneficiaries often face great difficulty in accessing information about global governance.

To address these concerns, this section clarifies standards for transparency and public awareness in global governance, and draws on empirical research to identify existing practices that may promote or undermine inclusion for intended beneficiaries. In doing so it identifies a significant gap in our understanding of the actual impact of practices of publicity.

### *Transparency and confidentiality*

Transparency makes it possible for actors not party to a decision-making process to determine the different positions put forward and the process or reasoning that led to an outcome.

Transparency is widely seen as necessary for accountability.<sup>305</sup> Only by knowing what institutions do, and how they came to do it, can decision-making be held to account or awarded legitimacy. To assess transparency, we look at whether actors can access the information they need to evaluate a decision rather than looking at the amount of information that is provided.<sup>306</sup> It matters who can access information, since transparency is necessary for accountability and different actors will seek to hold an institution accountable to different aims or standards.

Scholars have identified a transparency norm in global governance that became prominent in the 1990s and has largely continued.<sup>307</sup> Transparency in inter-state and IO decision-making has been improved in several ways: by giving outside actors – especially civil society organizations – greater access to decision-making processes; through increased publication of information about the policies, procedures and findings of IOs; and through the adoption by IOs of access to information policies.

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<sup>305</sup> Buchanan and Keohane, 2011; Grant and Keohane, 2005; Scholte, 2011d.

<sup>306</sup> Grigorescu, 2007.

<sup>307</sup> Florini, 2007; Grant and Keohane, 2005; Payne and Samhat, 2004.

Examples of improved transparency are legion. For instance, until the early 1990s the IMF only provided information about its policies to a restricted group of central bankers and finance ministry staff. It now puts considerable information online, makes public most of its policy papers, and uses outreach staff to engage civil society actors and broader publics.<sup>308</sup> The World Bank, too, makes public much of its research and policy analysis, engages extensively with civil society, and introduces transparency measures so that intended beneficiaries can evaluate the actions of service providers.<sup>309</sup> The WTO, once a “black box of world trade governance,” is now a leading organization in online distribution of information and includes NGOs in many deliberations.<sup>310</sup> Environmental IOs and processes to negotiate environmental treaties are significantly open to NGO observation or participation, and states are frequently required to publicize their adherence to agreements.<sup>311</sup> Transparency measures even exist in international security governance, as seen in NATO’s (admittedly tentative) engagement with civil society, in public information made available by the UN Register of Conventional Arms, or in the regular monitoring and surprise inspections by officials of the Organisation for the Prohibition of Chemical Weapons.<sup>312</sup>

It is beyond the scope of this dissertation to explain the expansion of the transparency norm. Certainly, civil society organizations have pushed for greater transparency. Additionally, Fox argues that transparency practices have proliferated due to their “trans-ideological character – and to the convergence of forces from above and below that have appropriated them.”<sup>313</sup> Similarly, Stiglitz and Bhattacharya argue that transparency has been seen as “virtue incarnate”

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<sup>308</sup> Barnett and Finnemore, 2004; Scholte, 2011b.

<sup>309</sup> Gaventa and McGee, 2013; Payne and Samhat, 2004.

<sup>310</sup> Nanz and Steffek, 2004, 327. Civil society participation remains constrained, however. “There is no way in which non-state actors could enter a regular dialogue with policy makers on concrete regulatory proposals, or exchange views with the assembly of national delegates as a whole” (Steffek and Ferretti, 2009, 50).

<sup>311</sup> Bäckstrand, 2006; Betsill and Corell, 2008; Payne and Samhat, 2004.

<sup>312</sup> Florini, 1998; Steffek, 2010.

<sup>313</sup> Fox, 2007, 663.

in reforms of international financial architecture, in part because of wide-ranging consensus to support it, “and partly because transparency reforms impose relatively little cost, especially on those calling for them.”<sup>314</sup>

The benefit of this transparency norm to intended beneficiaries can be undermined in two ways. First, there is concern that much of the information put forward by IOs is not particularly useful in promoting accountability. Fox notes that, in the area of economic development, there is considerable “fuzzy transparency,” which “involves the dissemination of information that does not reveal how institutions actually behave in practice, whether in terms of how they make decisions, or the results of their actions.”<sup>315</sup> As Grigorescu (2007) documents in his analysis of 72 international organizations, there is great variation in policies for providing information as well as institutional capacities or blockages in doing so. For instance, the World Bank published the World Development Indicators, but until recently it made the data available in book form that was neither as accessible nor as useful as a digital format.<sup>316</sup> Furthermore, transparency has little consequence if it is not accompanied by means to sanction or influence decision-makers.<sup>317</sup> Indeed, Bauhr and Grimes (2014) argue that when transparency reveals significant corruption but is not paired with opportunities for people to hold decision-makers to account, it can lead to resignation and reduced mobilization for accountability.

Second, despite a general shift toward greater transparency, some decision-making processes and some institutions remain opaque. Crucial decisions by states at the UNSC, World Bank, IMF and WTO are sometimes negotiated behind closed doors.<sup>318</sup> For instance, while many formal decision-making processes of the WTO are open to scrutiny by civil society, key decisions

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<sup>314</sup> Stiglitz and Bhattacharya, 2000, 95.

<sup>315</sup> Fox, 2007, 667.

<sup>316</sup> A senior World Bank official observed that the information was kept in book form because one unit generated \$2 million annual revenue from doing so (Dharssi, 2014). “To the Bank, USD \$2 million is a rounding error, but that was a major source of revenue for the group responsible for publishing the data,” says Aleem Walji, Director of the World Bank’s Innovation Lab.

<sup>317</sup> Bauhr and Grimes, 2014; Fox, 2007

<sup>318</sup> Brühl, 2010; Woods, 2007.

during Ministerial Conferences are made by a small number of major states in informal “green room” consultations, conducted confidentially and without records.<sup>319</sup>

Limitations on transparency can, however, produce benefits in some situations. As noted previously, research suggests that under some conditions, state officials and other negotiators are more likely to engage in deliberation if their discussions occur in secret.<sup>320</sup> For instance, Lewis (2010) finds that at the Council of the European Union, state representatives are more likely to engage in co-operative negotiations when they are insulated from public scrutiny. Moreover, Grigorescu (2007) finds less transparency at IOs that address a wide range of issues, as states often negotiate by horse-trading across issue areas. We thus need to be aware of the costs of transparency. At the same time, insiders’ arguments for confidentiality deserve to be treated with some skepticism. Scholte thus argues that “the default position [ought to be] timely and full disclosure, and any exceptions to that rule require thorough justification.”<sup>321</sup> There are also practices that can maintain transparency without undermining goods of confidentiality—such as scrutiny of decision-making processes by credible internal oversight mechanisms or by external but trusted review panels.<sup>322</sup>

Thus while transparency in global governance has increased, it is not yet clear when transparency measures improve the inclusion of intended beneficiaries. Key decisions that affect them may still be made in secret, or information provided may be “fuzzy”, difficult to access, or available too late. The ultimate test is whether transparency measures reveal how the interests and perspectives of intended beneficiaries have factored in decision-making, *and* do so in ways that allow intended beneficiaries and their representatives to take effective action. As several IR

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<sup>319</sup> Nanz and Steffek, 2004, 326.

<sup>320</sup> Checkel, 2001; Elster, 1999; Lewis, 2010.

<sup>321</sup> Scholte, 2011d, 17.

<sup>322</sup> Grigorescu (2010) finds that there has been a widespread proliferation of internal oversight offices among global governance institutions though he also finds flaws in the design of these offices (Grigorescu, 2008). Similarly, Pallis (2004) argues that the UNHCR’s Inspector General’s Office, which can respond to complaints from refugees or civil society actors, is flawed in its design and does not significantly improve transparency and accountability to refugees.

scholars have noted, the study of transparency in global governance needs to enter a new phase, which does not simply celebrate it but assesses who it benefits and through what mechanisms.<sup>323</sup>

*Public awareness by intended beneficiaries*

Another issue of concern about the publicity of global governance is whether intended beneficiaries themselves are sufficiently informed. Transparency is largely meaningless, Dingwerth (2014) argues, unless people can understand the information made available, assess how it affects their interests and act on that information. Several commentators have pointed to dramatic improvements in information and communication technology in recent years to suggest that such a reach may be possible. However, there are serious global inequalities that undermine opportunities for public awareness. For instance, over 750 million adults who literacy skills, and of this disadvantaged category approximately two-thirds are women.<sup>324</sup> In addition to this literacy divide there is a significant global “digital divide.” In developed states, 72% of people have Internet access, compared to 21% in developing states and 10% in Africa.<sup>325</sup> Digital divides also exist within states, with divisions along lines such as wealth, gender, ethnicity and geographical location. The intended beneficiaries of global governance are particularly likely to be affected by obstacles to public awareness, since they are often marginalized, impoverished, under-educated or displaced.

These challenges to widespread public awareness are somewhat less daunting if we use a feasible standard to assess awareness. In large-scale governance, it is not expected that all individuals affected by decisions will be well informed about them. Indeed, we do not expect citizens in developed democracies to have detailed knowledge of all government policies; instead we accept that they have limited amounts of time and capacity to devote to public policy issues. The intended beneficiaries of global governance face similar limitations. However, we do expect that

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<sup>323</sup> Fox, 2007; Gaventa and McGee, 2013; Scholte, 2011c.

<sup>324</sup> EFA Global Monitoring Report Team, 2010, 7.

<sup>325</sup> La Rue, 2011, 17.

citizens will know basic details about how they are governed, and that they will become aware of decisions that will have a significant and possibly negative impact on them or their communities.

Public awareness should therefore be understood as basic comprehension of governance relations, along with opportunities for people to better understand and direct their energies toward governance decision-making that most concerns them. Information and communicative engagement will come through many channels, including news media, outreach by governance agencies, civil society organizations and discussion among individuals about governance matters. Public awareness therefore should not only be evaluated by examining the amount of information that individuals have access to, but also by evaluating the various processes of communication that inform them and draw on their insights. As argued in Chapter Three, this systemic component can be understood as the quality of the “public spheres” or “deliberative systems” to which intended beneficiaries have access.

While there is a significant theoretical literature on global and transnational public spheres,<sup>326</sup> and an emergent literature on transnational deliberative systems, there appears to be little empirical literature that examines the place of intended beneficiaries in them.<sup>327</sup> For instance, Nanz and Steffek argue that civil society can serve as “a discursive interface between international organizations and a global citizenry,” and that their role ought to be “to monitor policy-making in these institutions, to bring citizens’ concerns into their deliberations and to empower marginalized groups so that they too may participate effectively in global politics.”<sup>328</sup> But their empirical analysis focuses only on civil society’s role in WTO decision-making and does not look at the awareness or communicative engagement of intended beneficiaries.

Civil society groups and IOs regularly administer public opinion surveys to intended beneficiaries. These surveys can be used to assess the level of knowledge that intended

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<sup>326</sup> See, among others, Benhabib, 2006; Bohman, 1997; Castells, 2008; Dryzek, 2006; Fraser, 2007; Habermas, 1997; Mitzen, 2005; Tully, 2012.

<sup>327</sup> I will likely need to draw on communication literature, rather than IR, for empirical approaches.

<sup>328</sup> Nanz and Steffek, 2004, 315.

beneficiaries have about IOs and the services they deliver. For instance, the World Bank surveys recipients of different forms of assistance and sometimes publishes their opinions,<sup>329</sup> and NGOs have conducted surveys in conflict-affected communities to assess their opinions on transitional justice issues and the International Criminal Court.<sup>330</sup> However, we lack empirical research that compares public awareness of intended beneficiaries across IOs and global governance regimes, which might shed more light on practices or conditions that best promote awareness.

To recap, both transparency and public awareness by intended beneficiaries about global governance decision-making has improved in recent years, in part due to improvements in transparency and information and communication technologies, as well as the expansion of global civil society. However, we lack good comparative research to discern those factors that best promote the capacity for intended beneficiaries to be alerted to global governance decisions that significantly affect them, to understand basic details about global governance, and to participate in a system of communication processes that – as Mansbridge puts it – “filters out and discards the worst ideas available on public matters while it picks up, adopts, and applies the best ideas.”<sup>331</sup> In Chapter Six I engage these issues when examining victims’ views and concerns with respect to the ICC.

## 4.5 Conclusion

This chapter engaged with IR literature to clarify the place of intended beneficiaries in global governance regimes and the possibilities for their mediated inclusion. In doing so I argued that the inclusion of intended beneficiaries is not a utopian aspiration, given certain trends in global

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<sup>329</sup> Access to opinion surveys on the views of the World Bank’s clients, partners, and other stakeholders can be found at <http://countrysurveys.worldbank.org> (accessed 20 November 2014). See also the report of the World Bank’s extensive *Voices of the Poor* consultation, Narayan and Petesch, 2002.

<sup>330</sup> For instance, the Human Rights Center (University of California, Berkeley) and the International Center for Transitional Justice have conducted surveys in northern Cambodia, Central African Republic, Democratic Republic of Congo, northern Uganda and elsewhere. For more see Chapter Six.

<sup>331</sup> Mansbridge, 1999a, 221.

politics. At the same time, existing empirical research shows that some assumptions in democratic theory, such as the belief that global civil society will necessarily function as good representatives of intended beneficiaries, warrant circumspection. I will briefly summarize these arguments and suggest key research questions going forward.

Some global governance regimes have been co-constituted along with the social category of their intended beneficiaries. As a result, claims about the legitimate authority of regimes and actors within them are often made through claims about intended beneficiaries' interests and perspectives. This does not necessarily mean that intended beneficiaries are accurately represented or that their interests significantly shape outcomes. Many observers have expressed concern that intended beneficiaries are not sufficiently included in relevant global governance decision-making.

To assess or promote this inclusion requires a clear conceptual framework for what inclusion might feasibly entail, but IR scholarship has lacked such a framework. In this chapter I used the framework of mediated inclusion developed in Chapter Three. I examined IR literature to assess conditions and practices that affect the quality of representative claim-making, advocacy by representatives and publicity of decision-making. For all three elements of mediated inclusion, the general trend in recent decades is encouraging, and some organizations and regimes show inclusive practices. At the same time there is considerable evidence of challenges and obstacles.

The rise of global civil society, and in particular of NGOs, has created a new category of actors capable of representing intended beneficiaries. However, many NGOs do not seek to represent intended beneficiaries, and those that do are challenged by factors including their competition for funding and their organizational structure. These and other factors must be considered when assessing whether NGOs can make strong claims to speak *for*, *as* and *about* intended beneficiaries. Furthermore, we must examine the possibility for other actors to represent constituencies of intended beneficiaries, including state officials who act as self-appointed representatives and IO staff who are institutionally-designated in that role. Such representatives may have limited independence or face other obstacles to making strong claims to *speak for*, *as* and *about*, but they may also have qualities or advocacy opportunities that NGOs lack.

The rise of global civil society has been accompanied by an opening up of both international negotiations and IO decision-making to non-state actors. This development improves access by categories of actors capable of representing intended beneficiaries improves, thereby improving opportunities for advocacy on their behalf. However, this access is uneven, and civil society actors are frequently limited to observing proceedings or providing information to decision-makers. Furthermore, access may not lead to appropriate consideration of representative claims about intended beneficiaries, due to limitations in representatives' status, resources and material power. However, global governance decision-making can include logics of arguing as well as bargaining or coercing, which makes it possible for normative and expert argument to shape outcomes. By promoting conditions conducive to arguing, representatives of weaker constituencies – such as intended beneficiaries – are more likely to influence decisions.

The publicity of global governance decision-making, the third element of mediated inclusion, has improved significantly in recent decades. A widespread transparency norm has made more information available about inter-state deliberations and IO decision-making. Developments in information and communication technology make the dissemination of that information easier. But for these developments to improve inclusion of intended beneficiaries, their representatives need information that actually enables them to evaluate decision-making and hold decision-makers to account. This is frequently lacking. Furthermore, intended beneficiaries themselves need to be aware about global governance decisions that significantly affect them, and need to be able to participate in public spheres that enable them to draw on and contribute to opinion development. Greater empirical research is needed to identify the mechanisms by which practices of transparency and public awareness enable intended beneficiaries and their representatives to develop positions and influence decision-making.

This chapter did not attempt to prove whether or not global governance is inclusive of intended beneficiaries. Instead, I argued that trends are encouraging, and I demonstrated that there are many practices in global governance today that illustrate possibilities for strong representative claim-making, advocacy and publicity. I also suggested factors that undermine or challenge these elements of mediated inclusion. Such analysis can help clarify where serious deficits are likely to exist and suggest means to address them.

To better understand the mediated inclusion of intended beneficiaries in global governance, broad comparative analyses of governance regimes and institutions is necessary. So, too, are in-depth case studies. Such studies can identify diverse and changing practices of representation, advocacy and publicity that develop in global governance, and clarify their strengths and weaknesses. They can help us understand how these practices came to exist and how they affect particular organizations and regimes. Finally, detailed studies of particular regimes can generate practical suggestions for the reform of particular organizations and practices, particularly if paired with analysis drawn from the insights of intended beneficiaries themselves on issues of inclusion and global governance performance.

In the following two chapters I present an in-depth study of the international criminal justice regime and the inclusion of victims of international crimes. In Chapter Five I will explain the centrality of victims to authority claims in the regime and examine their inclusion in the creation of the International Criminal Court. In Chapter Six I will look at the mediated inclusion of victims in the ICC's interventions in Kenya and Uganda. In Chapter Seven I will summarize victims' inclusion in international criminal justice, and how it affects the democratic legitimacy of the regime and opportunities for victims to address injustices they face. I will also propose how this case study can be brought into a comparative analysis with other IOs to help us understand the inclusion of intended beneficiaries in global governance more broadly.

## CHAPTER 5: FROM VICTORS' JUSTICE TO VICTIMS' JUSTICE? THE CREATION OF THE INTERNATIONAL CRIMINAL COURT

In the summer of 1998, hundreds of state officials, legal experts and civil society representatives met in Rome for five weeks of intense negotiations to create the world's first permanent international criminal tribunal. They confronted debates that had lasted for decades about issues such as who the court could prosecute, the crimes it should address, the criminal law procedures it should follow, and its relationship to the UN Security Council. At the culmination of those negotiations, the vast majority of states voted in favour of the Rome Statute, the founding treaty of the International Criminal Court. That moment has been celebrated as an act of moral progress in global politics, one taken on behalf of humanity in general and victims in particular.

Fifteen years later, Prince Zeid Raad Zeid Al Hussein of Jordan<sup>332</sup> invoked that moment in a speech to the ICC's governing body, the Assembly of State Parties to the Rome Statute ("Assembly of State Parties" or ASP). The 122 member states of the ASP were at that time riven by a backlash against the ICC by many African governments.<sup>333</sup> Prince Zeid called on his fellow diplomats to recollect the ICC's founding moment and the sense of shared moral triumph among its creators. "The thunderclap applause, the raw emotions of joy and relief, accompanying the final vote on [the Rome Statute] did not come about because we had offered yet more protections to the strong," he reminded them, but because "the strong would henceforth forfeit voluntarily their protections in respect of the weak, and most particularly the victims...It was, and still is, the most enlightened step in human history ever undertaken."<sup>334</sup>

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<sup>332</sup> Prince Zeid was the first President of the ASP (2002-2005) and in 2013 became the UN High Commissioner for Human Rights.

<sup>333</sup> Resistance to the ICC by African states began after the Prosecutor accused Sudan's President Omar al-Bashir of genocide, war crimes and crimes against humanity in 2008. This resistance intensified when the Prosecutor charged prominent Kenyan political leaders, and intensified further still in 2013 when two accused persons, Uhuru Kenyatta and William Ruto, became the President and Deputy President of Kenya. Pushback against the ICC by Kenya is discussed further in Chapter Six.

<sup>334</sup> Assembly of State Parties, 2013b.

Not all follow Prince Zeid in this evaluation. The ICC has been criticized as a tool used by Western governments to interfere in the sovereign affairs of weaker states, and as promoting a form of justice that is biased and narrow rather than impartial or universal.<sup>335</sup> Debates about the legitimacy of international criminal justice and the ICC often focus on whether or not it promotes justice for victims.<sup>336</sup> While proponents of international criminal justice frequently speak of victims as seeking or benefiting from international criminal processes, critics contend that victims are effectively voiceless in these processes, unable to advance their interests and desires, and are the targets of governance rather than the agents of justice. For these critics, “justice for victims” is often a moral slogan used to cast a veil over the governance regime, while states and other powerful actors use it to promote their own interests.

To a significant extent, different positions on the ICC’s relationship to victims come down to questions of inclusion: Are victims’ interests and perspectives included in decision-making processes that affect them?<sup>337</sup> If not, we must conclude that international criminal justice is not for victims but for others. At the same time, we must ask what forms of inclusion are appropriate for a governance regime that must be supported by many states and populations, that affects victims with quite different experiences and expectations, and that includes decision-making processes – such as judicial determinations of facts and guilt – that may require limitations on responsiveness to victims in order to achieve important normative functions.

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<sup>335</sup> For such criticisms from academics see, among others, Branch, 2007; Clarke, 2009; Mamdani, 2010. Some of the most trenchant criticisms of the ICC have come from African leaders. For instance, President Kenyatta of Kenya told African leaders that the ICC “performs on the cue of European and American governments against the sovereignty of African States and peoples” (Gekara, 2013). Ethiopian President Hailemariam Desalegn accused the ICC of “race-hunting” and targeting Africans (Reuters, 2013).

<sup>336</sup> On the importance of victims to the legitimacy of international criminal justice, see Fletcher, forthcoming; Glasius, 2012; Hirsch, 2010; Kendall and Nouwen, 2013; McEvoy and McConnachie, 2012; Mégret, forthcoming; Shaw *et al.*, 2010.

<sup>337</sup> As noted in Chapter One, by “victims” I refer to people harmed by acts defined as crimes by the ICC’s Rome Statute. The term is contentious, and some argue that it connotes powerlessness or dependency. For reflections on the use of the term “victims” by survivors of mass violence in Kenya and Uganda, see Chapter Six, Section 6.3, and Tenove, 2013b, 10-14.

In this chapter, I therefore ask what the inclusion of victims in international criminal justice should entail, and I examine the attempt by advocates for the interests of future victims to create a tribunal that would be responsive to victims in its processes and in the substantive justice it would deliver. My analysis proceeds as follows.

In Section 5.1, I argue that all human beings are vulnerable to large-scale political violence, and that international criminal justice is in part a response to this vulnerability. The creation of the ICC was a constitutional moment in the development of this global governance regime, providing an opportunity to create a court less vulnerable than previous tribunals to accusations of promoting “victor’s justice” or justice for powerful states. The Rome Statute negotiations also revealed possible tension between the more abstract “justice for humanity,” and justice that is responsive to actual victims of mass violence.

Section 5.2 explains that “victims of international crimes” are a social category constituted by international criminal justice. As its intended beneficiaries, victims are central to the regime’s legitimacy and to many of the competing authority claims by actors within it. Being the object of this claim-making does not necessarily promote inclusion. To achieve victims’ inclusion, I argue, their interests and perspectives ought to figure in decision-making processes that significantly affect them, including diplomatic and bureaucratic decision-making processes as well as judicial proceedings. I also identify some justifiable limits to victim inclusion in certain decision-making processes, including the determination of guilt during trials.

The subsequent sections examine the Rome Statute negotiations. Section 5.3 explains the background to the negotiations and identifies the important – and often controversial – victims’ issues that would be addressed. These include prosecutorial discretion, victim legal participation, reparations, and a focus on sexual and gender violence. In Section 5.4, I identify key state officials and non-state actors that advocated on behalf of victims’ interests, and assess the quality of their representative claims. I then examine their opportunities for advocacy and the closely-related issues of the publicity of negotiations in Section 5.5. As a result of these activities, the Rome Statute has several key victim-specific provisions, described in Section 5.6.

I analyze this advocacy for victim-related provisions in the Rome Statute for two reasons. First, doing so enables me to assess the inclusion of victims' interests in the negotiations. Second, these provisions would fundamentally shape opportunities for victims' inclusion at the ICC once it became operational. In other words, the victim-related provisions in the Rome Statute are the *result* of victims' inclusion in the ICC's creation, and the statutory *framework* for victims' inclusion in future ICC operations.

In this chapter's conclusion, I argue that the Rome Statute allows the ICC to be more procedurally inclusive of victims and more capable of advancing justice for victims than previous international criminal tribunals. However, at the completion of the negotiations, it was not known how victims' provisions would be implemented or whether the ICC would get sufficient state support to be effective. It was also unclear whether the claims that advocates made about the interests of future victims would correspond to the interests and perspectives of the actual victims that the ICC would affect. In Chapter Six I address these issues by looking at the ICC's interventions in Kenya and Uganda, and by drawing on the insights of survivors of violence in those two countries.

## **5.1 Humanity's Justice, Victor's Justice, Victims' Justice**

International criminal justice can be justified as promoting the interests or principles of different constituencies. It has been seen as "justice for humanity" but also as "victors' justice." This section briefly traces those arguments before turning to the more recent emphasis on the capacity for international criminal justice to promote "justice for victims."

All human beings are vulnerable to extreme forms of political violence, such as those occurring during war, civil strife and oppressive rule. That this violence has long existed does not mean it is natural or unchangeable. The forms this political violence takes, its distribution among populations, and the distinction between legitimate and illegitimate violence have all varied over time. Moreover, as Clark (2013) argues, these variations are considerably shaped by the rules

and practices of international society. This shared vulnerability can thus be seen as creating a global community of shared fate, to use the concept developed in Chapter Two.

A community of shared fate can be recognized and mobilized through acts of representation. State governments, civil society organizations and transnational networks have done so since the early 19<sup>th</sup> century, making appeals on behalf of humanity in order to create international humanitarianism and later international humanitarian law.<sup>338</sup> These efforts, which aimed to reduce the vulnerability of civilians and combatants in war, led to the Hague Conventions and the Geneva Conventions.<sup>339</sup> Efforts to address this shared vulnerability redoubled during and after the Second World War, creating new laws and institutions. Among these institutions were the first international criminal tribunals.<sup>340</sup>

The Allies created two tribunals, the International Military Tribunal (IMT) at Nuremberg and the IMT for the Far East, based in Tokyo. The IMTs were frequently justified through appeals to shared human values and shared human vulnerability. A new category of offenses was introduced, “crimes against humanity,” which encompassed not only illegitimate violence committed against civilians of other countries (laws that had already existed, such as under the 1907 Hague Convention), but also violence committed by governments against their own civilians.<sup>341</sup> Prosecutors and judges at the IMTs appealed to humanity’s vulnerability. For

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<sup>338</sup> Barnett, 2011a.

<sup>339</sup> Clark, 2013.

<sup>340</sup> There had been earlier attempts to create international criminal tribunals (Bass, 2000; Glasius, 2006; Schabas, 2007). Each attempt followed a conflict that saw terrible violence against combatants and civilians. Gustav Moynier, a founder of the International Committee of the Red Cross, called for a permanent international tribunal in 1872 following the Franco-Prussian War. At the end of World War One there were calls to prosecute leaders of Germany and the Ottoman Empire for atrocities they committed, so as to address the “cries for justice” of victims (Moffett, 2012). A tribunal was proposed in the Versailles Treaty, but the idea was dropped after The Netherlands gave asylum to the German Kaiser.

<sup>341</sup> The IMT statutes held that crimes against humanity only existed when they formed a nexus with war crimes or crimes against peace. The Allied governments were uncomfortable with the ramifications of standalone crimes against humanity, Schabas notes, because of “the ramifications that this might have with respect to the treatment of minorities within their own countries, not to mention their colonies” (2007, 99). This requirement for a nexus between crimes against humanity and war crimes or aggression

instance, in his famed opening statement at the Nuremberg IMT, American chief prosecutor Robert Jackson claimed:

The common sense of mankind demands that law shall not stop with the punishment of petty crimes by little people. It must also reach men who possess themselves of great power and make deliberate and concerted use of it to set in motion evils which leave no home in the world untouched.<sup>342</sup>

International criminal justice can thus be seen as a regime that affects all human beings, both because it targets a shared vulnerability and seeks to modify rules of international society that affect many or all people. It does so by shifting international humanitarian law to hold individuals as well as states to account, and by justifying punitive international action against state officials for violence against citizens of their own state. Indeed, state representatives, scholars and civil society actors regularly make the argument that international criminal justice is “justice for humanity.”<sup>343</sup>

The claim that international criminal tribunals promote justice for humanity has been met with accusations that tribunals enact “victor’s justice.” The IMTs did not prosecute any of the notorious acts committed by Allied governments, such as the fire-bombing of Dresden, the Soviet murders of Polish officers in the Katyn forest, and the atomic bombing of Hiroshima and Nagasaki.<sup>344</sup> One judge of the IMT for the Far East argued that all defendants should be found not guilty, given the patent one-sidedness of the proceedings.<sup>345</sup> Recognizing this potential criticism, Robert Jackson declared in his opening statement at the Nuremberg IMT that “the

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was weakened but not entirely eliminated in the statutes of subsequent international criminal tribunals, including the ICC.

<sup>342</sup> Jackson, 1948.

<sup>343</sup> For a survey of some of these claims, see Mégret, forthcoming.

<sup>344</sup> See Popovski, 2012; Schabas, 2009.

<sup>345</sup> Pal, 1953. For commentary on Pal’s judgment, see Moyn, 2013; Shklar, 1964.

record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well.”<sup>346</sup>

The next international criminal tribunals came to exist in the 1990s, when the UNSC created ad hoc international tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR). These, too, have met with accusations of “victor’s justice.”<sup>347</sup> Critics have pointed to the ICTY Prosecutor’s decision not to investigate alleged war crimes committed during NATO bombings of Serbia in 1999, and the ICTR’s failure to bring charges for any crimes committed by the Rwandan Patriotic Front.<sup>348</sup>

Many supporters of an International Criminal Court hoped it would put international criminal justice in service of “justice for humanity” rather than “victor’s justice.”<sup>349</sup> A permanent court would make it unnecessary for new inter-state negotiations to create a new ad hoc tribunal every time mass violence occurred. No longer would the “victors” determine what counted as a crime. Moreover, many ICC supporters wanted to make sure the Court would not be a pawn of the UNSC, with its political conflicts and the tendency by the five permanent members to use their vetoes to shield themselves and their allies from accountability for human rights violations. The ICC has, however, been accused of being biased and partial, an issue that will be discussed in Chapter Six.

In recent years, international criminal tribunals have increasingly been justified as “justice for victims” rather than the more abstract “justice for humanity.” There are several possible reasons for this shift, including the increasing emphasis on justice for victims in domestic criminal justice systems; the weakness of claims that the ICC acts on behalf of state governments or state

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<sup>346</sup> Jackson, 1948.

<sup>347</sup> Popovski, 2012.

<sup>348</sup> One-sided justice raises problems of legitimacy as well as the possibility that violence against some victims is ignored. Ward thus argues: “Just as the devastation of Dresden and Tokyo was no less a crime against humanity than the devastation of Coventry, so too the needless slaughter of the citizens of Belgrade is no less reprehensible than the wanton murder of the citizens of Srebrenica” (2003, 130).

<sup>349</sup> Amnesty International, 1995; Ferencz, 1998; Human Rights Watch, 1998.

populations; and the rise of international human rights law and transitional justice practice that are frequently victim-centred.<sup>350</sup> Furthermore, as will be discussed further in Section 5.3, the emphasis on victims has also been seen as a corrective to failings of the ICTY and ICTR.

The goal of making international criminal tribunals more attentive to victims' needs and desires for justice fits with my normative argument that governance should be responsive to intended beneficiaries on grounds of justice and democracy.

First, those people who have suffered mass violence ought to be included in decision-making so that governance is more likely to promote justice for them. If the interests and perspectives of victims figure more prominently in decision-making, they will likely have greater opportunity to alert others to their predicament, demand attention, advocate for actions that would cause greater benefit (or less harm), contribute their experiences and insights, and hold decision-makers to account for their actions. Furthermore, survivors of mass violence ought to be part of the conversation about what form of justice ought to be pursued.

Second, victims of international crimes should be included in international criminal justice according to the democratic principle of self-determination, since the governance regime may significantly affect them. Survivors of mass violence may or may not have violence against them recognized and condemned, their perpetrators held to account, their lives put at risk as witnesses, their losses and suffering addressed by reparations, their communities pushed toward reconciliation or conflict, and so forth. Victims are not the only people affected by international criminal justice, but they will tend to be more significantly affected than others.<sup>351</sup>

Despite these normative arguments for victim inclusion in international criminal justice, there are justifiable limits to including victims' views and interests in certain decisions. There are also

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<sup>350</sup> Dixon and Tenove, 2013; Fletcher, forthcoming; Kendall and Nouwen, 2013; Mégret, forthcoming.

<sup>351</sup> This consideration of a broader constituency possibly affected by governance, and of a smaller concrete group that is directly affected, is not unique to international criminal justice. Similar considerations are needed in peacekeeping and humanitarian relief, for instance, as governance rules must be created that consider the interests of future intended beneficiaries, while actual peacekeeping and humanitarian relief programs must be responsive to populations whose lives are being affected by them.

significant practical obstacles to achieving victim inclusion. The next section discusses what appropriate and feasible victim inclusion might entail.

## **5.2 Constructing and Including “Victims” in International Criminal Justice**

As many commentators have noted, victims are a “figure” or a “constituency” that is central to the legitimacy of international criminal justice.<sup>352</sup> Civil society actors, state representatives, and the staff of international tribunals frequently make claims about their relationships to victims, their knowledge about victims, or their dedication to victims’ interests, in order to justify their actions and authority. At the same time, commentators have expressed concern about misrepresentations of victims’ interests and views, and the instrumental use of claims about victims and their suffering by actors seeking to advance their own interests or political projects.<sup>353</sup> These commentators frequently argue that international criminal justice should be more responsive to victims, but they are rarely clear about what that might entail.

In this section I explain the place of the social category of victims in international criminal justice. I argue that victims should be included in different decision-making processes that affect them, and that their inclusion in some processes can be justifiably limited.

### *Constituting “victims” and mobilizing authority*

The “victim of international crimes” is a relatively new social category in global politics, one that did not exist in international law or global governance in a substantive way before the IMTs that followed World War Two. The category may not resonate deeply with individuals assigned to it. It is unlikely that an Acholi village elder whose home was burned down by the Lord’s Resistance Army, a Cambodian businesswoman forced to marry a Khmer Rouge cadre, and a Hema youth enlisted to fight in long-lasting inter-ethnic violence in Ituri, think of themselves as

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<sup>352</sup> See Dixon and Tenove, 2013; Kendall and Nouwen, 2013; Mégret, forthcoming Fletcher, forthcoming.

<sup>353</sup> See, among others, Branch, 2007; Mamdani, 2010; Sagan, 2010.

belonging to a single social group. However, since the resurgence of international criminal justice in the last two decades, the victim of international crimes has become a common figure in diplomatic rhetoric, a rights-bearing status in international law, and a governance target of international organizations. For that reason, the lives of the Acholi elder, the Cambodian woman and the child from Ituri may be affected by whether and how the category is applied to them.

Victims play a necessary or constitutive role in international criminal justice, along with judges, prosecutors and accused persons. These roles are constructed through the rules, norms and practices of this governance regime. At the same time, there are understandings of “victims” that have existed prior to and alongside the social category of “victims” in international criminal law. These alternate understandings of victims contribute to and challenge the legitimacy and the practices of international criminal justice. For instance, as I will show in Chapter Six, the ICC’s approach to victims has been challenged by divergent understandings of victims and justice in Uganda and Kenya.

The social category of victims of international crimes operates as the international criminal justice regime’s “intended beneficiaries,” as the term is described in Chapter Four. Victims are frequently invoked to justify the legitimacy of international criminal justice and its institutions. Claims about justice for victims are commonly used to promote international criminal justice in political speeches, NGO reports and other forms of advocacy.<sup>354</sup> For instance, annual reports to the UNGA and UNSC by the presidents of the ICTY and ICTR frequently refer to the tribunals’ mandates to provide justice for victims.<sup>355</sup> In one such report, for instance the ICTY President comments on the need to improve tribunal outreach in order to address any gaps that geographical distance may create “between justice and its beneficiaries - victims of the conflict.”<sup>356</sup> The Coalition for the International Criminal Court, a network including over 2,500 NGOs, regularly calls for state governments to join or support the ICC in order to promote

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<sup>354</sup> For others who make this argument, see Fletcher, forthcoming; Glasius, 2012; Hirsch, 2010; Kendall and Nouwen, 2013; McEvoy and McConnachie, 2012; Mégret, forthcoming; Shaw *et al.*, 2010.

<sup>355</sup> For an extensive list, see Fletcher, forthcoming, 9n9-10.

<sup>356</sup> ICTY President, 1999, 147.

justice for victims. Human Rights Watch proclaims: “Victims and affected communities are first among the [ICC’s] many constituencies.”<sup>357</sup>

Claims about victims are not only used to promote the legitimacy *of* international criminal justice, but also used by actors to mobilize their authority and to influence decisions *within* the regime. For instance, some state representatives can gain recognition or authority with civil society or other state actors by being seen as “pro-victim,” either by engaging with victims or making claims on their behalf.<sup>358</sup> State officials sometimes invoke victims when challenging the political authority of other governments, using the existence of victims of international crimes to argue that another government has failed in its basic obligation to protect its citizens.<sup>359</sup>

The staff of international criminal tribunals frequently make authority claims for themselves or their institutions by invoking victims. For instance, the prosecutors of all six existing international criminal tribunals claimed in a joint statement that they would seek “the expeditious and effective completion of our mandates, on behalf of the victims in the affected communities that we serve.”<sup>360</sup> More succinctly, then ICC prosecutor Luis Moreno Ocampo pronounced, “My mandate is justice; justice for the victims.”<sup>361</sup> Judge Sang-Hyun Song, President of the ICC, has encouraged support for the Court by arguing: “We must not let down the countless victims around the world who place their hope in this institution.”<sup>362</sup>

Civil society organizations frequently claim authority by invoking victims. Unlike state governments they cannot make claims to speak for state populations, but many do claim

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<sup>357</sup> Dicker and Evanson, 2012.

<sup>358</sup> Dixon and Tenove, 2013, 405.

<sup>359</sup> For instance, when US Ambassador Samantha Power pushed the UNSC to refer crimes in Syria to the ICC, she spoke of “victims of the Assad regime’s industrial killing machine” and she arranged to have a Syrian victim stand up in the UNSC gallery to represent those who were being denied justice. See Power, 2014. For more on the incident, see Tenove, 2014.

<sup>360</sup> Special Court for Sierra Leone, 2011.

<sup>361</sup> Office of the Prosecutor, 2008 (quoted in Kendall and Nouwen, 2013, 239).

<sup>362</sup> International Criminal Court, 2012.

*representative authority* on behalf of subnational and transnational constituencies.<sup>363</sup> Examples include the Mothers of Srebrenica Association (an NGO representing approximately 6,000 surviving relatives of men killed in Srebrenica, Bosnia, in 1995) and the Acholi Religious Leaders Peace Initiative (an association of religious and traditional leaders who claim to represent victims and affected communities in northern Uganda, discussed in Chapter Six). Civil society organizations frequently claim *expert authority* regarding victims' interests in international criminal justice, as can be seen in the regular legal and policy submissions made to the ICC by Human Rights Watch, REDRESS, the Women's Initiatives for Gender Justice and other organizations.<sup>364</sup> Finally, civil society actors frequently claim *moral authority*, both through their commitment to principled positions and their production of moral outrage at the terrible forms of violence and suffering that victims endure.

While claims about victims and their interests are ubiquitous in international criminal justice, many commentators argue that victims are rarely the authors or the beneficiaries of these claims. Kendall and Nouwen (2013) suggest that victims are usually represented in the abstract, which effaces individual victims' diverse experiences, desires for redress or political aims. Similarly, Fletcher (forthcoming) argues that international criminal justice actors often invoke "imagined victims," who are assumed to support the ICC and its approach to justice. "Actual victims," Fletcher writes, "have limited rights and power to influence justice; they are recipients of retributive justice as defined and secured by the ICC."<sup>365</sup> Branch contends that international criminal justice misinterprets political violence and forces actors into the ill-fitting roles of the "criminal," the "transcendent judge" and the "innocent, passive victims."<sup>366</sup> In the victim role, Branch argues, individuals cannot express or act on their desires for a more just political order.

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<sup>363</sup> Fletcher, forthcoming; Glasius, 2009; Haslam, 2011; Kendall and Nouwen, 2013.

<sup>364</sup> For examples, see Human Rights Watch, 2005b; REDRESS, 2012; Women's Initiatives for Gender Justice, 2012b.

<sup>365</sup> Fletcher, forthcoming, 29.

<sup>366</sup> Branch, 2007, 190.

This gap between the centrality of victims to authority claims and the possibility that victims' interests and perspectives may nevertheless go unheard, is illustrated by a passage from David Scheffer's memoir of his time as the US Ambassador-at-Large for War Crimes Issues. As noted in Chapter One, Scheffer recognized the symbolic power of victims and wished he could more powerfully invoke them when trying to convince his government to support international criminal justice more strongly. He writes in his memoir that he often wanted the "mutilated bodies and missing souls of girls, boys, women and men of Bosnia, Rwanda, eastern Congo, and Sierra Leone to file silently through that wood-paneled room and remind policy-makers of the fate of ordinary human beings."<sup>367</sup> Some critical scholars argue that victims in international criminal justice are much like these apparitions of Scheffer's imagining, made present but voiceless by decision-makers who speak on their behalf and make decisions about them.

#### *Victim inclusion in multiple sites of decision-making*

To evaluate these accusations, we must identify the decision-making processes that warrant victim inclusion. Different decision-making processes require different forms of inclusion, and some – such as criminal trials – may need to partly exclude victims' views and interests. Furthermore, different constituencies of victims may need to be included in different decision-making sites. These considerations have important implications for institutional design.

Victims ought to be included in decision-making processes that significantly affect them. Most scholarship on victim inclusion in international criminal justice has focused on victims' legal participation in judicial processes.<sup>368</sup> That is an important issue, and one that I address later in this chapter and in Chapter Six. However, victims also deserve inclusion in certain bureaucratic decision-making processes that affect them. For instance, tribunal registries decide how victims will be informed about proceedings and how they might be treated as witnesses. Prosecutors' offices decide which individuals and crimes to investigate and prosecute, decisions that

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<sup>367</sup> Scheffer, 2013, 2.

<sup>368</sup> This is a voluminous literature, but important contributions include Dembour and Haslam, 2004; Karstedt, 2010; Moffett, 2012; Pena and Carayon, 2013; Zappalà, 2010.

significantly affect victims' opportunities for justice.<sup>369</sup> The ICC's Trust Fund for Victims decides whether and how to provide assistance to victims in countries where the Court operates. In addition to these bureaucratic decision-making processes, certain decisions by state representatives ought to include victims' interests and perspectives. For instance, victims' perspectives and interests should be considered in some decisions to change tribunals' rules, or when the UNSC decides to initiate or defer ICC proceedings.<sup>370</sup>

Victim inclusion in multiple decision-making sites can be seen in the domestic context of democratic states. Victims and their advocates seek to influence criminal justice policies and decisions through a number of channels. They seek to elect or persuade politicians who can change the criminal code, introduce new victims' rights, introduce tougher or more rehabilitative sentences, and otherwise contribute to legislation. They can contribute to expert recommendations that will influence the policies of state agencies. They can challenge legislation and policy in judicial processes. In some states, victims can contribute to criminal trials, not only as witnesses but also through 'victim impact statements,' or even – as will be discussed below – as civil parties.<sup>371</sup> The functions of these "branches of government" exist in global governance, though they are distributed differently than in the domestic context. States perform "legislative" functions through multilateral negotiations to create and reform tribunals and laws. States and tribunal officials perform "executive" functions when they decide budgets and make institutional policies. Tribunals perform judicial functions when they investigate crimes, try cases, dispense punishments and reparations, and rule on victims' rights.

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<sup>369</sup> In Chapter Six I look at a prominent debate over decisions by the Prosecutor regarding cases in northern Uganda, which were challenged by some victims' representatives.

<sup>370</sup> In Chapter Six I examine decision-making by the UNSC about whether to suspend the ICC's proceedings against Kenya's President Kenyatta and Deputy President Ruto.

<sup>371</sup> Victims' interests should not trump all other considerations. For instance, the emphasis on victims' interests has been used to undermine the rights of accused and convicted persons in some domestic criminal systems (Ashworth, 2000; Garland, 2001; McEvoy and McConnachie, 2012). It should be noted that both conservative and progressive political camps have championed victims' rights and wellbeing in domestic politics and criminal justice, though often with different emphases.

While victims should generally be included in decisions that significantly affect them, their inclusion can be justifiably limited. For instance, criminal trials should not determine the guilt or punishment of accused persons according to the wishes of victims. To put decisions of guilt in the hands of victims would turn international criminal trials into acts of retaliation, and as Olásolo notes, “the history of criminal law and criminal sanctions reflects the struggle to counteract private retaliation.”<sup>372</sup> Furthermore, to put decisions about guilt into the hands of victims as political actors would create show trials. Doing so would undermine the legality and legitimacy of the proceedings. Commenting on this relationship between fair trials and legitimacy, Luban writes:

Tribunals bootstrap themselves into legitimacy by the quality of justice they deliver; their rightness depends on their fairness. During the first Nuremberg trials, prosecutors fretted that acquittals would delegitimize the tribunal; in hindsight, it quickly became apparent that the three acquittals were the best thing that could have happened, because they proved that Nuremberg was no show trial. In the same way, it is essential that the ICTY, ICTR, and ICC deliver champagne-quality due process and fair, humane punishments...<sup>373</sup>

Moreover, several goals of international criminal justice require that guilt or innocence be determined fairly and legitimately. For instance, tribunals’ capacity to discover the truth about past violence is partly dependent on a fair trial. The rights of the accused not only protect accused persons from suffering the injustice of false conviction, “they are part and parcel of the epistemological mechanism for fact finding in criminal proceedings.”<sup>374</sup>

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<sup>372</sup> Olásolo, 2012, 144. See also Gardner, 2007.

<sup>373</sup> Luban, 2010, 579. Luban claims that fair trials must adhere to “natural justice,” but then admits that “natural justice” is a misnomer because “the basic procedural rights recognized world-wide today are products of centuries of tinkering, not pure reason alone” (580). To put this differently, I would argue, the legitimacy of fair trial rights does not come from being natural or inherently rational, but through extensive use and acceptance by many societies. Furthermore, there is not a single set of fair trial rights, but these rights differ between jurisdictions and have changed over time within jurisdictions.

<sup>374</sup> von Wistinghausen, 2013, 169.

For these and other reasons, some limits on victim inclusion in trial processes are justifiable. However, it must also be recognized that there is great diversity in the practices of criminal justice in different societies, and that the normative goods of trials are plural and disputed. As I will show below, the proper legal role for victims in judicial processes was heatedly debated during the Rome Statute negotiations and continues to be a contested policy matter at the ICC. Many lawyers from common law countries insisted that the fairness of trials is undermined if victims can become a party to proceedings alongside the prosecution and defense. Victim participation in trials is widespread in states with civil law systems, however, and some proponents of victim participation accused its common law detractors of “legal chauvinism” during the Rome Statute negotiations.<sup>375</sup>

The practices and normative goods of criminal trials – particularly as practiced in international criminal justice – can also be interrogated on the grounds of their Western pedigree, and their high degree of technicality. These features can make the “fair trial” – and victims’ role in it – controversial or perplexing for many people.<sup>376</sup> Individuals may have legitimate disagreements about how justice – even justice as individual accountability – should function. Rather than assume “that law manufactured in the donor states is beyond reproach,”<sup>377</sup> Stewart argues, one challenge for improving international criminal justice “is to resist normative systems that... seem culturally alien, morally superior, and largely insensitive to the needs of affected societies.”<sup>378</sup>

Attempts to include victims’ interests and perspectives may also challenge certain normative goods or forms of legitimacy of bureaucratic and diplomatic decision-making processes. For instance, some state officials resist the inclusion of victims’ representatives in inter-state negotiations. As a senior diplomat forcefully put it, during the Review Conference of the Rome

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<sup>375</sup> Comment by a Latin American state representative to the Rome Conference (author interview conducted in The Hague, The Netherlands, September 2013). See Appendix for a list of interviewees.

<sup>376</sup> For this argument see, among others, Almqvist, 2006; Clarke, 2009; Combs, 2010. This issue will be discussed further below.

<sup>377</sup> Stewart, 2014, 336.

<sup>378</sup> *Ibid.*, 335.

Statute in 2012, “We don’t need victims or civil society here to cry to us about blood that has been spilled. They just get in the way. [Diplomatic conferences] are for states to get together and hash out the rules.”<sup>379</sup> The argument is not always made this baldly, but others have proposed that state negotiations that include victims’ representatives or that focus too extensively on victims’ interests may be less likely to achieve state commitments. For instance, in the words of a senior member of an international human rights organization: “The UNSC’s mandate is peace and security, and that might mean deals among states that don’t attend to victims’ issues.”<sup>380</sup>

Victims’ inclusion is not the only legitimate factor in decision-making, and their inclusion may be justifiably constrained or modified in deference to other normative goods or sheer feasibility. Also, as Mégret (forthcoming) rightly points out, other constituencies may be affected and warrant inclusion in international criminal justice. At the same time, non-inclusive practices must be open to questioning and change. Indeed, some proponents of international criminal justice see it as a way to *improve* the quality of domestic criminal trials, including reparative as well as retributive elements, rather than to simply reproduce to them.<sup>381</sup>

In addition to asking *how* victims can be included, we must also ask *which victims* ought to be included. Different decision-making processes will affect different victim constituencies. For instance, some decisions might affect victims in one country or community, while others may affect victims in all present and future situations under a court’s jurisdiction. As general rules of thumb, those individuals who count as victims deserving inclusion are those who a) suffered from the harms under consideration, and b) will be significantly affected by the actions that result from a decision in question.

The application of these criteria in particular cases can and should be debated. As many scholars have noted, the identity and interests of victims are socially constructed and politically

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<sup>379</sup> Interview with the author, Kampala, Uganda, June 2012.

<sup>380</sup> Interview with the author, Skype (New York), September 2014.

<sup>381</sup> For the ICC’s approach to “positive complementarity” to improve domestic criminal processes see Office of the Prosecutor, 2006. For alternate notions of how the ICC might improve domestic criminal systems, see Olugbuo, 2011; Roach, 2013a.

contested.<sup>382</sup> The act of defining victims helps to define who perpetrators are and what violations they committed. Such definitions are particularly contentious in the context of serious social conflict. As McEvoy and McConnachie note, the victim can be “a symbol around which contested notions of past violence and suffering are constructed and reproduced.”<sup>383</sup> The assumption that victims must be “innocent” can also be problematic, since victims can often be supporters, bystanders, or even perpetrators of violence against other people. Furthermore, in situations in which there are resource constraints on justice processes, there can be a distributional conflict among different victims over who deserves social recognition or material assistance.<sup>384</sup> For all these reasons, debate about who should count as the “victim deserving of global justice” is unavoidable.<sup>385</sup>

In the rest of this chapter I examine the negotiations of the Rome Statute to assess how victims’ interests were understood and advocated, and to trace the design of the ICC’s legal framework relating to victims.

### **5.3 Negotiating the Rome Statute: A Constitutional Moment for International Criminal Justice and Victims**

The negotiation of the Rome Statute, the founding treaty of the ICC, was a constitutional moment in the international criminal justice regime, reconfiguring many of its rules, norms and practices. A constitutional moment exists when there is an opportunity to significantly change the structural rules, legal or otherwise, of a governance regime.<sup>386</sup> Following the Rome Statute

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<sup>382</sup> Haslam and Edmunds, 2013; Hirsch, 2010; Kendall and Nouwen, 2013; Madlingozi, 2010; McEvoy and McConnachie, 2012.

<sup>383</sup> McEvoy and McConnachie, 2012, 532.

<sup>384</sup> For this debate among survivors of mass violence in Kenya and Uganda, see Tenove, 2013b.

<sup>385</sup> Hirsch, 2010.

<sup>386</sup> For the original treatment of the term “constitutional moment,” see Ackerman, 1989. For its application to the ICC’s creation, see Sadat and Carden, 1999. Constitutional moments also reveal

negotiations and the ICC's creations, it would no longer be up to powerful states to create new ad hoc tribunals to address situations as these states see fit, as the Allies did at the end of the Second World War and as the UNSC did with the creation of the ICTR and ICTY.<sup>387</sup> The Rome Statute also advances the norm that criminal prosecutions are required as a response to atrocity crimes such as genocide and crimes against humanity, and promotes the expectation and legal means for intruding on sovereignty if this norm is not satisfied.<sup>388</sup> These developments have become central to international human rights advocacy, with major human rights organizations insisting on ICC action on issues ranging from the conflict in Syria to the occupation of Palestine.

Furthermore, as I will show, the Rome Statute has important consequences for the intended beneficiaries of international criminal justice, the victims of international crimes. Its creation is frequently seen as a signal event for victims of international crimes, incorporating new rights and protections for victims that had not existed in previous tribunals.<sup>389</sup> The Statute has also contributed to a shift in the iconic victim intended to benefit from the regime, from the soldiers and civilians of Allied countries at post-war IMTs, to African women and children at the ICC.<sup>390</sup> As I will argue, it changes the way that victims' interests are addressed, moving from the purely retributive model of earlier tribunals to an approach that is more attentive to victims' interests and views, and which gives victims opportunities for assistance and reparations.

How did these changes come about? The negotiation of the Rome Statute has been the subject of extensive analysis, both because it created an important new international organization and

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competing aspirations and assumptions about a governance regime by parties involved. For an explanation of the importance of such episodes for study of the norms and discourse of governance see Price, who refers to these as “defining moments” in his analysis of the development of an international chemical weapon taboo (1997, 10).

<sup>387</sup> Although the UNSC continues to play a role – often controversial – in referring cases to the ICC. See Bosco, 2013; Schabas, 2009; Tiemessen, 2014.

<sup>388</sup> Thus, for instance, Arbour (2008) argues that a “responsibility to punish” is one component of the doctrine of “responsibility to protect.” See also Broomhall, 2003; Cryer, 2005; Teitel, 2011.

<sup>389</sup> See, for instance, Danieli, 2005 Benedetti *et al.*, 2013; Funk, 2010; Haslam, 2004; Musila, 2010; Olásolo, 2012.

<sup>390</sup> See Dixon and Tenove, 2013, 408; Sagan, 2010.

because the negotiations seemed to initiate an era of “new diplomacy,” in that there was extensive involvement of civil society and a somewhat diminished role for great powers.<sup>391</sup> However, there has been no systematic investigation of the negotiation of the Rome Statute’s victim-related provisions, and the strategies and contexts that enabled actors to promote them.

This chapter analyses the negotiation of these victim-related provisions, both to explain how they came to be and to assess victims’ mediated inclusion in the negotiating process. I will therefore examine the representative claims and opportunities for advocacy of actors that focused on victims’ issues in the statute, as well as conditions of publicity that shaped the strategies these actors employed. Before doing so, I will provide a sketch of the Rome Statute negotiations and the victims’ issues that would figure prominently in them.

### *The road to Rome*

After the post-WW2 International Military Tribunals, there was a push at the United Nations to create a permanent international criminal tribunal. That effort was blocked by Cold War disagreements, but the ambition continued to percolate at the UN and among civil society. When the UNSC created the ICTY and ICTR it triggered a renewed diplomatic and civil society push to create a permanent international criminal tribunal.

The Rome Statute was developed in distinct phases, primarily between 1991 and 1998.<sup>392</sup> It included both formal state negotiations and informal meetings of state officials and civil society actors. Members of the International Law Commission (ILC), a UN expert body, had worked

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<sup>391</sup> There is a voluminous literature on the Rome Statute negotiations in international law and international relations. For key IR accounts, see Bass, 2000; Benedetti *et al.*, 2013; Deitelhoff, 2009; Fehl, 2004; Glasius, 2006; Schiff, 2008; Struett, 2008. For key international law accounts, see Cassese *et al.*, 2002; Lee, 1999; Schabas, 2010. For more on the “new diplomacy,” see Section 5.5.

Much of the analysis of the Rome Statute negotiations is celebratory. However, the triumph of the ICC’s creation is sometimes contrasted to its modest achievements to date, with few cases successfully concluded, accused persons avoiding arrest, and the failure to go beyond preliminary investigations in any country outside of Africa. On the limited accomplishments of the ICC, see Schabas, 2013.

<sup>392</sup> On the negotiations, see Benedetti *et al.*, 2013; Glasius, 2006; Kirsch and Holmes, 1999; Schabas, 2007.

intermittently on a legal framework for a permanent tribunal during the Cold War years, knowing it was unlikely to be acted on. In 1991 the UN General Assembly (UNGA) asked the ILC to present it with a draft text, which it did in 1994. That text was very conservative, in that it recommended a court that zealously maintained principles of state consent and UNSC oversight. An ad hoc committee of states was created to review the ILC draft. In 1995 the UNGA created the Preparatory Committee, or “PrepCom”, to develop a text for consideration at an international conference. The committee and its working groups produced a text with hundreds of unresolved issues and competing proposals, which would become the draft document for the Rome Conference in 1998. Leading up to the Rome Conference there were public and private meetings around the world that brought together interested experts, NGOs and state officials. These informal meetings were often organized by NGOs and by states that belonged to the “Like-Minded Group,” whose members supported a robust and independent tribunal. As will be discussed below, these meetings had a significant effect on the negotiations.

State delegates met in Rome on 15 June 1998 for five weeks of intense negotiations. The Rome Conference, conducted at the offices of the Food and Agriculture Organization, included over 2,000 members of state delegations and approximately 450 representatives of civil society organizations.<sup>393</sup> Different sections of the Rome Statute were negotiated in different forums including the general plenary, issue-specific working groups and informal meetings. These discussions generated consensus on some issues but deep disagreement remained on questions such as the court’s crimes, its jurisdiction, its relationship to the UN Security Council and the independence of its prosecutor. Near the end of the allotted time for the conference, its chairman, Canadian ambassador Philippe Kirsch, oversaw the creation of a final text and proposed it to all states. In a final vote, the text was adopted with 120 states in favour, seven against and 21 abstentions. Upon hearing results of this vote, diplomats and civil society members erupted in “an enormous outpouring of emotions, of relief among those present, unparalleled for such a

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<sup>393</sup> Benedetti and Washburn, 1999; Glasius, 2006.

conference: screams, stamping, exultation without end, tears of joy and relief.”<sup>394</sup> This was the euphoric scene that Prince Zeid would speak of fifteen years later.

The Rome Statute came into force on 1 July 2002, after it had been ratified by 60 states, and the ICC was created.

### *Victims’ issues in the negotiations*

The prominence given to victims’ issues in the Rome Statute negotiations was the result of several developments that converged in the mid-1990s. In the preceding decades, victims’ rights movements in many states had promoted reforms of domestic criminal justice systems to increase victim participation and better protect their interests. These campaigns contributed to and borrowed from developments in international human rights law, including the decisions of international and regional human rights courts.<sup>395</sup> A transnational expert community that focused on victims’ rights had promoted rights for victims in international law, contributing to the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985): this document would be used as a source of legal principles and language in the Rome Statute negotiations.<sup>396</sup> Furthermore, the Rome Statute was negotiated at a time when the practices and institutions of “transitional justice” were increasingly prominent, including truth commissions in Latin American and the Truth and Reconciliation Commission in South Africa. Transitional justice institutions emphasize victims’ agency and recognition, principles that advocates for victims would raise in the Rome Statute negotiations. Finally, as argued in Chapter Four, the 1990s saw many international organizations increase their openness and accountability to civil society and to intended beneficiaries. The attention to victims’ engagement with international criminal tribunals can be seen as part of that trend.

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<sup>394</sup> Kaul, 2012, 3.

<sup>395</sup> See Bassiouni, 2006; Trumbull, 2007-2008.

<sup>396</sup> States were not always aware that language from the Declaration was being incorporated in the Rome Statute. As one member of a state delegation put it, an “unseen hand” added terms and references of the 1985 UNGA Declaration in various draft proposals during the negotiations (interview with author, New York, November 2014).

The place that victims had played in earlier international tribunals did not accord well with these developments. Neither of the statutes of the post-war IMT's mentioned victims,<sup>397</sup> and the IMT trials rarely gave victims the opportunity to voice their views or experiences.<sup>398</sup> The ICTR and ICTY were criticized for failing to empower victims in trial processes and for failing to inform or engage victims in their communities. These deficits were particularly acute in the early years of the ICTY and ICTR, when it became clear that violence-affected communities were uninformed and often critical of the tribunals' activities.<sup>399</sup> These and other criticisms provoked many civil society organizations and states to push for the ICC to take a different approach to victims.<sup>400</sup>

During the Rome Statute negotiations, many state delegations and civil society actors viewed victims' issues as important. Benedetti *et al* observe that the "repeated discussion on these issues, as well as the innovations in the treaty and [later] ICC practice... are proof that the question of victims was central to the negotiations and a unique feature of the ICC itself."<sup>401</sup> On some issues, as will be discussed below, victim-related provisions were the focus of a clash between a transnational movement promoting women's rights and a transnational backlash against it. Other differences on victims' issues were driven by competing beliefs about the appropriate principles and practices of criminal justice, including disagreements between lawyers from common law and civil law traditions. Disputes also reflected different opinions about the nature of the court to be created. Gilbert Bitti, deputy leader of the French delegation to the Rome Conference, claims that there was a deep difference between those who wanted a "typical criminal court" that would prosecute a few "bad guys" in order to promote political stability, and those who wanted a court "whose focus is on the people who suffered, what they suffered, and what it can do for them."<sup>402</sup>

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<sup>397</sup> Zappalà, 2003, 220.

<sup>398</sup> See Dembour and Haslam, 2004; Karstedt, 2010; Moffett, 2012.

<sup>399</sup> Mégret, 2011; Orentlicher, 2008; Peskin, 2005.

<sup>400</sup> Haslam, 2004; Schabas, 2007; War Crimes Research Office, 2007.

<sup>401</sup> Benedetti *et al.*, 2013, 12.

<sup>402</sup> Interview with author, The Hague, The Netherlands, July 2011.

There were five key victim-related issues, all addressing perceived failings of previous international criminal tribunals:

1. Victim influence over the Prosecutor's decision to investigate and prosecute

A major debate in the Rome Statute negotiations concerned how investigations and prosecutions could be triggered, and thus how much independence the Prosecutor would have.<sup>403</sup> Some states wanted to limit this authority to state parties or the UNSC, and this was the formula proposed by the ILC. Other states and many NGOs were concerned that this would make the Court a pawn of geopolitical machinations among states. They proposed an independent prosecutor, capable of initiating investigations without a referral from a state party or the UNSC. UNSC permanent members and some other delegations feared that this approach would create a prosecutor acting as a “lone ranger running wild.”<sup>404</sup>

The interests of victims figured in these debates. Several NGOs proposed a “victim-triggered system,” in which victims could file complaints to the Court that the Prosecutor would act on unless he or she deemed there to be no reasonable basis for a prosecution.<sup>405</sup> Though most state representatives considered this an overly radical proposal, it helped shift the debate toward a less-threatening alternative.<sup>406</sup> Argentina also argued for victims to have “an opportunity to submit their case to the Prosecutor without totally relying on a State or Security Council referral.”<sup>407</sup> Ultimately, Argentina would propose a compromise – prosecutorial independence with judicial oversight – that maintained this opportunity for victims.

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<sup>403</sup> For treatments of this debate during the negotiations, see Fernández de Gurmendi, 1999; Glasius, 2006, 47-60.

<sup>404</sup> Ibid., 181.

<sup>405</sup> For one such proposal, see International Commission of Jurists, 1995, 37.

<sup>406</sup> Glasius, 2006, 58.

<sup>407</sup> Fernández de Gurmendi, 1999, 184.

## 2. Victim participation in legal proceedings

Another key issue was the role victims would play in trials and other judicial proceedings. Past international criminal tribunals had been criticized for giving victims few opportunities to add their voices to proceedings.<sup>408</sup> In previous tribunals, the prosecutor or defense decided what opportunities victims would have to speak, often focusing on forensic details and submitting them to hostile cross-examination. The former President of the ICTY, Claude Jorda, describes this approach at the ICTY and ICTR as one of treating the victim as an “instrument” in the proceedings.<sup>409</sup>

The circumscribed place for victims’ voices in trials and their lack of agency in contributing to proceeding conflict with transitional justice and restorative justice approaches.<sup>410</sup> They also highlight a difference in criminal justice in common law and civil law countries. In the Rome Statute negotiations, states with civil law systems wanted to ensure that their approaches were not marginalized, as they had been in the statutes and practices of previous international criminal tribunals.<sup>411</sup> Previous tribunals had followed the common law system in limiting the victim’s role to being a witness for the prosecution or defense.<sup>412</sup> Many countries with civil law systems allow

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<sup>408</sup> For analyses of the inclusion of victim participation in the Rome Statute, see Donat-Cattin, 1999; Friman, 2009; Haslam, 2004; War Crimes Research Office, 2007.

<sup>409</sup> Jorda and Hemptinne, 2002. Similarly, Bitti (2011) refers to this as the “utilitarian” use of victims in criminal trials.

<sup>410</sup> “Restorative justice” is itself a contested term, which has been applied to a broad range of practices and understandings of justice. Restorative justice seeks to right the damaged relationships between victims, perpetrators and communities, restorative justice processes often emphasize an active role for victims (De Greiff, 2006; Walker, 2006). Restorative justice processes are sometimes contrasted to criminal trials. I will therefore use the term “reparative justice” to refer to elements of restorative justice that can be used in conjunction with criminal trials.

<sup>411</sup> For a reflection on the competition and reconciliation of civil and common law approaches in the Rome Statute negotiations, see Brady, 2000. Schabas notes: “Many of the States involved in drafting the Rome Statute initially treated debates about the procedural regime to be followed by the Court as an opportunity to affirm the merits of their own justice systems within an international forum” (2007, 235).

<sup>412</sup> Victims’ input into criminal trials has been expanded in some common law countries with opportunities for victims to make statements about how crimes have affected them. These statements can contribute to sentencing decisions, a practice that is heatedly debated by legal scholars and practitioners (Ashworth, 2000; Garland, 2001).

victims to act as a party and play a role in seeking charges that can lead to the punishment of a perpetrator or to compensation for the victim. During the Rome Statute negotiations, some states and civil society actors promoted a similar approach for the ICC, arguing that it would improve the future court's ability to bring attention to victims' voices and address their interests.<sup>413</sup>

### 3. Assistance and reparations for victims

Victims often suffer physical harm, psychological damage, economic destitution and social neglect, and they often prioritize addressing these harms above the trial and punishment of perpetrators.<sup>414</sup> International criminal tribunals prior to the ICC failed to respond to these interests. The IMTs did not address issues of reparation. The ICTY and ICTR have the legal authority to provide restitution for property damage or theft but have little capacity to do so, and no authority to provide reparation to those who suffered crimes unrelated to property. Judges and prosecutors of the ICTY and ICTR have acknowledged that without being able to grant reparations, the tribunals struggle to promote reconciliation and justice for victims.<sup>415</sup> Former ICTY President Jorda thus argues that “legal reparations for those who have suffered harm constitutes an essential criterion for the restoration of social harmony.”<sup>416</sup>

In the Rome Statute negotiations, most civil society organizations supported reparations, often drawing on developments in international human rights law.<sup>417</sup> Among states it was more contentious. Some state representatives argued that reparations processes might complicate or

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<sup>413</sup> Since the ICC's creation, several other tribunals have given a role to victims in proceedings. Victims can act as “participants” at the Special Tribunal for Lebanon and as “civil parties” at the Extraordinary Chambers in the Courts of Cambodia.

<sup>414</sup> See, for instance, results of opinion surveys on transitional justice options in several countries: Pham *et al.*, 2005; Pham and Vinck, 2010; Pham *et al.*, 2007; Vinck *et al.*, 2008. See also Weinstein *et al.*, 2010.

<sup>415</sup> For this comment by ICTY judges, see International Criminal Tribunal for the former Yugoslavia, 2000. For this comment by the Prosecutor of the ICTY/ICTR, see Del Ponte, 2000.

<sup>416</sup> Jorda and Hemptinne, 2002, 1398.

<sup>417</sup> They could draw both on the UNGA's Basic Principles of Justice for Victims of Crime (1985) and text of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims, which would not be adopted by the UNGA until 2005 but which already existed in draft form during the Rome Statute negotiations.

distract the ICC from prosecuting perpetrators, which should be its primary function. A second controversial issue was whether the ICC could issue reparations orders against states as well as against convicted individuals.<sup>418</sup>

#### 4. Victims of sexual and gender-based crimes

Sexual violence and violence against women were largely neglected in the post-war IMTs. Despite widespread rape committed by German and Soviet forces, it was not included in the indictments of accused persons at the Nuremberg tribunal. By the time of the Rome Statute negotiations, sexual violence and violence against women were prominently featured in the trials at the ICTR and ICTY as well as in the media accounts of violence in Rwanda and the former Yugoslavia. Moreover, in the 1990s a transnational movement for women's rights had mobilized around issues of sexual violence and violence against women. This feminist movement included civil society organizations, academics and many state officials.<sup>419</sup> It aimed to raise awareness about violence against women and address some of its structural causes, including cultural assumptions and practices around gender. As will be discussed below, members of this transnational movement created the Women's Caucus for Gender Justice, a civil society network that played an advocacy role during the Rome Statute negotiations. The transnational movement faced opposition from a counter-movement, which included states and civil society organizations that opposed access to abortion, non-traditional notions of gender, and rights for homosexual or transsexual individuals.<sup>420</sup>

#### 5. Victim treatment and protection

Victims who provide information to court officials or who act as witnesses can be exposed to intimidation or retribution, or may suffer from recounting traumatic experiences to court officials. State representatives and civil society actors wanted to ensure that the rights and

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<sup>418</sup> Muttukumar, 1999. See below for more on these debates.

<sup>419</sup> Copelon, 2000; Halley, 2008.

<sup>420</sup> See Copelon, 2000; Oosterveld, 2005; Steains, 1999.

wellbeing of victim-witnesses would be protected. It was an important but uncontroversial issue promoted by victims' rights advocates in the negotiations.

These five issues of victims' rights or victim inclusion – with the exception of victim treatment and protection – remained unresolved during negotiations leading to the Rome Conference. When the conference began on 15 June 1998, key provisions for victims in the draft text were “highly bracketed and rife with alternative formulations.”<sup>421</sup> The following sections examine the actors engaged with these issues and assess their representative claims, their opportunities for advocacy, and the eventual outcome of negotiations.

#### **5.4 Representing Victims: Actors and Representative Claims**

Many civil society and state actors made references to victims and their interests over the course of the Rome Statute negotiations. Some victims of past international crimes attended informal meetings or formal conferences, such as members of Argentina's Mothers of the Plaza de Mayo who protested during the speech of their Justice Minister at the Rome Conference.<sup>422</sup> Rather than examining all references to victims, I focus on three groups that consistently advocated for victims' interests throughout the negotiations. Two were NGO networks: the Victims' Rights Working Group and the Women's Caucus for Gender Justice. The third group consists of state representatives who had a keen interest in victims' issues, and who allied with civil society organizations to promote certain victim-related provisions. This section describes the three groups, the positions they took and the basis for their representative claims.

Before doing so, it is necessary to clarify the kinds of claims that could be made on behalf of victims. Many actors invoked past and future victims in a general sense. For instance, Canadian Foreign Minister Lloyd Axworthy told fellow state representatives shortly before the Rome

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<sup>421</sup> Danieli, 1998.

<sup>422</sup> Terra Viva, 1998, 1.

Conference that they must remember that the “ultimate goal” is “not the Court as an end in itself, but peace, reconciliation and justice for the victims.”<sup>423</sup> At the commencement of the Rome Conference, UN Secretary-General Kofi Annan told the assembled diplomats: “The eyes of the victims of past crimes, and of the potential victims of future ones, are fixed firmly upon us.”<sup>424</sup> In these and many other pronouncements, victims served as a rhetorical figure or trope to justify a general statement about the potential ICC.<sup>425</sup> References to victims, including victims of the Holocaust and of recent violence in Rwanda and the former Yugoslavia also helped smooth over some of the issues of inter-cultural conflict that can bog down UN negotiations. As Benedetti and Washburn note, “People everywhere felt the same loathing and anger about such crimes. The UN had no need to walk softly around cultural relativism here.”<sup>426</sup>

Rather than looking at these general or rhetorical references to victims, this chapter focuses on claims in negotiations that more concretely addressed the ways in which the ICC would identify and interact with actual victims of international crimes. However, the membership of this constituency remained ambiguous at the time of the negotiations. These victims would only exist in the future, since the Rome Statute would not enter into force for several years and the ICC would only have jurisdiction over violations committed after that date.<sup>427</sup> For that reason, representative claims of advocates for victims must be evaluated as claims to speak *about* this victim constituency. Advocates could not claim to speak *for* future victims, as no constituency existed that could engage representatives in a relationship of authorization, accountability and responsiveness. Nor could an actor speak *as* a future victim. Those who could speak *for* or *as*

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<sup>423</sup> From his ministerial statement to the ICC Preparatory Committee on April 3, 1998, quoted in ICC Monitor, 1998a.

<sup>424</sup> United Nations, 1998.

<sup>425</sup> It would be interesting and valuable to analyze the rhetorical use of the term “victims” by actors throughout the negotiations, to better understand the category’s construction in discourse and operationalization in debates. That analysis is beyond the scope of this dissertation.

<sup>426</sup> Benedetti and Washburn, 1999, 23-24.

<sup>427</sup> Several NGOs proposed that the ICC should have jurisdiction over crimes that predated its creation, since those crimes were illegal under international law when they were committed. However for states “the idea was unmarketable and was never seriously entertained during the drafting” (Schabas, 2007, 68).

victims of *past* crimes could make valuable and legitimate contributions to debates by speaking *for* future victims, but could not promote the agency or social recognition of future victims by speaking *for* or *as* them.

Claims to speak *about* victims can be assessed on epistemic and normative grounds.<sup>428</sup> The epistemic acceptability of claims is evaluated through deliberative engagement with relevant epistemic communities. Individuals have expert authority when an audience accepts that the claims they make are likely to meet this criterion, and therefore defer to their judgment. The normative acceptability of claims requires that an audience can recognize and agree on the moral force of the claim. Actors mobilize moral authority as a result of the substance of their claims or – in some cases – the qualities of the individual making it.<sup>429</sup>

#### *Victims' Rights Working Group (VRWG)*

The VRWG was one of several working groups that operated under the auspices of the Coalition for the International Criminal Court (CICC), the overarching network of NGOs engaged in advocacy for the ICC.<sup>430</sup> The various CICC members organized themselves in region-specific or issue-specific caucuses to pool knowledge and coordinate lobbying.<sup>431</sup> The VRWG was officially created in December 1997, although members had worked together on victims' issues before then.<sup>432</sup> It was coordinated by REDRESS, a UK-based NGO that advocated internationally on

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<sup>428</sup> This approach to the epistemic and normative validity draws on the discourse ethics of Habermas (Habermas, 1996), while recognizing limitations of that approaches assumptions about rationality and communication (cf. Young, 2000, among others).

<sup>429</sup> For more on this, see Chapter Four, Section 4.2.

<sup>430</sup> The CICC was founded in 1995 by the World Federalist Society and Amnesty International. It was created to be “an informal coalition of supportive non-governmental organisations, for the purpose of strategising, sharing information, and working together to support the creation of this idealistic institution” (Pace and Panganiban, 2002, cited in Cakmak, 2008, 376).

<sup>431</sup> By the time of the Rome Conference in 1998, the CICC had grown to include over 800 NGOs, ranging from human rights organizations to student legal associations to a three-person association of former prosecutors at the Nuremberg IMTs. It was regionally diverse, with all geographic areas well represented except for Asia, the Middle East and North Africa. For more on the CICC, see Glasius, 2006; Pace and Thieroff, 1999.

<sup>432</sup> Danieli, 1998

behalf of torture survivors. Major human rights NGOs, such as Amnesty International and Human Rights Watch, were supportive of the VRWG but played a limited role in developing and promoting its positions.<sup>433</sup> Instead, key members of VRWG belonged to small NGOs or were academic experts.

VRWG members did not produce joint policy papers but generally agreed on positions regarding victim-related provisions.<sup>434</sup> They pushed for significant victim participation in judicial processes and for robust victim and witness protection. They promoted a comprehensive approach to victim reparations, based on recent developments in international human rights law. They also wanted a trust fund for victims to help provide assistance and reparations to victims.

In developing and promoting these claims, members of the VRWG drew primarily on expert authority in international human rights law and international criminal law, and on expert and moral authority from working with survivors of past violence. For instance, Yael Danieli, a particularly influential member, had conducted research working with survivors of the Holocaust and their families, as well as victims of conflicts in countries including Argentina, Rwanda, South Africa and the former Yugoslavia.<sup>435</sup> She and several other members of the VRWG had been advocating for victims' rights in international negotiations and legal texts for over a decade, including the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985) and the UN Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law (2005).<sup>436</sup> According to Danieli, "We had been working on this for years, the Rome Statute was not the first step."<sup>437</sup> The

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<sup>433</sup> Author interview with Fiona McKay, co-founder and coordinator of the VRWG while a member of REDRESS (interview conducted in The Hague, The Netherlands, September 2013), and author interview with Yael Danieli, co-founder of the VRWG (interview conducted in New York, USA, June 2014).

<sup>434</sup> Ibid.

<sup>435</sup> Danieli, 2005, 2009.

<sup>436</sup> As noted above, draft text of this declaration was in circulation by the time of the Rome Statute negotiations. The declaration was developed under the guidance of Theo van Boven and Cherif Bassiouni between 1989 and 2000, and its framework is sometimes referred to as the "van Boven principles".

<sup>437</sup> Interview with author.

expertise of some VRWG members enabled them to influence state delegations, Danieli observes: “The diplomats were only partially informed on these matters, because they were working on all parts of the Statute and not just victims’ issues. We would make suggestions to diplomats and sometimes we would persuade them.”<sup>438</sup>

Members of the VRWG also mobilized moral authority. They brought victims of earlier conflicts (or their families or representatives) to formal and informal meetings during the negotiations. These interventions helped bring attention to the problems that future victims might face. The VRWG members also argued that people’s moral obligations to future victims required more than prosecutions. For instance, VRWG coordinator Fiona McKay declared to the diplomats who convened for the Rome Conference: “Punishing criminals is not enough. There will be no justice without justice for victims. And in order to do justice for victims, the ICC must be empowered to address their rights and needs.”<sup>439</sup>

#### *Women’s Caucus for Gender Justice (Women’s Caucus)*

The Women’s Caucus, like the VRWG, was a network of experts and civil society organization representatives that organized under the auspices of the CICC. It was larger than the VRWG, claiming the support of more than 300 organizations.<sup>440</sup> As noted above, the Women’s Caucus was part of a transnational movement to promote women’s rights. One key tactic of this movement was to “gender the agenda” of multilateral treaty-making, and the Rome Statute negotiations was one of several international conferences that featured a Women’s Caucus.<sup>441</sup>

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<sup>438</sup> Ibid.

<sup>439</sup> McKay, 1998.

<sup>440</sup> See <http://www.iccwomen.org/wigjdraft1/Archives/oldWCGJ/aboutcaucus.htm>. (Accessed 19 November 2014).

<sup>441</sup> Friedman, 2003. According to caucus member Donna Axel, many caucus members saw the Rome Statute as an attempt to codify into law the women’s rights made prominent at the 1993 World Conference on Human Rights and the 1995 World Conference on Women (quoted in ICC Monitor, 1998b, 8).

The Women's Caucus active in the Rome State negotiations arose from a caucus that had participated in the Fourth World Conference on Women in Beijing in 1995.<sup>442</sup>

The Women's Caucus pushed to ensure that the ICC would have clear and complete definitions of sexual and gender-related crimes, and would be committed to pursuing them. Its members advocated for the term "gender" in the statute and the recognition of gender violence as well as sexual violence.<sup>443</sup> According to Rhonda Copelon, a cofounder and legal adviser of the Women's Caucus, it was necessary to integrate gender concerns into international criminal law because sexual violence had long been invisible, trivialized, or even accepted as "an inevitable by-product of war, the necessary reward for the fighting men."<sup>444</sup> The Women's Caucus also promoted the crime of "enforced pregnancy." The crime could apply to situations where women were impregnated against their will and forced to carry the pregnancy to term, as occurred in ethnic cleansing in the former Yugoslavia. Finally, the Women's Caucus also supported the VRWG's aims of a comprehensive approach to reparations for victims, legal participation, and robust victim and witness protection.

The Women's Caucus thus pushed to re-characterize the category of victims, significantly emphasizing the way in which sexuality and gender roles were the targets of violence.

To promote these claims, the Women's Caucus drew on the expert authority of its members in human rights law and international criminal law. Many members had worked with survivors of sexual violence, and many had advocated on the issue in domestic courts, human rights bodies and legislative processes.<sup>445</sup> Two organizations that belonged to the Women's Caucus had issued

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<sup>442</sup> Benedetti *et al.*, 2013, 69.

<sup>443</sup> Gender-based violence is rooted "primarily in socially constructed roles, manifestations, and stereotypes," while sexual violence is "reflected primarily in biological differences" (Koenig and Askin, 1999, quoted in SaCouto, 2011, 297-8). "Gender-based violence" includes violence that targets gender roles and practices, such as female genital mutilation or enforced heterosexuality.

<sup>444</sup> Copelon, 2000, 220.

<sup>445</sup> Copelon, 2000; Glasius, 2006.

major reports on sexual violence in Rwanda and the initial failures of the ICTR to address it.<sup>446</sup> Some members of the Women’s Caucus had considerable diplomatic expertise, gained through their advocacy for women’s rights in other multi-lateral negotiations.<sup>447</sup>

The Women’s Caucus members also made normative claims about the unmet need to address sexual violence in recent conflicts, building on widespread moral outrage about the prevalence of rape in recent conflicts in Rwanda and the former Yugoslavia. The moral authority of the Women’s Caucus was strengthened by including organizations that worked with or included survivors of sexual violence. The membership was also geographically diverse, with organizations and Executive Committee members from Asia, Africa and Latin America as well as Western countries. This diversity was important for countering claims by the opponents of the Women’s Caucus, who accused them of imposing Western feminist beliefs on other cultures.

Moral and expert authority were frequently combined, as in a policy paper by Amnesty International that included descriptions of sexual violence against women in Liberia, Iraq and Bosnia, along with legal arguments about crime definitions and reparations.<sup>448</sup> Summing up the authority the Women’s Caucus deployed, Glasius writes that it “included both women from conflict areas and experts on the ‘hard-core legal stuff.’... While the former could speak with moral authority about violations of women’s rights, the latter could invoke emerging precedents in national and international law.”<sup>449</sup>

The Women’s Caucus, unlike the VRWG, had a clear adversary in the Rome Statute negotiations: a coalition of socially-conservative or “pro-family” states, which included the Vatican, most Arab countries and some Catholic countries.<sup>450</sup> These states were supported by

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<sup>446</sup> African Rights, 1994; Nowrojee, 1996

<sup>447</sup> Copelon, 2000; Glasius, 2006, 79-81.

<sup>448</sup> Amnesty International, 1998.

<sup>449</sup> Glasius, 2006, 81.

<sup>450</sup> This coalition can’t be designated as “religious” because many religious groups argued for a strong ICC and some called for attention to gender issues. The coalition can be called “pro-family,” Glasius

several North American NGOs such as the REAL Women of Canada and the International Right to Life Federation.<sup>451</sup> This coalition challenged claims about gender that might legitimate homosexuality, and challenged legal arguments that might legitimate abortion. As a result, the crime of enforced pregnancy “became the most contentious gender issue at Rome, with opponents, including the Vatican and some Catholic and Arab states, arguing that making enforced pregnancy a crime implied a state obligation to permit abortion.”<sup>452</sup> However, the crime’s inclusion in the statute was supported by Bosnia and Rwanda. Both delegations argued that the act had happened in their countries. Bosnia, a predominately Muslim state whose citizens had suffered from the crime, was seen as having a particular moral authority on the issue.<sup>453</sup>

### *State officials as victims’ advocates*

Several state representatives were strong and consistent proponents of victims’ interests in the negotiations. These individuals often took similar positions to the VRWG and Women’s Caucus and actively worked with civil society allies to build support among other states. Why did some state representatives play this role? In some cases they were following the position set by their own government.<sup>454</sup> For instance, France committed itself to supporting victim participation, in part because it wanted to expand the use of a civil law approach at the ICC. Several Latin American countries, which had begun to address past human rights violations domestically through trials and truth commissions, insisted that ICC judicial processes should provide opportunities for victims’ voices.<sup>455</sup> Several states were committed to promoting women’s rights

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argues: “The term ‘pro-family’ [is] preferred over ‘pro-life’ because the concerns of these groups at the ICC extended beyond abortion, including opposition to the use of the term ‘gender’” (2006, 77).

<sup>451</sup> Ibid., 83-4.

<sup>452</sup> Ibid., 89.

<sup>453</sup> Glasius, 2006, 89; Steains, 1999.

<sup>454</sup> Author interviews with Gilbert Bitti of the French delegation, Hans-Peter Kaul of the German delegation (interview conducted in The Hague, The Netherlands, September 2013), and a member of a Latin American delegation.

<sup>455</sup> For instance, the Argentinian delegate to a PrepCom meeting argued that giving victims a voice was critical, and that it was “essential to give the victims an opportunity to make representations to the Prosecutor” (quoted in Benedetti *et al.*, 2013, 165).

and attentiveness to gender, including Australia, Bosnia, Canada, Costa Rica, Sweden and South Africa.<sup>456</sup> At the Rome Conference, Canada and Costa Rica added members of the Women's Caucus to their official delegations, providing an inside track for the caucus to state negotiations.<sup>457</sup>

Often, state representatives engaged vigorously in victims' issues out of personal interest or conviction rather than their state's official policy. Several diplomats were devoted to certain victim-related provisions. For instance, Theo van Boven, a law professor who had been the UN's Special Rapporteur on the issue of victims' rights to reparations, was the head of the Dutch delegation. The head of the French delegation, Béatrice Le Fraper du Hellen, strongly supported reparations for victims as well as victim participation. Her deputy, Gilbert Bitti, was given the role of promoting those issues during the negotiations. The personal commitment of these two French officials, combined with France's influence as a permanent member of the UNSC and sway with francophone countries, meant that they were particularly important advocates for victims' issues.

Some state representatives invested considerable time and energy into understanding and promoting victims issues. McKay, the VRWG coordinator, observes that the convictions of individual diplomats played a significant role in their actions: "They spent hours and hours of their time in the cafeteria with us or with other delegations, trying to agree on text for this or that victims' issue...they were doing it because they thought it was important."<sup>458</sup>

These and other individuals were representatives of their states, but to the extent that they went beyond or challenged the institutional expectations for their role they can also be seen as *self-appointed* representatives of victims.<sup>459</sup> Some had extensive expert authority to draw on. Some had particular moral authority, such as Bosnian delegates who lobbied for the criminalization of

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<sup>456</sup> Glasius, 2006, 81.

<sup>457</sup> Ibid., 81.

<sup>458</sup> Interview by author of Fiona McKay.

<sup>459</sup> See Chapter Four for more on self-appointed versus institutionally-designated representatives.

“enforced pregnancy, mentioned above.”<sup>460</sup> Not all diplomats who acted as self-appointed representatives for victims could make strong claims to expert or moral authority, however. One delegate from a European state observes: “Some spoke with emotion about the fates of victims...and supported positions that they did not really understand, or had not thought through how they could work in the context of the ICC.”<sup>461</sup> Importantly, regardless of their expert or moral authority, their political authority as state representatives gave them significant opportunities for advocacy in negotiations.

### *Challenges of representing future victims*

Advocates often made strong claims to speak *about* victims during the Rome Statute negotiations, on epistemic and normative grounds. This ability to represent victims was, however, necessarily challenged by the fact that these victims would only exist in the future. Future victims might have different needs or desires than those promoted by advocates in the Rome Statute negotiations. It is therefore noteworthy that advocates for victims in the Rome Statute negotiations were primarily elite members of transnational advocacy movements in international human rights and women’s rights. As such, they had different backgrounds and institutional affiliations compared to many civil society actors who would later make strong claims to speak *for, as* and *about* actual victims in Uganda, Kenya and other countries where the ICC has intervened.

In the Rome Statute negotiations, advocates for rights of future victims did not promote some positions that future representatives of actual victims might promote. For instance, they did not strongly advocate for criminal liability for “unconstitutional change in government.” Abass argues that the absence of ICC jurisdiction over such this crimes is one of several gaps in the

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<sup>460</sup> Struett, 2008, 121.

<sup>461</sup> Interview with author, senior member of a European state delegation to the Rome Conference, conducted in 2013.

Court's ability to promote justice in Africa.<sup>462</sup> Furthermore, victims' advocates in the Rome Statute negotiations rarely advanced approaches to justice that differed from criminal processes in Western countries. While there was a significant debate between civil and common law approaches during the negotiations, there was little attention to alternate processes that future victims might desire.<sup>463</sup>

The representation of future constituencies is challenging but not rare. Institutions and laws are frequently created that will affect constituencies whose future membership and qualities are unclear. For instance, this occurs when democratic states create laws that will affect future schoolchildren, crime victims, or people in need of medical care, as well as in more striking cases such as the attempt to develop an international framework to address future climate-displaced migrants.<sup>464</sup> The "conversation model" of representation developed in Chapter Three helps us understand how such situations may be addressed. On this model, representatives make claims about a constituency that constituency members and other representatives of the constituency respond to at a later point in time, supporting these claims, contesting them, proposing alternatives, and so forth. We become more concerned about the quality of representation when the "gaps" in these conversations are longer, as it becomes more likely that decisions will be made based on the claim before there are chances for a "response" from the constituency. This challenge can be partly addressed by designing flexibility into institutions so they can accommodate diversity of constituencies at a later time.<sup>465</sup>

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<sup>462</sup> Abass, 2013. This crime, along with crimes committed by corporations, are proposed as crimes under the jurisdiction of the African Union's proposed African Court of Justice and Human and Peoples Rights (Assembly of the African Union, 2014).

<sup>463</sup> The absence of approaches to justice that diverge significantly from the largely Western criminal justice model advocated during the Rome Statute negotiations speaks to a larger problem that the ICC, and international criminal justice more generally, faces. As Almqvist argues, "The unfortunate conditions associated with a culturally diverse environment – limited (or lack of) understanding, alienation and disagreement – if ignored, seriously undermine the efforts of international criminal tribunals to deliver justice" (2006, 746).

<sup>464</sup> For more on this topic, see Chapter Seven, Section 7.2.

<sup>465</sup> For more on this, see my discussion of the subsidiarity principle in Chapter Three, Section 3.5.

On this analysis, the absence of some perspectives about future victims' interests and ideas of justice in the Rome Statute negotiations would make it important for actual victims to enter the conversation at a later date. Doing so would require provisions that enable alternate approaches to justice to be considered and – possibly – to shape Court behaviour. In Chapter Six I explore this issue in the context of the ICC's intervention in Uganda, where some victims' representatives argued that the Court was imposing an unwanted and possibly harmful form of justice. There I find that both the Prosecutor and the Pre-trial Chamber at the ICC could in principle take into consideration a desire by Ugandan victims for an alternate form of justice to the ICC, but have not significantly done so in practice.

### **5.5 Opportunities for Advocacy and Publicity: Strategies for Arguing and Bargaining**

The Rome Statute negotiations have been acknowledged as an example of the “new diplomacy,” which features extensive and impactful participation by civil society, in part through coordination with small and medium-sized states.<sup>466</sup> In negotiations of the Rome Statute and the Mine Ban Treaty, these coalitions achieved robust treaties that deviated from great power preferences.<sup>467</sup> For the advocates of victims' issues, these features of the new diplomacy provided significant opportunities to access and contribute to the Rome Statute negotiations

In this section I describe the forms of access that members of the VRWG and the Women's Caucus had to state negotiations. I then analyze the institutional factors that promoted arguing over bargaining at some points in the negotiations, which enabled victims' advocates to use moral and expert authority to influence outcomes. Furthermore, publicity – the third element of mediated inclusion – played a role in empowering victims' advocates. The transparency of negotiations promoted deliberation and limited opportunities for powerful states to impose their preferences on the outcome. However, victim-related issues were not advanced by reason-giving

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<sup>466</sup> See Axworthy, 1998; Cooper *et al.*, 2002.

<sup>467</sup> Bower, 2012; Price, 1998.

alone. State officials that advocated for victims' interests used their political authority and bargaining capacity to secure the provisions they desired in the final text of the statute.

### *Access to decision-making*

Members of the VRWG and the Women's Caucus had significant access to decision-making during different phases of the Rome Statute negotiations. Several factors contributed to this high level of civil society access.

First, civil society actors had tight working partnerships with sympathetic state delegations. Indeed, there was considerable blurring of lines between the two groups.<sup>468</sup> As will be discussed below, civil society organizations and states convened conferences and meetings where individuals interacted with considerable formal equality, and where expert and moral authority could be more influential. For instance, international criminal law expert Cherif Bassiouni hosted annual meetings in Siracusa, Sicily, where generally pro-ICC state representatives, civil society members and academics cultivated personal relationships and negotiating positions.<sup>469</sup> Some civil society actors had access to formal state negotiations by joining state delegations. For instance, law professor Theo van Boven headed the Dutch delegation, and Women's Caucus member Valerie Oosterveld joined the Canadian delegation.

Second, states could not control or limit access by civil society to most discussions. UN officials gave the coordinator of the CICC authority over the accreditation of NGOs to participate in the Rome Conference.<sup>470</sup> At the conference, there was no separate forum where civil society would be hived off to discuss matters with each other. Instead, they shared the hallways and had access to the plenary meetings along with state representatives.<sup>471</sup>

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<sup>468</sup> As Glasius observes, the negotiations "were marked by a good deal of cross-over between academics, NGO staff and state representatives" (2006, 45).

<sup>469</sup> *Ibid.*, 55-6.

<sup>470</sup> Benedetti *et al.*, 2013, 77.

<sup>471</sup> *Ibid.*, 21. Also, author interviews with Hans-Peter Kaul, Fiona McKay and a state delegate to the Rome Conference.

Access by the VRWG and Women's Caucus members to negotiations was not unlimited. State representatives sometimes met in closed discussions, particularly when negotiations became most difficult. Negotiations became considerably more secretive in the final ten days of the Rome Conference. But overall, there was unprecedented civil society access to negotiations. Israeli Chief Counsel Alan Baker, whose delegation opposed many of the positions advanced by CICC members, later told the *Wall Street Journal*: "In all my years of international work, I've never seen the NGOs play a more powerful role... They were in on nearly every meeting. They were in on everything."<sup>472</sup>

### *Deploying expert and moral authority*

Advocates for victims' interests used a variety of strategies to influence state negotiations. These included classic lobbying techniques, such as writing letters, issuing press releases, and personally lobbying government officials in their foreign offices or home capitals.<sup>473</sup> In addition to these approaches, the VRWG and the Women's Caucus used two strategies to create opportunities that would maximize the impact of their expert and moral authority.

First, working together with sympathetic states, civil society organizations organized conferences and meetings around the world that emphasized reason-giving and expertise rather than political confrontation. For instance, REDRESS convened a conference on reparations in Geneva during the PrepCom phase, which brought psychologists and legal experts together with "the key diplomats of the states that were really taking the lead on this issue."<sup>474</sup> The aim for this conference and others, McKay says, was to produce proposals for the statute that would be both "weighty and authoritative," and would have momentum by receiving state backing.

Deitelhoff (2009) argues that meetings and conferences such as this, held in the months leading up to the Rome Conference, served as "islands of persuasion" in the negotiations. These

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<sup>472</sup> Quoted in Pace and Thieroff, 1999, 201.

<sup>473</sup> Danieli, 1998.

<sup>474</sup> Author interview with Fiona McKay.

encounters brought experts and activists together with the representatives of states that did not yet have firm positions. “Designed as learning forums,” Deitelhoff writes, “[the conferences] strove to approximate the ideal of a rational discourse.”<sup>475</sup> State positions shifted during the period of negotiations when these deliberative encounters were taking place, suggesting that they helped “increase the importance of arguments and reasons within negotiations, thereby empowering weak actors who [would] usually lack bargaining powers.”<sup>476</sup>

Second, members of the VRWG and the Women’s Caucus were able to shape state positions by providing delegations with expert reports and detailed legal arguments. McKay observes that state representatives would frequently use VRWG recommendations in their negotiating positions. “I could often see that our arguments would be picked up; not necessarily the exact wording we might have proposed in the beginning, but a lot of the ideas.”<sup>477</sup> The expert proposals by these civil society groups were particularly influential when delegations lacked sufficient expertise, a common situation for many small and even medium-sized countries.<sup>478</sup>

#### *Publicity of the negotiating process*

For much of the Rome Statute’s creation, negotiations were conducted with considerable transparency. State delegates were aware of attention by civil society actors, thereby disrupting the private club mentality that sometimes pervades diplomatic negotiations. For instance, during the meetings of the Preparatory Committee at UN headquarters, civil society members interacted with state delegates and observed their discussions from elevated seating around the meeting hall. As a result of this arrangement, Benedetti *et al* note, “government delegates to the Preparatory Committee, much to the dislike of some, often felt that they were under constant

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<sup>475</sup> Deitelhoff, 2009, 56.

<sup>476</sup> *Ibid.*, 62.

<sup>477</sup> Author interview with Fiona McKay.

<sup>478</sup> See Barrow: “Often the national delegates...had little experience or understanding of the complicated mass of legal concepts and different legal systems involved, and were grappling with large amounts of information. They thus relied on the extensive legal expertise provided by NGO groups” (2004, 18). Two representatives of small or medium-sized states made similar observations to the author in interviews (conducted in September 2013 and November 2014).

observation.”<sup>479</sup> Members of the VRWG and the Women’s Caucus were present in meetings or, on occasions when they were excluded, would receive updates from allied state representatives.

During the Rome Conference itself, three daily news teams covered developments. The CICC regularly surveyed diplomats to provide the latest tallies of those for and against certain provisions. These surveys often revealed that the positions of a few powerful or outspoken states were in the minority, while the majority supported the positions held by members of the CICC and Like-Minded Group.<sup>480</sup> The head of the German delegation, Hans-Peter Kaul, explains how he allied with NGOs to improve the transparency of the Rome Statute negotiations:

I decided that this was an alliance with a strong potential, so I sought their support, I sought their advice, and I informed them regularly about critical developments. I had no difficulties to establish full transparency of the negotiations. States, if the dealing and wheeling gets difficult they like to do it in obscurity... [which] brings out their *realpolitick* tendencies.<sup>481</sup>

In addition to the transparency of proceedings, civil society organizations – and some state governments – tried to raise broader public awareness about the attempt to create a permanent international criminal court. Organizations such as Amnesty International and Human Rights Watch mounted publicity campaigns; academics and civil society actors wrote newspaper columns; and the CICC provided up-to-date information and expert commentary to journalists.<sup>482</sup> Silvia Fernández de Gurmendi, an Argentinian delegate, concluded that: “It was the dedicated efforts of NGOs in all corners of the world that put the ICC on the political agenda for many

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<sup>479</sup> Benedetti *et al.*, 2013, 21.

<sup>480</sup> Glasius, 2006, 59.

<sup>481</sup> Interview with author, The Hague, The Netherlands, August 2013.

<sup>482</sup> Barrow, 2004; Benedetti *et al.*, 2013.

countries.”<sup>483</sup> These efforts helped mobilize support for the ICC by some governments, and brought greater scrutiny and transparency to the negotiations themselves.

*Achieving results through arguing and bargaining*

As a result of these strategies and conditions, the Rome Statute negotiations featured considerable deliberation. This occurred for several reasons.<sup>484</sup> First, as noted, the negotiations were mostly transparent, thereby exposing claims that were self-interested, poorly-justified or epistemically-weak. Second, the conveners or chairpersons of negotiations cultivated open discussion and solutions, rather than entrenched state positions.<sup>485</sup> Third, because the negotiations aimed to create an institution that would address future political violence, governments had little concern that provisions would be used against them for past acts. State interests were therefore less clear. State discussions shifted toward principles that could be applied impartially.<sup>486</sup>

The Rome Statute negotiations were not free of acrimony or bargaining, however. The Women’s Caucus faced strong opposition from a group of states led by the Vatican and Arab countries, which Women’s Caucus co-founder Rhonda Copelon uncharitably referred to as the “Unholy Alliance.”<sup>487</sup> Civil society groups that opposed the Women’s Caucus accused them trying to use the Rome Statute negotiations to push an agenda that would “drastically restructure societies throughout the world”<sup>488</sup> and even of trying to create a Court that would criminalize those people “who object to abortion on demand; those who oppose mandating the acceptance of homosexuality in the schools on the basis of religious teachings; [and] those who have the

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<sup>483</sup> Quoted in Benedetti *et al.*, 2013, 78.

<sup>484</sup> Deitelhoff, 2009; Glasius, 2006; Struett, 2008.

<sup>485</sup> See, for instance, Kirsch and Robinson, 2002, 72-78.

<sup>486</sup> Struett, 2008.

<sup>487</sup> Copelon, 2000, 236.

<sup>488</sup> Position paper of the David M. Kennedy Center for International Studies, circulated during the Rome Conference, as cited in Oosterveld, 2005, 63n51.

temerity to preach morality from their pulpits, as they have for thousands of years.”<sup>489</sup> This was a cultural struggle rather than a technical debate, and it would not be resolved by argument alone. The discussion about legal participation, too, opened a cultural rift between common and civil law states.

It was therefore necessary for state allies of the victims’ advocates to engage in strategic bargaining to ensure that their desired provisions entered the Rome Statute. State delegates that acted as victims’ advocates did not rely entirely on expert and moral authority, they also deployed their political authority and bargaining power. The following section describes some of the negotiating tactics that led to the final outcomes on victim-related provisions.

## **5.6 Rome Statute Outcomes: Key Victim-Related Provisions**

Advocates for victims’ rights were largely successful in securing their aims for victim-related provisions in the Rome Statute. This section summarizes these outcomes and makes two general observations about the results.

### *1. Victims’ influence over the Prosecutor’s decision to investigate and prosecute*

The question of prosecutorial independence was a central disagreement through months of negotiations. Shortly before the Rome Conference, Argentina and Germany proposed a compromise that combined prosecutorial independence with a judicial safeguard: the Prosecutor would have the authority to initiate investigations on his or her own accord, but that such *proprio motu* investigations would require the approval of a panel of judges of the Pre-Trial Chamber.<sup>490</sup> The judicial oversight would help guard against a “maverick” Prosecutor, but the Prosecutor

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<sup>489</sup> Reflections on the gender debate in the Rome Conference by a civil society member in the “pro-family” camp (Sabom, 1999).

<sup>490</sup> Fernández de Gurmendi, 1999, 183.

would not be limited to cases accepted by State Parties or the UNSC. This proposal satisfied a majority of state delegations and was incorporated into the Rome Statute.<sup>491</sup>

Victims' advocates did not play a major role in securing this prosecutorial independence. However, the Statute does provide opportunities for victim inclusion in decisions about investigations and prosecutions. The Prosecutor is obliged to take into account the "interests of victims" when deciding to initiate investigations (53(1)(c)), or when deciding not to proceed with prosecutions after investigations (53(2)(c)). Furthermore, while the Prosecutor is not *obliged* to address complaints by victims, he or she can initiate prosecutions based on information received from victims, among other sources.

The Prosecutor's decisions about which situations, individuals and charges to pursue have proven to be extremely contentious. In Chapter Six I discuss prosecutorial decisions in Uganda that provoked strong criticism by some victims' representatives.

## *2. Victim participation in legal proceedings*

The role of victims in proceedings remained controversial and unresolved until the final weeks of the Rome Conference.<sup>492</sup> During the PrepCom negotiations, many states had been open to victim participation, provided that victim participation would not violate the rights of the accused or challenge the Prosecutor's role. Members of the VRWG and allied state officials built support for the idea through criticisms of past tribunals, and drew on text and principles of the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985). Some states – primarily with common law systems – continued to oppose the idea entirely.

Before and during the Rome Conference, the French delegation led the push for victim legal participation. Its deputy leader, Bitti, lobbied extensively and received expressions of support

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<sup>491</sup> The negotiation of an independent prosecutor has received extensive consideration elsewhere. See Deitelhoff, 2009; Fernández de Gurmendi, 1999; Schabas, 2010, 314-324.

<sup>492</sup> This account draws on interviews with Gilbert Bitti, Fiona McKay, Hans-Peter Gaul, and a Latin American state representative who participated in Rome Conference negotiations on the issue.

from most Latin American, African and European delegations. With this support, he informed the few remaining opponents to victim participation that the French would not back down on the issue. He threatened to maneuver the US delegation, a principal opponent, into taking a solitary position “against victims” in the plenary hall. In Bitti’s recollection, the American diplomat exclaimed, “Gilbert, the NGOs will eat me alive!” and Bitti responded, “Yes, and I will enjoy the show.”<sup>493</sup> The American delegation backed down.

The resulting Rome Statute provision that establishes the right of victim participation reads:

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. (Article 68(3))

The article gives considerable discretion to judges to decide what participation entails, leaving unclear both its normative aim and operationalization. Schabas observes, “When the *Rome Statute* was being drafted, few could have imagined the importance that this short and rather obscure provision would have upon the proceedings at the Court.”<sup>494</sup> The implementation of the provision has been difficult and remains controversial today. In Chapter Six I examine the participation of victims in the Kenya situation to assess the provision’s strengths and limitations in advancing victim inclusion.

### 3. *Assistance and reparations for victims*

Victims’ rights to reparations faced resistance from a number of state delegations over the course of the Rome Statute negotiations. Members of the VRWG, as noted above, convened meetings of experts and representatives of sympathetic states during the PrepCom phase. The French

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<sup>493</sup> Author interview, The Hague, Netherlands, July 2011.

<sup>494</sup> Schabas, 2010, 827.

delegation took a leading role and put forward a draft provision in August 1997.<sup>495</sup> However, some states argued that the Court's primary role is to prosecute, and that reparations processes might prove a distraction, or might compromise fair trials.<sup>496</sup> Several states were willing to support reparations for victims but opposed any possibility that states would be obligated to contribute to them. The UK made a counter-proposal in December 1997 that would prevent the Court from making orders against states. Rather than continue to oppose each other, France and the UK, with encouragement and assistance from REDRESS, drafted a consolidated proposal that they introduced several months before the Rome Conference. The proposals' backers hoped it would avoid a confrontation between common law and civil law countries over the issue.

Opposition continued, however. For instance, the United States opposed the draft, and in particular the attempt to include rehabilitation – and not just compensation or restitution – as a possible order against a convicted person.<sup>497</sup> An American delegate argued that “the Court could not be a ‘social service agency’.”<sup>498</sup> At the Rome Conference, REDRESS organized a meeting that included VRWG members from the United States and members of the US delegation who were more likely to agree to a right to reparation: the meeting resulted in assurances that the USA would not block rehabilitation as a form of reparation.<sup>499</sup> The Japanese delegation also opposed the French-UK proposal, and put forward a counter-proposal that significantly limited opportunities for reparations.<sup>500</sup>

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<sup>495</sup> Muttukumar, 1999, 264.

<sup>496</sup> Muttukumar, 1999, 263.

<sup>497</sup> In fact, this opposition came from some members of the American delegation but not others, according to an American who was a state delegate at the Rome Conference and an American NGO delegate at the conference (authors interviews in November and December, 2014).

<sup>498</sup> Benedetti *et al.*, 2013, 155.

<sup>499</sup> *Ibid.*, 155.

<sup>500</sup> The Japanese were partly motivated by concerns about claims for reparations that were being leveled against the government on behalf of the “comfort women” of World War Two, according to a state delegate and a member of an NGO delegation to the Rome Conference (interview with author).

State delegations continued to disagree over the possibility that states could be obliged to pay reparations. Compromises were proposed, such as the possibility that the Court could issue non-binding recommendations for states to contribute to victim reparations.<sup>501</sup> Ultimately, it became clear that the right to reparation would be opposed so long as state obligation was a possibility. France and the UK introduced a narrower provision, which left significant discretion to judges over principles for reparations and denied opportunities for orders to be made against states. That proposal was ultimately accepted.<sup>502</sup>

The final Rome Statute provisions on reparations thus leave great discretion to the Court, both to develop principles for reparations (Article 75(1)), and to decide how convicted persons might be ordered to contribute to them (75(2)). The Rome Statute orders that a Trust Fund for victims be created, which would distribute funds for reparations or, more generally, “for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims” (Article 79(1)). It did not specify where such funds would come from, other than fines and forfeitures the Court may or may not be able to obtain from convicted persons. Thus, while state representatives were persuaded to give victims the right to reparations, they carefully protected governments from an obligation to provide resources that might be necessary to meaningfully fulfill that right.

#### *4. Victims of sexual and gender-based crimes*

The Women’s Caucus and its allies successfully made sexual and gender violence central to the agenda of the Rome Statute negotiations. As noted previously, certain provisions provoked heated disagreements. During the PrepCom phase and the Rome Conference, the Women’s Caucus used their legal expertise and support from states to promote these issues. Its members were sometimes included directly in inter-state negotiations, and Halley notes that in the tense

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<sup>501</sup> Muttukumar, 1999, 268.

<sup>502</sup> Ibid., 269. To guide the interpretation of the article for developing principles of reparations, several comments were added in footnotes. These included references to the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, which some VRWG members had pushed for.

debates over the crime of enforced pregnancy, “at one point [the Women’s Caucus] was negotiating directly with the Holy See.”<sup>503</sup>

On some matters, the Women’s Caucus’ preferences were incorporated directly into the treaty text. The final Statute specifies crimes that had not existed in the statutes of previous international criminal tribunals, such as sexual slavery, enforced prostitution, enforced sterilization, and other forms of sexual and gender violence. The Rome Statute also mandates institutional elements to ensure that sexual violence would be addressed. It specifies appropriate treatment of those who have suffered sexual or gender violence, and it requires that Chambers and the Prosecutor’s office have legal expertise in the matter (Articles 36(8)(b) and 42(9)).

On the most contentious issues, however, the success of the Women’s Caucus was tempered. The term “gender” was controversial for some states, and its inclusion was opposed in many provisions, ranging from crimes of gender violence to a requirement for some judges to have expertise in understanding “sexual and gender violence.”<sup>504</sup> A delegate of a state ally to the Women’s Caucus recalls that there were seemingly endless votes and debates over “gender”, ranging from “whether criminalizing consensual intercourse would have relevance to the ICC prosecutor if [gender] was included, to what God or gods meant when he or she created men and women. At some stage, it seemed as if the whole ICC project... would stand or fall on this word.”<sup>505</sup> In several instances the term was removed from the final provisions, but the Women’s Caucus and supportive state delegations lobbied to ensure that it remained in most others. There were ongoing, provision by provision negotiations over the use of the term.

The definition of gender loomed over the conference. Steins writes:

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<sup>503</sup> Halley, 2008, 23.

<sup>504</sup> Oosterveld, 2005, 58-65. There were also debates over “gender balance” among judges, opposed by some states when redefined as “fair representation of female and male judges.” According to Benedetti *et al.*: “When the Syrian representative was asked if he could live with that solution, he replied he would ‘not commit suicide’” (2013, 151).

<sup>505</sup> Tallgren, 1999, 700.

Protracted debate ensued in all levels of the Conference – the formal debates, informal debates, bilateral corridor negotiations between delegations and discussions between delegations and NGOs – until it became clear that the matter would need to be resolved in the context of informal discussions between interested delegations.<sup>506</sup>

In the final two weeks of the conference, Canada and Chile led an effort to find compromise language that would satisfy states that opposed the term and concept of “gender.” Negotiations in informal meetings eventually led to a compromise definition.<sup>507</sup> The Rome Statute thus reads: “For the purpose of this Statute, it is understood that the term ‘gender’ refers to the two sexes, male and female, within the context of society” (Article 7(3)). The definition allowed both sides to claim victory. Traditional notions of gender were reaffirmed, but Women’s Caucus members believed that “within the context of society” allowed for sufficiently flexible interpretation.<sup>508</sup> Here, as in many provisions, ambiguity was necessary to achieve an agreement.

The other major battle was over the crime of enforced pregnancy. Although accepted by the states involved in the early years of the PrepCom negotiations, along with other crimes of sexual violence that the Women’s Caucus had lobbied for, the crime of enforced pregnancy was strongly opposed by the Vatican and several other states before and during the Rome Conference. The provision became “the most contentious of all the gender provisions and...one of the most emotionally charged issues in the Rome negotiations.”<sup>509</sup> The Vatican, along with many Arab and some Catholic states, interpreted the provision as an attempt to criminalize the denial of abortion. They proposed its removal or the use of more narrow language, such as a crime of “forcible impregnation.”<sup>510</sup> Proponents of the provision argued that enforced pregnancy also involved acts to keep a woman pregnant and deliver the baby, and the Bosnian delegation

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<sup>506</sup> Steains, 1999, 373.

<sup>507</sup> Oosterveld, 2005, 64.

<sup>508</sup> Copelon, 2000, 237-8.

<sup>509</sup> Steains, 1999, 366.

<sup>510</sup> Ibid.

argued that exactly this had occurred in recent civil war in their country.<sup>511</sup> Similar to the negotiation of gender, the opposing sides of the dispute went from several weeks of stalemate, to a series of informal meetings that sought common ground, to the eventual adoption of compromise language. The final Rome Statute text reads:

‘Forced pregnancy’ means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy. (Article 7(2)(f))

While the definition of gender was accepted because of its significant ambiguity, the crime of ‘forced pregnancy’ (no longer “enforced pregnancy”) was accepted because it was precise enough to satisfy opposing factions.

### *Observations*

I make two general observations about these outcomes. First, advocates for victims’ rights achieved most of their aims. On each of the above issues, they developed positions and won support over months of deliberating and lobbying. These processes were significantly deliberative, enabling victims’ advocates to mobilize their moral and expert authority. However, for the provisions to become international law they required widespread state endorsement. At the Rome Conference, these advocates faced opponents who were not persuaded by their arguments. The VRWG and Women’s Caucus therefore needed state representatives with the capacity to bargain effectively, drawing on their governments’ stature and their own diplomatic expertise (such as building coalitions, horse-trading support for issues, and isolating and undermining opponents). The provisions advanced by advocates of victims’ rights were not secured by the power of the better argument alone.

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<sup>511</sup> Ibid.

Second, key victim-related provisions in the Rome Statute are ambiguous. In some cases, provisions were left open to interpretation to provide judges with sufficient flexibility to address unanticipated challenges that the new court would face.<sup>512</sup> In other cases, no compromise among state representatives was possible on anything but vague formulations. As a result, key phrases would need to be interpreted and implemented, such as the Prosecutor's requirement to consider the "interests of victims," or victims' right to present their "views and concerns," or the meaning of male and female "within the context of society." Different interpretations of these provisions could lead to dramatically different approaches by the ICC to victims. Their interpretation and implementation will be discussed in the next chapter.

## 5.7 Conclusion

The Rome Statute negotiations were a constitutional moment for international criminal justice, and they reconfigured the place of victims in the regime. First, the Rome Statute enlarges the social category of those who can be treated as "victims of international crimes," because it expands the reach of international criminal justice. Over 120 states have ratified the Rome Statute, and states that have not can voluntarily accept the ICC's jurisdiction or can be placed under the ICC's jurisdiction by the UNSC.<sup>513</sup> Second, the Rome Statute negotiations were part of a broader shift to emphasize the gendered nature of violence and victimization in conflict. The ICC has a focus on sexual and gender violence built into its Statute, emphasizing gender as a characteristic of its intended beneficiaries.<sup>514</sup> Third, the ICC has altered the way that victims' interests are addressed, moving from the purely retributive model of the IMTs and the ad hoc tribunals to a partly reparative model, which includes the provision of assistance and reparations

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<sup>512</sup> Interviews with Gilbert Bitti, Hans-Peter Kaul, Philippe Kirsch, Fiona McKay and a Latin American delegate.

<sup>513</sup> However, the ICC's reach may be much more limited in practice than its legal jurisdiction would suggest, given the political obstacles to prosecuting citizens of powerful states (Bosco, 2013).

<sup>514</sup> See Dixon and Tenove, 2013, 408; Sagan, 2010.

to victims.<sup>515</sup> Fourth, the Rome Statute created opportunities for victims to influence the Court, imposing an obligation for the Prosecutor to consider their interests, and giving victims the right to participate in judicial proceedings. Taken together, I argue, the Rome Statute creates a framework for a court that is much more inclusive of diverse victims' interests and perspectives than were previous international criminal tribunals.

This analysis supports several propositions developed in Chapter Four: that civil society access, the prevalence of arguing as well as bargaining, and significant transparency can improve the inclusion of intended beneficiaries in global governance decision-making. To further support the generalizability of these claims, research on other key negotiations in global governance regimes is necessary.

While the Rome Statute negotiations yielded provisions that create significant opportunities for victim inclusion, several important caveats must be acknowledged. First, key victim-related provisions are ambiguous. Whether the provisions would achieve in practice the hopes of victims' advocates would depend upon their future implementation.

Second, victims' advocates promoted what they took to be the interests of future victims. They could only speak *about* this hypothetical constituency. As noted in Section 5.4, the international legal experts, women's rights advocates and Western state representatives that advocated for victims' rights differ from many of the kinds of actors who would be able to speak *for, as* and *about* actual victims in future ICC interventions. Perhaps as a result, advocates for victims' rights in the Rome Statute negotiations gave little consideration to some issues that would prove important, such as whether victims might prefer alternative justice processes to domestic or international criminal approaches. To make a Court responsive to actual victims would require rules and procedures to accommodate diverse victims' interests and desires. I explore whether the Rome Statute does so in the following chapter.

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<sup>515</sup> On the ICC as a court capable of more restorative justice, see Funk, 2010; Musila, 2010.

Third, beyond victims' issues, the future effectiveness of the ICC was unclear. Once the euphoria of the Rome Conference subsided, it was not obvious that states bind themselves to their lofty aims, ratify the Statute, and strongly support the ICC. Nor was it known whether the Court would be able to arrest and prosecute accused persons if it did not have diplomatic and military support from powerful states, including the United States, Russia and China. If the ICC could not secure sufficient state support, the Rome Statute's provisions for victims would have little impact.

Reflecting on the Rome Statute negotiations, Bitti – now Senior Legal Adviser to the ICC's Pre-Trial Division – claims that the drafting process occurred during a “window of utopia” between the end of the Cold War and the 9/11 attacks on New York:

It is very good that from time to time in the history of this poor mankind we have little windows of utopia, because it is during those windows that you try to do something to really improve the world. Of course then you realize that the world is more grey than what you had seen in those years.<sup>516</sup>

The next chapter examines struggles for victim inclusion in the very grey world of the ICC's interventions in Kenya and Uganda.

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<sup>516</sup> Interview with author.

## CHAPTER 6: VICTIMS' INCLUSION AND CONTESTED JUSTICE IN UGANDA AND KENYA

*Ever since the massacre, many people like me have been left with injuries and physical deformations. We suffer and cannot plant crops, and we have never been assisted. To me, it seems that there is nobody who will speak for us, the victims.*

-- Subsistence farmer in Barlonyo, Uganda<sup>517</sup>

The Rome Statute entered into force on 1 July 2002, after being ratified by 60 states.<sup>518</sup> By 2003 the International Criminal Court had transformed from an agreement on paper to an institution with a €30 million budget, dozens of staff, and headquarters in a gleaming white office tower in The Hague.<sup>519</sup> Now that the ICC existed, it needed a situation to investigate. In early 2004 the charismatic new Prosecutor, Luis Moreno Ocampo, stood on a stage in London with Ugandan President Yoweri Museveni and announced that the Ugandan government had asked the ICC to investigate crimes committed by the Lord's Resistance Army (LRA). The LRA rebel group was notorious for its ranks of kidnapped children and its atrocities against civilians. The Ugandan situation seemed like an auspicious opportunity for the ICC to demonstrate its commitment to pursuing justice for victims.

Within the year, however, the ICC and Moreno Ocampo faced intense criticism from Ugandan civil society actors who claimed the Court would harm victims and their communities. These advocates argued that the ICC undermined peace, contradicted northern Ugandan norms of restorative justice, and ignored victims of crimes committed by the Ugandan government. Their criticisms triggered debates about how victims' interests ought to figure in decision-making by

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<sup>517</sup> Focus group participant, Barlonyo, Lira District, Lango Sub-region, Uganda, July 2012.

<sup>518</sup> There were 122 State Parties as of 1 October 2014.

<sup>519</sup> The ICC now has close to 700 staff and a projected 2014 budget of €122 million (Assembly of State Parties, 2014).

the Prosecutor. They also challenged the assumption that the ICC would necessarily promote justice for victims.

The controversy in Uganda was in some ways a surprising development. The Rome Statute negotiations had featured regular statements about how the ICC would provide victims with justice. Civil society actors and concerned state officials had successfully inserted provisions into the Statute that they believed would make the Court responsive and beneficial to victims. Since its creation, supporters of the ICC have frequently invoked victims' desire for justice when promoting the Court's legitimacy.<sup>520</sup> They had done so at times to counter criticism of the ICC: as a "globalist" instrument to control states and constrain their militaries, with the United States as its particular target;<sup>521</sup> as a tool used by former colonial powers and the USA against African states;<sup>522</sup> and as a mismanaged bureaucracy with a hotheaded Prosecutor.<sup>523</sup> The invocation of victims to counter these criticisms would ring hollow if the actual victims of violence do not support or benefit from the Court.

This chapter examines the mediated inclusion of victims in decision-making by and about the ICC. It proceeds in five sections. In Section 6.1, I trace the implementation of the Rome Statute's victim-related provisions. As I argued in Chapter Five, these provisions are both the *outcome* of victim inclusion in the Rome Statute negotiations, and key *determinants* of victim inclusion in the ICC's operations. The provisions have significantly shaped the kind of justice the Court can provide victims, which includes both retributive and reparative elements. The provisions have also shaped opportunities by victims and their representatives to influence the ICC's activities. They have done so by creating an institutional architecture in which several different sites of decision-making affect victims' interests, including judges' Chambers, the Office of the

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<sup>520</sup> On the importance of victims to the legitimacy of international criminal justice, see Fletcher, forthcoming; Glasius, 2012; Hirsch, 2010; Kendall and Nouwen, 2013; McEvoy and McConnachie, 2012; Mégret, forthcoming; Shaw *et al.*, 2010.

<sup>521</sup> Ailslieger, 1999; Bolton, 2001.

<sup>522</sup> For criticisms from scholars see Branch, 2007; Clarke, 2009; Mamdani, 2010. Some of the most strongest criticisms have come from African leaders, as will be discussed in Section 6.4.

<sup>523</sup> Flint and de Waal, 2009.

Prosecutor (OTP) and the UN Security Council. Paying attention to these multiple sites of decision-making is a necessary corrective to literature on victim inclusion that focuses almost entirely on judicial proceedings.

To evaluate victim inclusion in different sites of decision-making, and to analyze key developments in the implementation of the Rome Statute's victim-related provisions, I examine victims' mediated inclusion in the ICC's interventions in Uganda and Kenya. These two case studies highlight different decision-making sites and different practices of victim inclusion. To investigate the two cases, I conducted close to 100 interviews with diplomats, ICC staff, victims' lawyers, and civil society actors in New York, The Hague, Kenya and Uganda.<sup>524</sup> The case studies also draw on secondary literature, and on policy papers and judicial decisions by the ICC.

The ICC's intervention in Uganda, which I examine in Section 6.2, triggered debates about the Court's impact on peace and on local justice practices. At the centre of the controversy were questions about the role that victims' interests and perspectives ought to play in decision-making by the OTP. There were also disputes about who legitimately represented Ugandan victims. The section analyzes the competing representative claims of three prominent organizations, and their opportunities for advocacy in OTP decision-making. I argue that these organizations contributed to debates within the OTP about its approach to investigations and prosecutions, leading to policies that would affect prosecutorial discretion and victim inclusion in the Ugandan situation and other situations. Examining the third element of mediated inclusion, publicity, I find that the OTP had a mixed record of transparency, and that many Ugandan victims lacked sufficient information to assess the ICC's actions.

Section 6.3 examines the mediated inclusion of victims in the ICC's intervention in Kenya. In 2010 the Court indicted several individuals, including leading politicians Uhuru Kenyatta and William Ruto, for their alleged roles in mass violence that followed the 2007 elections. While victims of the post-election violence have seen limited accountability or material assistance and reparation, Kenyatta and Ruto went on to win the 2013 elections. I look at victim inclusion in

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<sup>524</sup> See Appendix: List of Interviews.

two decision-making processes. First, I examine victim inclusion in ICC judicial processes, focusing on the role of their Court-appointed legal representatives. I argue that victim legal participation, a hard-won provision in the Rome Statute, improves victim inclusion in judicial decision-making, albeit for a small subset of victims. Second, I assess the UN Security Council's vote in 2013 to suspend ICC proceedings against Kenyatta and Ruto. Victim inclusion in UNSC decision-making appears to be very limited.

In Section 6.4, I turn to the insights of survivors of violence, drawing on focus groups conducted in Uganda and Kenya. Participants discussed the social category of "victims," the kinds of representation victims require, the extent to which the ICC appears to act on victims' interests, and their difficulties in accessing information about the Court. These views helped shape the dissertation's conceptual framework. Reflecting on these discussions, I identify several challenges faced when assessing victims' views, and I draw attention to the ambiguous role of academic researchers as representatives.

I conclude in Section 6.5 that the ICC's interventions in Uganda and Kenya paint complex pictures of victim inclusion. Different types of victims' representatives made competing claims about what victims want and need. These actors contributed to judicial, bureaucratic and diplomatic decision-making processes, although their influence on decision outcomes appears to often be limited. Furthermore, some decision-making processes are insufficiently transparent, and victims often face serious limitations to information about the Court or about activities of actors who represent them.

The strengths and weaknesses of victim inclusion in these cases highlight the importance of institutional design. Compared to previous international criminal tribunals, the Rome Statute's victim-related provisions provide greater opportunities for victims' interests and perspectives to contribute to decision-making. The ICC's implementation of these provisions has only partly realized their potential, in part due to the constrained budget and limited state support of the ICC and the Trust Fund for Victims. Factors external to the ICC also challenge victim inclusion, ranging from limited information access in violence-affected communities to the clash of state

interests at the UNSC. In Chapter Seven, I make concluding observations on the ICC's contributions to justice for victims and to democracy in global politics.

## **6.1 Implementation of the Rome Statute's Victims' Provisions**

As I described in Chapter Five, during the Rome Statute negotiations, several civil society actors and state officials pushed for a Court that would be responsive to victims' interests and perspectives, that would pursue reparations for victims as well as accountability for perpetrators, and that would pay greater attention to sexual and gender violence. As a result of their advocacy, the Statute contains provisions that promote these aims. This section summarizes key decisions and debates in their implementation. In doing so, I show that the Rome Statute created an institutional architecture in which several different decision-making sites significantly impact victims' interests, each of which should be evaluated according to victim inclusion.

The text of the victim-related provisions in the Rome Statute is often ambiguous. Some negotiators thought this ambiguity was necessary to give judges and Court staff sufficient room to address novel situations, while others believed that ambiguity was necessary to paper over the unresolved disagreements among negotiating states.<sup>525</sup> Time constraints at the Rome Conference may also have contributed to the ambiguity of provisions. According to Philippe Kirsch, chair of the Rome Conference, "It was a mad rush in Rome so provisions on victim participation, as on many issues, were not really worked out."<sup>526</sup>

Since the Rome Conference, these ambiguous provisions have been interpreted and operationalized in a complex process involving multiple actors. States created a new Preparatory Commission, which drafted two additional statutory documents elaborating on the Rome Statute: the Rules of Procedure and Evidence and the Elements of Crimes. These were adopted at the first

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<sup>525</sup> Author interviews with Gilbert Bitti, Hans-Peter Kaul, Fiona McKay and a Latin American diplomat. See also Benedetti *et al.*, 2013.

<sup>526</sup> Interview with author, Winnipeg, Canada, November 2010.

meeting of the Assembly of State Parties in September 2002. The Court's first staff were hired in 2002 and began to develop the ICC's bureaucratic structure and rules.<sup>527</sup> In 2003 the first judges took office and began to interpret and apply statutory rules.

Following the ICC's creation, its internal actors – such as the judges, the Prosecutor and bureaucrats within the Registry – have had considerable independence to implement the Statute, but external actors have also played a significant role. State Parties maintain continual contact and oversight of the Court through annual ASP conferences, ongoing meetings of issue-specific Working Groups<sup>528</sup> and informal discussions. Only the ASP can change the Rome Statute, the Rules of Procedure and Evidence, or the Elements of Crimes, and it has done so on several occasions.<sup>529</sup> Experts and NGOs have also shaped the development of ICC policies, by means such as policy consultations, formal meetings and *amicus curiae* contributions. In addition, there has been a regular flow of academics and civil society actors in and out of positions at the Court.

Many actors have therefore contributed to the Rome Statute's implementation, which has been a convoluted and path-dependent process with elements of legal interpretation, institutional operationalization, ASP oversight and reform, expert input and criticism, bureaucratic infighting and personality conflicts, and decisions made in reaction to particular events and circumstances. As a result, victim-related provisions have been implemented in fits and starts over time. This section summarizes key details of the implementation of the victim-related issues that were the focus of Chapter Five. For a summary of key indicators of this implementation, see Table 6.1.

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<sup>527</sup> Key administrative units for victim-related provisions were created, including the Victims and Witnesses Unit, the Victim Participation and Representation Section, and the Office of Public Counsel for Victims.

<sup>528</sup> Working Groups in The Hague and in New York meet regularly to review ICC activities and develop policies for consideration by the ASP. One subsection of The Hague Working Group addresses policies related to victims and affected communities, the Trust Fund for Victims, reparations and intermediaries.

<sup>529</sup> For instance, the ASP had a major Review Conference in 2012 in Kampala, which led to amendments to the Rome Statute's provisions on war crimes and the crime of aggression. In 2013, under pressure from the Kenyan government and its allies, the ASP changed procedural rules to allow accused persons to be absent from trial proceedings if they had "extraordinary public duties" (Assembly of State Parties, 2013a).

**Table 6.1: Implementation of victim-related provisions by situation**

<b>Situations and Cases</b> <sup>530</sup>	<b>Initiation of Investigations</b>	<b>Victim Participation</b> <sup>531</sup>	<b>Assistance and Reparations</b>	<b>Gender and Sexual Violence</b>
<b>Uganda (2004-)</b> - Kony <i>et al.</i>	State referral by Uganda.	21 participants in the situation and 41 in <i>Kony et al.</i>	TFV assistance since 2008. No trials at reparations stage.	Charges include rape and sexual slavery.
<b>Democratic Republic of the Congo (2004-):</b> - Lubanga <sup>532</sup> - Katanga & Ngudjolo <sup>533</sup> - Ntaganda	State referral by DRC.	203 participants in the situation, 157 in <i>Lubanga</i> , 365 in <i>Katanga &amp; Ngudjolo</i> . 1,119 in Ntaganda.	TFV assistance since 2008. <i>Lubanga</i> and <i>Katanga</i> trials at reparations stage.	All charged with rape and sexual slavery, except Lubanga.
<b>Central African Republic (2005-):</b> - Bemba	State referral by CAR.	5,229 victims accepted as participants in <i>Bemba</i> .	TFV assistance delayed by insecurity. Trial not at reparation stage.	Charged with rape.
<b>Darfur, Sudan (2005-)</b> - President Al Bashir - Banda & Jerbo - Harun & Ali Kushayb - Hussein	UN Security Council referral.	Over 200 victim participants in total for the situation and cases.	No TFV assistance. No trials at reparations stage.	All charged with rape. Some charged with sexual slavery or other sexual violence.
<b>Kenya (2010-)</b> - Ruto & Sang - Kenyatta	Initiated by Prosecutor. <sup>534</sup>	489 participants in <i>Ruto &amp; Sang</i> , 571 in <i>Kenyatta</i> .	No TFV assistance. No trials at reparation stage.	Kenyatta charged with rape and other gender-related crimes.
<b>Côte d'Ivoire (2011-)</b> - Laurent Gbagbo - Simone Gbagbo - Blé Goudé	Initiated by Prosecutor. <sup>535</sup>	199 participants in <i>Laurent Gbagbo</i> . 470 in <i>Blé Goudé</i> .	No TFV assistance. No trials at reparation stage.	All charged with rape and/or other forms of sexual violence.

<sup>530</sup> Dates refer to the initiation of a formal investigation by the Prosecutor. Table does not include cases dropped by the Prosecutor or cases in which Pre-Trial Chambers did not confirm charges.

<sup>531</sup> Figures as of 31 August 2014, collated by Women's Initiatives for Gender Justice (2014).

<sup>532</sup> Lubanga was convicted in 2012 of enlisting, conscripting and using child soldiers.

<sup>533</sup> The joint trial of Ngudjolo and Katanga was severed in 2012. Trial Chamber II later acquitted Ngudjolo of all charges. In 2014, Katanga was found guilty as an accessory in one crime against humanity and four war crimes. He was acquitted of charges of rape, sexual slavery, and using child soldiers.

<sup>534</sup> Victims consulted in Pre-Trial Chamber authorization of investigation (Pre-Trial Chamber III, 2010).

<sup>535</sup> Victims consulted in Pre-Trial Chamber authorization of investigation (Pre-Trial Chamber III, 2011). While technically initiated by the Prosecutor, Côte d'Ivoire requested the investigation and granted jurisdiction to the ICC. The state could not refer the situation because it had not yet ratified the Rome Statute.

*Victims' influence over the Prosecutor's decisions to investigate and prosecute*

The Rome Statute gives the Prosecutor considerable power to decide on investigations and prosecutions. There are three decisions over which the Prosecutor has discretion. The first is whether to launch a formal investigation into a “situation,” which is a particular conflict or scenario in which different individuals may have committed crimes. The launch of formal investigations is closely related to “triggering” the ICC’s jurisdiction. All other international criminal tribunals were created to investigate and prosecute crimes in specific conflicts and countries. The ICC’s focus for investigations and prosecutions, by contrast, is open-ended. The Rome Statute’s Article 13 creates three ways to trigger the Court’s jurisdiction over a situation: through a referral by a State Party, through a referral by the UNSC, or through the initiation of an investigation on the Prosecutor’s own authority (“*proprio motu*”). Importantly, a UNSC referral can give the ICC jurisdiction over a state that has not ratified or acquiesced to the Rome Statute, as occurred in the UNSC referrals of Sudan and Libya. Even when a State Party or the UNSC refers a case, the Prosecutor can still decide – based on a preliminary examination – that there is no reasonable basis to launch a formal investigation. The Pre-Trial Chamber must review this decision. In the absence of a State Party or UNSC referral, the Prosecutor can launch a formal investigation into a situation on his or her *proprio motu* authority. This decision requires authorization by a Pre-Trial Chamber. The Prosecutor therefore has significant discretion over choosing situations to investigate.

The Prosecutor’s second decision is to select, based on investigations, which acts of violence in a situation to prosecute. The Prosecutor’s third decision is to choose individuals to prosecute for committing these acts. These two decisions determine the “cases” in a situation. For instance, in the “situation” of conflict in northern Uganda since 2002, the Prosecutor identified several massacres and other violent acts, and then requested charges against Joseph Kony and four other LRA leaders. Doing so produced the case *Prosecutor vs. Kony et al.* Regardless of how the investigation in a situation was initiated, the Rome Statute gives the Prosecutor complete discretion over which cases to advance.

The Prosecutors' choices have been the focus of extensive analysis and criticism.<sup>536</sup> Critics have pointed to the OTP's failure to launch a formal investigation in any non-African country (despite comparable violence in Afghanistan, Iraq, Sri Lanka, Syria and elsewhere), and accused the Prosecutor of bias in the selection of cases (charges have rarely been brought against the governments of State Parties), and of gaps in the types of crimes charged.<sup>537</sup>

Most analysis has focused on the political significance and impact of prosecutorial discretion. Despite the fact that victims are fundamentally affected by the Prosecutor's decisions, little attention has been given to the impact of prosecutorial decisions on victims.<sup>538</sup> Without the Prosecutor's attention, victims may have no opportunity to have crimes against them recognized, to receive reparations or to see perpetrators held to account. Human Rights Watch thus argues: "The most essential of all victims' interests is likely to be the interest in seeing that the Court is seized with the matter and that an investigation proceeds. This decision is one on which the satisfaction of all other victims' interests depends."<sup>539</sup> International criminal prosecutors can therefore be likened to film directors, Aptel suggests, since they direct the "spotlight" of international criminal justice on some acts "and leave everything else in the dark."<sup>540</sup>

Victims' interests may not always be promoted by prosecutions, however. As I discuss in Section 6.2, some victims and their representatives in northern Uganda have argued that peace is more important than prosecutions, and that the ICC's retributive approach undermines the reparative justice Ugandan victims desired. To address the possible tensions between ICC prosecutions and peace processes, the Rome Statute's Article 16 gives the UNSC the authority to have the Court "defer" proceedings on a renewable one-year basis if they are deemed to threaten international

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<sup>536</sup> Decisions by the first Prosecutor, Moreno Ocampo, have received much more criticism than the few decisions made by his successor, Fatou Bensouda.

<sup>537</sup> See, among others, Flint and de Waal, 2009; Goldston, 2010; Human Rights Watch, 2011b; Nouwen and Werner, 2010; Schabas, 2009; Tiemessen, 2014.

<sup>538</sup> Aptel, 2012, 1358-9.

<sup>539</sup> Human Rights Watch, 1999, 33.

<sup>540</sup> Aptel, 2012, 1372.

peace and security. The Rome Statute does not clearly address means to accommodate justice approaches other than criminal trials. During the Statute’s negotiation, several state delegations argued that the ICC should not prosecute acts addressed by transitional justice processes such as truth and reconciliation commissions, but other states argued that the failure to prosecute would foster impunity.<sup>541</sup> Unable to resolve this issue, “the drafters turned to the faithful and familiar friend of diplomats, *ambiguity*, leaving a few small avenues open to the Court and allowing the Court to develop an appropriate approach when faced with concrete situations.”<sup>542</sup>

The Rome Statute gives victims several means to influence the Prosecutor’s decisions. First, victims can contribute to judges’ reviews of certain decisions. Victims are entitled to “make representations” to the Pre-Trial Chamber when it decides whether or not to authorize a *proprio motu* investigation (Article 15(3)). Victims are also entitled to “submit observations to the Court” if the Prosecutor’s cases are challenged on grounds of jurisdiction or admissibility (Article 19(3)). Victims have used these rights to contribute to oversight decisions by the Pre-Trial Chamber in both situations in which the Prosecutor pursued *proprio motu* investigations (Kenya and Côte d’Ivoire). The Pre-Trial Chamber considered representations from hundreds of victims as part of their analysis before they authorized investigations in the two situations.<sup>543</sup>

Second, several Rome Statute provisions direct the Prosecutor to take victims’ interests into account.<sup>544</sup> These provisions do not specify how victims’ interests are to be assessed, and give no clear rights to victims to contribute to decision-making by the OTP. As a result, victim inclusion

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<sup>541</sup> Robinson, 2003.

<sup>542</sup> *Ibid.*, 483, emphasis in the original.

<sup>543</sup> Pre-Trial Chamber III, 2010 (Kenya) and Pre-Trial Chamber III, 2011 (Côte d’Ivoire). Pre-Trial Chamber III asked the Prosecutor to expand the list of crimes he would investigate in Côte d’Ivoire based on victims’ representations.

I thank Benjamin Perrin, UBC Law, for sharing his unpublished analysis of these decisions.

<sup>544</sup> The Prosecutor is instructed to take into account the “interests of victims” when deciding to initiate investigations (Article 53(1)(c)) or deciding not to proceed with prosecutions after investigations (Article 53(2)(c)), and to “respect the interests and personal circumstances of victims and witnesses” during investigations (Article 54(1)(b)).

in prosecutorial decision-making has primarily developed through the OTP's internal policy-making. As I show in Section 6.2, the OTP grappled with the issue during the first years of its work in Uganda. These experiences contributed to a pivotal policy paper by the OTP, in which it committed to consulting victims and their representatives, while at the same time indicating that these consultations would have a limited impact on decision-making.<sup>545</sup>

In sum, the Rome Statute grants authority to three main decision-making sites to determine what acts will be investigated and prosecuted: the OTP, the Pre-Trial Chamber that reviews the OTP on some decisions, and the UNSC that can refer situations or defer proceedings. The Statute gives victims the right to submit their views to the Pre-Trial Chamber. It does not give a right to contribute to OTP decision-making, but rather suggests that their interests should be considered. It does not give any guidance to the UNSC regarding victims. Victim inclusion in these three decision-making processes will be assessed in the context of the ICC's interventions in Uganda and Kenya.

#### *Victim participation in legal proceedings*

In the Rome Statute negotiations, some advocates for victims insisted that victims have a voice in judicial proceedings that was independent of the prosecutor. The result was Article 68(3), which states: "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." Because of the provision's ambiguity, former ICC President Philippe Kirsch estimates that about half of judges' work in the ICC's early years was spent on questions of victim participation.<sup>546</sup> The implementation of victim participation remains in flux today, and many inside and outside the Court agitate for its reform.<sup>547</sup>

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<sup>545</sup> Office of the Prosecutor, 2007. This paper is discussed in greater detail in Section 6.2.

<sup>546</sup> Interview with author. Kirsch served as an Appeals Chamber judge and the Court's first President from 2003 to 2009.

<sup>547</sup> Observation based on author interviews with staff of the ICC Registry, legal officers of State Parties, civil society organizations and victims' lawyers (2013-2014).

To participate in judicial proceedings an individual has to show that he or she suffered harm that can be linked to an alleged crime under the ICC's jurisdiction. Individuals fill out forms that are assessed by judges. As of 30 June 2013 the ICC had received 16,194 applications for participation in its various situations or cases, and 9,131 victims had been accepted.<sup>548</sup> To deal with the large numbers, judges appoint "common legal representatives" (CLRs) to represent groups of victims. Victims' lawyers can come from outside the Court or from the ICC's Office of Public Counsel for Victims (OPCV). Victims' representatives have been able to participate in pre-trial, trial and appeals proceedings. They can access court records, make opening and closing statements, question witnesses, and participate in proceedings in other ways, at judges' discretion. Several victims have been able to participate directly, either as witnesses providing evidence under oath, or by presenting their general views and concerns to judges. Different Chambers have taken different approaches to granting participant status to victims, assigning counsel to groups of victims, and allowing victims' lawyers to contribute through somewhat different modalities in proceedings.<sup>549</sup>

Victims' participation at the ICC has been heralded by some as a triumph of victim inclusion and dismissed by others as an exercise that is costly, provides little benefit to victims, or infringes on the due process of trials.<sup>550</sup> Some observers claim that many victims are unable to exercise their right to participate because they are unaware of the opportunity, unable to complete application forms, or become frustrated by the Court's slow processes and arbitrary deadlines.<sup>551</sup> Others claim that victims do not substantively contribute to judicial processes, either directly or by giving instructions to a lawyer, and so victim "participation" is more symbolic than real.<sup>552</sup> Judge

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<sup>548</sup> Women's Initiatives for Gender Justice, 2014, 244.

<sup>549</sup> See REDRESS, 2012; Vasiliev, forthcoming; War Crimes Research Office, 2011.

<sup>550</sup> For considerations of victim participation at the ICC see Bitti and Bourguiba, 2012; Friman, 2009; Haslam and Edmunds, 2012, 2013; Kendall and Nouwen, 2013; Pena and Carayon, 2013; Van den Wyngaert, 2012; von Wistinghausen, 2013; War Crimes Research Office, 2011, 2013. For my own commentary on victim participation, see Tenove, 2012b, 2013b, 2013c.

<sup>551</sup> Independent Panel of Experts, 2013; War Crimes Research Office, 2009.

<sup>552</sup> Haslam and Edmunds, 2012; Kendall and Nouwen, 2013.

Christine Van den Wyngaert of the ICC questions whether “the participation system set in place is ‘meaningful’ enough to justify the amount of resources and time invested in it or whether it would be better to spend those resources and time directly on reparations.”<sup>553</sup> By contrast Judge Adrian Fulford, who presided in the *Lubanga* trial, states that victim participation did not significantly extend the trial and that victims’ representatives made relevant contributions.<sup>554</sup> Despite the extensive commentary on victim participation, there has been relatively little analysis of its impact on trials or on victims themselves—in part because the ICC only recently completed a case to the conclusion of all possible appeals.<sup>555</sup>

ICC staff, officials of State Parties, civil society organizations and victims’ legal representatives hold very different assessments of the normative aim of victim participation.<sup>556</sup> There is little clarity about the appropriate form of relationship between CLRAs and their hundreds or thousands of clients, or about the impact that representative should have on judicial processes. I argue that mediated inclusion is an appropriate normative framework, and in Section 6.4 I apply that framework to examine victim participation in the Kenya situation.

#### *Reparations and assistance for victims*

Victims’ advocates and several state delegations lobbied for Rome Statute provisions that would enable the ICC to provide reparations to victims. Article 75 grants this right and gives broad discretion to judges to develop principles for reparations.

The Statute also calls for the creation of a Trust Fund, which would hold and distribute funds for reparations and “for the benefit of victims of crimes within the jurisdiction of the Court” (Article 79). To implement this provision, the ASP created the Trust Fund for Victims (Trust Fund, or TFV) and gave it two mandates. First, the TFV assists in the reparations process by collecting

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<sup>553</sup> Van den Wyngaert, 2012, 495.

<sup>554</sup> Fulford, 2011.

<sup>555</sup> But see Garbett (2013) on the *Lubanga* trial, as well as Haslam and Edmunds (2013) on the *Jerbo* and *Banda* trial.

<sup>556</sup> Interviews with author (2012-2014).

funds from convicted persons or other sources, including voluntary contributions from states and individuals, and disbursing them to victims on the Court's orders. Reparations are given to the victims of crimes for which there have been convictions. Since reparations are awarded after trials and appeals are completed, they will come long after victims suffered harm. Indeed, no reparations have yet been issued by the ICC.<sup>557</sup>

The Trust Fund's second mandate is to provide "assistance" to individuals harmed by crimes in the Court's jurisdiction in a situation country. Assistance is therefore not tied to cases and can be given before a conviction. Funding for assistance comes from voluntary donations from states and individuals. Since 2007 the TFV has supported projects in Uganda and the Democratic Republic of the Congo (DRC) ranging from reconstructive facial surgery and prosthetic limbs, to psycho-social support for victims of sexual violence, to micro-credit loans. With an annual budget of less than €2 million a year to cover activities in all situation countries, the TFV's impact is important but limited.<sup>558</sup>

The Trust Fund faces several operational challenges, including the fact that some organizations that implement its programs do not want to be publicly associated with the ICC, fearing repercussions.<sup>559</sup> Reparations have been slow in coming, and may cause conflict if they go to some individuals and not others.<sup>560</sup> But perhaps the most significant problem faced by the Trust Fund is the vast gap between victims' interest in assistance and reparations and the resources available.<sup>561</sup> Victims of mass violence frequently prioritize physical, psychological, economic

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<sup>557</sup> The Court made its first reparation decision in 2012, following the conviction of Thomas Lubanga (Trial Chamber I, 2012). Implementation was delayed during appeals of the conviction. As of November 2014, no reparation order has been implemented.

<sup>558</sup> Total contributions to the TFV from all countries from 2004 to October 2014 amount were €20.4 million, of which €3.6 million is kept in reserve for future reparations orders (Trust Fund for Victims, 2014).

<sup>559</sup> Author interview with Trust Fund officer, July 2011. See also Peschke (2013, 326-7).

<sup>560</sup> The TFV has acknowledged this problem and recommended that the ICC act as a catalyst to encourage other national and international bodies to deliver reparations beyond the Court's limitations Trust Fund for Victims, 2012, para. 8.

<sup>561</sup> See Peschke, 2013; Tenove, 2013b; Van den Wyngaert, 2012.

and social rehabilitation above accountability for perpetrators.<sup>562</sup> The Trust Fund budget does not reflect this desire: it is a tiny fraction of the budget of the entire ICC.<sup>563</sup> The TFV is primarily dependent on voluntary donations from State Parties, and most have been reluctant to make major contributions.<sup>564</sup>

The Trust Fund's secretariat and its Board of Directors have considerable discretion in how funds are used for assistance, and the Chambers has discretion over how reparations will be awarded, but neither have much control over the amount of funds available. That is a decision made by individual states. The Rome Statute gives states the opportunity to fund reparations and assistance by the ICC, but does not mandate it.

### *Victims of sexual and gender-based crimes*

The provisions advocated by the Women's Caucus and its allies have significantly shaped the ICC. Attention to women, children, and victims of sexual and gender violence has been institutionalized at the ICC. The Registry's Victims and Witness Unit has been directed to take "gender-sensitive measures to facilitate the participation of victims of sexual violence at all stages of the proceedings."<sup>565</sup> The Trust Fund pays particular attention to victims of sexual and

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<sup>562</sup> As noted earlier this claim is corroborated by opinion surveys in many post-conflict, or mid-conflict, situations (Chapter Five, Section 5.3). See also Weinstein *et al.*, 2010.

<sup>563</sup> The budget for the TFV's secretariat is €1.6 million of the €122 million ICC budget. Donations have averaged approximately €2 million a year, though they have increased markedly in recent years (Trust Fund for Victims, 2014).

<sup>564</sup> While some State Parties are regular and substantial donors, such as The Netherlands and Germany, others have given little. For instance, Canada has not donated at all. Diplomats with two State Parties told the author (June 2014) that their governments would prefer the kind of humanitarian assistance the TFV delivers to go through their own development agencies or through other multilateral agencies. The diplomat of another State Party told the author (August 2013) that his government was not convinced that the TFV uses funds effectively.

<sup>565</sup> Rule 16(1)(d) of the Rules of Procedure and Evidence. However, one VWU staff member has been accused of sexually assaulting witnesses under protection in the DRC, leading to an external review of the VWU that identified several institutional shortcomings (International Criminal Court, 2013).

gender violence in its assistance programs.<sup>566</sup> The OTP has a Women and Children Unit, which promotes the safety and wellbeing of victim-witnesses in OTP investigations and prosecutions.<sup>567</sup> The OTP also has a Special Adviser on Gender. The current Special Adviser, Brigid Inder, is the Executive Director of the Women's Initiatives for Gender Justice, a well-resourced NGO that emerged from the Women's Caucus.<sup>568</sup> The Women's Initiatives' most recent annual "report card" notes that women are in the majority on the bench (10 of 18 judges are women), nearly half of all victim participants are women (of the victim participants of known sex, 47% are women) and sexual and gender violence crimes have been charged in 74% of cases.<sup>569</sup>

References to sexual and gender violence are pervasive in the rhetoric of the ICC, but this rhetoric has been undermined in practice in two ways. First, the OTP failed to prosecute sexual and gender violence in the ICC's first trial. Thomas Lubanga was only charged and convicted of using child soldiers, despite widespread evidence of sexual violence committed by his militia. Indeed, the Prosecutor's own witnesses, along with witnesses brought forward by victims' legal representatives, testified about sexual violence. The victims' representatives attempted to have the charges "recharacterized" to include charges of sexual violence, but their motion was ultimately rejected by the Appeals Chamber.<sup>570</sup> The OTP did seek charges of rape and sexual slavery in its second case, against Ngudjolo and Katanga. However, Ngudjolo was eventually acquitted of all charges, and Katanga was acquitted of charges of sexual violence. The Prosecutor's failures in charging or convicting individuals on crimes of sexual and gender violence have been blamed on a number of factors, including poor quality investigations, a

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<sup>566</sup> Most TFV projects have "incorporated both gender and child-specific interventions to support the special vulnerability of women and children" (Trust Fund for Victims, 2013, 1-2).

<sup>567</sup> Author interview with head of unit, Gloria Atiba-Davies, September 2013.

<sup>568</sup> Office of the Prosecutor, 2012.

<sup>569</sup> Women's Initiatives for Gender Justice, 2014.

<sup>570</sup> Trial Chamber I, 2009.

misguided prosecutorial strategy that pursues quick and narrow cases, the institutional culture of the OTP, and the “embedded gender-biased norms of international law.”<sup>571</sup>

Second, there has been little emphasis on the issue of “gender,” the term that the Women’s Caucus had fought to keep in the Rome Statute. Among other aims, Women’s Caucus hoped to show that women are targeted for violence as a result of their culturally-determined gender roles. Such crimes have been difficult to specify and distinguish from sexual violence. Furthermore, very little attention has been paid to sexual or gender violence against men.<sup>572</sup> Taken together, the tendency to focus only on sexual crimes against women has led some commentators to accuse the ICC of reifying a conventional notion of women as passive targets of rape in war, rather than taking a more transformative approach that would expose the way that gender roles contribute to violence and vulnerability.<sup>573</sup>

The current Prosecutor acknowledged shortcomings in the OTP’s performance and addressed them in a recent policy paper.<sup>574</sup> It remains to be seen how this new policy will affect investigations, charges and trials.

#### *Evaluating victims’ inclusion in multiple decision-making processes*

The victim-related provisions in the Rome Statute have been implemented in ways that have significantly shaped the ICC’s institutional structure, internal policies and judicial decisions. Furthermore, the Rome Statute creates an institutional architecture with several different decision-making processes that affect victims’ interests. Attention needs to be paid to these decision-making processes, to evaluate the mediated inclusion of victims.

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<sup>571</sup> Chappell, 2013, 183. See also Ferstman, 2012; Women’s Initiatives for Gender Justice, 2012a, 132-163.

<sup>572</sup> The exception is Kenya Case II, which includes accusations regarding acts of acts of penile amputation and forced circumcision of men. However, these were charged as “inhumane acts” rather than as “other forms of sexual violence.” See Pre-Trial Chamber II, 2011b, 93-95.

<sup>573</sup> Buckley-Zistel, 2013.

<sup>574</sup> Office of the Prosecutor, 2014.

The following two sections are case studies of the ICC interventions in Uganda and Kenya, in which I examine victim inclusion in three of the most important decision-making sites. The Uganda case study focuses on the contentious decisions in the Prosecutor's office over investigations and charges. The Kenya case study looks at the role of victims' legal representatives in decision-making in chambers, as well as victim inclusion at the UNSC. Each of these analyses addresses the representative claims that actors make on behalf of victims, the opportunities for advocacy for victims' representatives, and the publicity of decision-making.

## **6.2 Contested Justice in Uganda**

Uganda was the first situation to be referred to the ICC. In 2003 the Ugandan government asked the Court to address violations of international criminal law committed on its territory. The Lord's Resistance Army had been fighting the Ugandan military since 1987 and had perpetrated mass killing, looting, abduction, and other forms of violence against civilians. The referral letter from the Ugandan government stated: "Having exhausted every other means of bringing an end to this terrible suffering, the Republic of Uganda now turns to the newly established ICC and its promise of global justice."<sup>575</sup>

Prosecutor Moreno Ocampo began investigations in early 2004. In mid-2005 the ICC issued arrest warrants for Joseph Kony, the LRA leader, and four of his commanders. They were accused of committing war crimes and crimes against humanity, ranging from murder to sexual enslavement. No government or military officials were indicted, although they have been linked

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<sup>575</sup> Government of Uganda, 2003.

to extensive human rights abuses.<sup>576</sup> To date none of the charged persons have been captured, but two have died.<sup>577</sup> Because there have been no arrests, there have been no trials.

The ICC's intervention received immediate support from international human rights NGOs and many states. However, ICC staff met a different reaction from activists and organizations on the ground in northern Uganda.<sup>578</sup> Speaking on behalf of victims and affected communities, they challenged the assumption that victims would want or benefit from the ICC. The ICC intervention prompted a debate about prosecutorial discretion, and how the OTP would interpret its responsibility to promote the "interests of justice" and the "interests of victims."

This case study examines victims' mediated inclusion in these developments during the first years of the ICC's involvement in Uganda. I begin by summarizing three critical debates about the ICC that were triggered by its intervention in Uganda. I assess the representative claims of three prominent organizations that represented victims' interests and perspectives on these issues: the Acholi Religious Peace Leaders Initiative, Human Rights Watch and academic researchers from the Human Rights Center of the University of California, Berkeley. I then examine their opportunities for advocacy at the OTP, the transparency of the OTP's decision-making, and public awareness about the Court. I briefly comment on the Trust Fund's work in Uganda before making concluding observations.

*Background: Three debates triggered by the ICC's intervention in Uganda*

The ICC's intervention in Uganda triggered three important debates. First is the 'peace vs. justice' debate. The Ugandan government had tried to defeat the LRA militarily since the late 1980s, but in 2000 it passed an amnesty law to convince LRA fighters to leave the rebel group. Many northern Ugandans worried that the ICC's insistence on accountability would undermine

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<sup>576</sup> Academics and civil society groups have documented extensive violence by the Ugandan military during military actions and in the confinement of hundreds of thousands of northern Ugandans to displaced persons camps (Branch, 2011; Dolan, 2009; Human Rights Watch, 2011b).

<sup>577</sup> Raska Lukwiya was killed by the Ugandan military in 2006. Vincent Otti was executed on Kony's orders in 2007.

<sup>578</sup> For accounts of local mobilization against the ICC's involvement, see Allen, 2006; Branch, 2007.

that program. After another unsuccessful attempt to defeat the LRA militarily between 2002 and 2005, the government and LRA leaders began peace negotiations in Juba, Sudan. These talks ran from 2006 to 2008 and produced a number of tentative agreements, but they ultimately collapsed. Kony repeatedly claimed that the ICC arrest warrants were a key obstacle to a peace deal.<sup>579</sup> The LRA went on to commit extensive violence against civilians in other countries, although it has been largely inactive in Uganda.

Second, the ICC's criminal justice approach differs from the local justice practices of many northern Ugandans, which often emphasize forgiveness and community reconciliation. Particular attention has been given to *mato oput* ceremonies and other practices of the Acholi people, the ethnic group that makes up the majority of the LRA's members and victims. There has thus been a debate about whether these "local" or "traditional" justice practices would be more legitimate and effective in northern Uganda than would the ICC's approach.<sup>580</sup>

Third, the Prosecutor's decision not to charge any members of the Ugandan government or military provoked a debate about the ICC's impartiality and allegations that it pursues selective justice. Prosecutor Moreno Ocampo is alleged to have actively recruited the Ugandan government to refer the situation to the ICC, in the belief that ICC involvement in Uganda would help build the legitimacy of the new court.<sup>581</sup> Critics argue that the Ugandan government has used the ICC as a tool to further stigmatize its opponents and to legitimize itself in the eyes of the international community.<sup>582</sup> Furthermore, critics and victims themselves argue that the ICC fails many victims when it ignores violence committed against them by the Ugandan state.<sup>583</sup>

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<sup>579</sup> There is an ongoing debate among scholars about whether the ICC's intervention helped or hindered the peace process. See, among others, Atkinson, 2010; Otim and Wierda, 2008; Wegner, 2012.

<sup>580</sup> On this debate see, among others, Allen, 2010; Baines, 2007; Refugee Law Project, 2009.

<sup>581</sup> Nouwen and Werner, 2010.

<sup>582</sup> Branch, 2007; Burke-White and Kaplan, 2009, 80; Nouwen and Werner, 2010.

<sup>583</sup> ARLPI, 2009; Pham and Vinck, 2010; Tenove, 2013b.

### *Representative claims about victims and affected communities*

This section examines three prominent organizations that represented “victims and affected communities” and contributed to debates over ICC’s actions.<sup>584</sup> I use the phrase “victims and affected communities” for two reasons. First, entire communities in northern Uganda were harmed by the civil war; for instance, hundreds of thousands of people were forced into displaced persons camps that were insecure and disease-ravaged. Second, entire communities were vulnerable to future violence if the LRA and Ugandan military continued to commit abuses, and the ICC activities could affect those outcomes.

The Acholi Religious Leaders Peace Initiative (ARLPI) is an ecumenical association of religious leaders of the Acholi ethnic group. Since 1998, ARLPI has tried to end conflict in northern Uganda and promote reconciliation through Christian and neo-traditional practices.<sup>585</sup> Its members claim that ending conflict is the primary interest of victims and affected communities. ARLPI pushed for the Amnesty Law that the government passed in 2000, which induced hundreds of LRA fighters to leave the rebel group. ARLPI members argued that ICC arrest warrants would undermine this progress. For instance, Archbishop John Baptist Odama asked: “How can we tell the LRA soldiers to come out of the bush and receive amnesty when at the same time the threat of arrest by the ICC hangs over their heads?”<sup>586</sup> ARLPI members had long promoted peace negotiations and feared that LRA leaders would not engage in talks or agree to a peace deal if they feared arrest by the ICC. Father Carlos Rodriguez warned that “arrest warrants would practically close once and for all the path to peaceful negotiation as a means to end this long war, crushing whatever little progress has been made during these years.”<sup>587</sup> ARLPI members opposed the ICC’s issuance of arrest warrants and asked for their suspension before and during the Juba peace talks.

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<sup>584</sup> To be clear, by referring to these organizations as “representatives” engaged in “advocacy,” I am referring to these terms as developed in Chapters Three and Four. I do not suggest that these organizations would describe themselves as representatives or advocates.

<sup>585</sup> Apuuli, 2011.

<sup>586</sup> IRIN News, 2005.

<sup>587</sup> New Vision, 2004.

ARLPI members also claimed that the ICC's retributive approach to justice would not satisfy the needs and desires of victims.<sup>588</sup> They argued that northern Ugandans favoured traditional justice practices that emphasize truth-telling, social reconciliation, and material benefits for victims and their families or communities.<sup>589</sup> Finally, ARLPI members criticized the Prosecutor's failure to charge Ugandan government or military officials, arguing that the Court "has not maintained an appearance of neutrality."<sup>590</sup>

Several international human rights organizations challenged ARLPI's recommendations and argued that they would not promote victims' interests in justice. The most prominent of these was Human Rights Watch (HRW). In reports and press releases, HRW argued that the ICC should pursue LRA prosecutions regardless of peace processes, because international law demanded accountability and a durable peace required it.<sup>591</sup> HRW also argued that traditional justice measures (or national trials with light penalties) did not meet "international standards" and were unacceptable alternatives to ICC proceedings.<sup>592</sup> Like ARLPI, however, HRW argued that Ugandan government and military officials warranted serious investigation and possible prosecution, based on HRW research reports that alleged widespread human rights violations.<sup>593</sup>

Researchers from Berkeley's Human Rights Center (HRC) took a very different approach.<sup>594</sup> They represented affected communities by conducting large-scale opinion surveys to assess views on issues of justice, peace and development. The researchers see this work as a "consultation process" to inform the design of transitional justice policies, and to "influence the

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<sup>588</sup> ARLPI, 2009.

<sup>589</sup> See Baines, 2007; Refugee Law Project, 2009. Some have argued that these practices are unsuited for mass crimes and were more invented than "traditional", including Allen, 2010.

<sup>590</sup> ARLPI, 2009.

<sup>591</sup> Human Rights Watch, 2005b, 2006, 2008.

<sup>592</sup> Human Rights Watch, 2007b, 2008.

<sup>593</sup> Human Rights Watch, 2011b.

<sup>594</sup> The Human Rights Center worked in partnership with the International Center for Transitional Justice (ICTJ) on two of the three surveys in northern Uganda.

political agenda and foster a sense of ownership and participation.”<sup>595</sup> Marieke Wierda, co-author of the 2005 and 2007 reports, notes that they used a more quantitative research approach in order to get gauge the extent of public support for the ICC and other transitional justice processes.<sup>596</sup> In northern Uganda they conducted surveys in 2005, 2007 and 2010, each time interviewing approximately 2500 individuals.<sup>597</sup>

Research by the HRC contradicted some of ARLPI’s claims and revealed considerable diversity in preferences regarding justice measures. For instance, their 2005 survey found that the majority (66%) of respondents thought LRA leaders deserved to be tried and punished, and just 22% wanted them forgiven and reintegrated.<sup>598</sup> In the same survey, 61% of the respondents who knew of the ICC’s work did not believe it would endanger the peace process.<sup>599</sup> While ARLPI members tended to promote a static view of victims’ desires, HRC opinion surveys showed significant shifts in opinion over time. For instance, compared to HRC’s 2005 report, its 2007 study showed declining support for the ICC, increasing support for amnesties, and greater knowledge of traditional justice practices.<sup>600</sup> The 2007 study therefore suggested that there had been a shift toward ARLPI’s positions among victims and affected communities.

Assessing the representative claims of ARLPI, HRW and HRC using the typology introduced in Chapter Three reveals different strengths and weaknesses. ARLPI members made relatively strong claims to speak *for* Acholi communities, and particularly those individuals who belonged to their religious congregations. ARLPI members lived in these communities and regularly engaged in public discussions. As Allen notes: “Individuals such as Bishop Ochola, it needs to

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<sup>595</sup> Vinck and Pham, 2008, 399.

<sup>596</sup> Author interview with Wierda (conducted via Skype (Tunisia), September 2014.) Wierda was a Senior Associate with ICTJ.

<sup>597</sup> Pham *et al.*, 2005; Pham *et al.*, 2007; Pham and Vinck, 2010. The first two studies were conducted in partnership with ICTJ.

<sup>598</sup> Pham *et al.*, 2005, 26.

<sup>599</sup> *Ibid.*, 34.

<sup>600</sup> Pham *et al.*, 2007.

be stressed, are regarded with considerable respect, not least because they have sometimes acted with remarkable courage – liaising with the rebels, standing up to the government and assisting the afflicted.”<sup>601</sup> Many Acholi recognized the legitimacy of ARLPI members as their spokespeople. However, ARLPI members often made claims to represent all northern Ugandans, when in fact their claims to speak *for* non-Acholi people were much weaker.<sup>602</sup> Scholars also note that the justice practices promoted by ARLPI members reified their own authority and may not be responsive to women.<sup>603</sup>

In addition to speaking *for* victims and affected communities, ARLPI members’ extensive experience of promoting reconciliation between the LRA and Acholi civilians gave them some claim to speak *about* policies that would promote peace. Furthermore, some ARLPI members spoke *as* victims, such as Bishop Ochola whose wife had been killed by the LRA.

HRW disputed the legality and effectiveness of prescriptions offered by ARLPI. To make these arguments, HRW staff drew on their expertise in international law, as well as their research and advocacy on justice processes in other countries. By pointing to past violence in Uganda and proposing policies that might address them, HRW made claims to speak *about* the interests of victims and affected communities. The organization could not make strong claims to speak *for* victims and affected communities, as it did not seek their authorization or accountability, nor did HRW’s positions seem to hinge on consultations with them. In its reports and press releases on the Uganda situation, HRW did not claim to speak *for* or speak *as* victims.<sup>604</sup>

HRC researchers consulted several thousand members of affected communities and brought attention to their expressed opinions. By randomly selecting informants of different ethnic

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<sup>601</sup> Allen, 2006, 137.

<sup>602</sup> Allen, 2010.

<sup>603</sup> Baines observes that “women are not involved in major decision-making, arbitration or negotiations in the *mato oput* process. Since women and girls were targeted in sexual and gender-based ways, and since their needs and aspirations in a justice process differ from those of men because of their gender roles, it is unlikely that *mato oput* will be able to reflect their interests without significant modification” (2007, 107).

<sup>604</sup> Content analysis by author.

groups, ages and sexes, their research included the opinions of non-Acholi and those with little social standing in Acholi society—populations not well-represented by ARLPI. However, HRC was not authorized by or accountable to affected communities. Their research also suffered from limitations common to opinion surveys: opinions are often based on people’s limited or incorrect information, and standardized questionnaires can miss nuances in views. As one of the researchers involved notes, the HRC reports captured “snapshots of opinion at particular points in time,” and needed to be paired with qualitative and interpretive research to provide a deeper understanding of victims’ perspectives and desires.<sup>605</sup> HRC researchers can be said to speak *for* a broader constituency than did ARLPI but had a less responsive relationship with constituency members. They did not attempt to speak *as* victims. While their principal aim was to articulate victims’ views, they also drew on their expertise to speak *about* policies that the ICC and other actors might pursue to respond to victims’ interests and preferences.

ARLPI and HRC thus employed different practices to speak *for* somewhat different constituencies of victims and affected communities. Their representative claims regarding the interests and perspectives of victims and affected communities sometimes clashed and sometimes agreed with each other. HRW principally made claims to speak *about* victims’ interests as part of their advocacy for international human rights standards. They contributed expert knowledge but provided little responsiveness to victims’ views.

No single representative claim was adequate on its own, but when taken together – and supplemented by the views and criticisms of other actors – they provided a robust representation of the diverse and shifting views of victims and affected communities in northern Uganda. Their claims were debated in Ugandan and international civil society, as well as by scholars, diplomats and ICC staff. But to what extent did they influence the OTP?

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<sup>605</sup> Author interview with Wierda.

### *Advocacy by victims' representatives*

The OTP was the decision-making site that mattered most during the early years of the ICC's intervention in Uganda. The Prosecutor decided whether to pursue investigations, what charges to lay, and when to issue arrest warrants.

ARLPI members had several opportunities to make their views known to the OTP. They met with OTP staff who visited northern Uganda, beginning in 2004.<sup>606</sup> In March 2005 the ICC brought Acholi leaders to The Hague to hear their views, and the delegation included ARLPI member Archbishop Odama. Prosecutor Moreno Ocampo and the Acholi delegation issued public statements acknowledging each other's key claims. The Prosecutor announced that he was "mindful of traditional justice and reconciliation processes and sensitive to the leaders' efforts to promote dialogue between different actors in order to achieve peace."<sup>607</sup> The next month the Prosecutor met another delegation, which included representatives from non-Acholi communities, and issued similar public statements.<sup>608</sup>

Human Rights Watch had longstanding channels of communication with the OTP, due to the organization's prominence and the legal and expert authority of its staff. To influence the OTP's policies, HRW issued a series of press releases and reports,<sup>609</sup> including a legal brief on how the Prosecutor should interpret Rome Statute provisions that required him to consider "the interests of justice" and "the interests of victims."<sup>610</sup> HRW staff also met with OTP staff, advocated to State Parties, and engaged international and Ugandan news media.

Researchers from Berkeley's HRC (or ICTJ, its partner on two reports) shared their findings with the OTP in The Hague, and presented it at conferences in which the Prosecutor or his staff

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<sup>606</sup> Author interview with two civil society members, Gulu, Uganda, July 2012.

<sup>607</sup> Office of the Prosecutor, 2005b.

<sup>608</sup> Office of the Prosecutor, 2005a.

<sup>609</sup> Darehshori, 2009; Human Rights Watch, 2005a, 2005c, 2006, 2007a, 2007b.

<sup>610</sup> Human Rights Watch, 2005b.

participated.<sup>611</sup> Moreno Ocampo has expressed his appreciation to the researchers and has referred to their results in his public comments.<sup>612</sup> The researchers also distributed their reports and explained their findings to civil society and media in Uganda, and to experts, NGOs and state officials in New York and The Hague.<sup>613</sup>

The three organizations can be said to have “consultation” status in OTP decision-making, according to the scale put forward in Chapter Four, Section 4.3. The OTP was not obligated to listen to the views of the organizations but chose to do so, and it was up to the Prosecutor and his staff to decide what consideration to give to their views.

Based on public statements by the Prosecutor and my interviews with individuals who were OTP staff at that time, it appears that the Prosecutor’s views and policies changed significantly during this period.<sup>614</sup> At the beginning of his term, from 2004 to 2006, the Prosecutor expressed his interest in being attentive to the OTP’s impact on societies in conflict. However, he appears not to have fully appreciated the political dynamic in Uganda, and in particular the extent to which the LRA was seen in northern Uganda as a resistance movement – albeit a brutal one – to an unpopular government.<sup>615</sup>

Opposition from ARLPI members and other local civil society actors helped alert the OTP to the negative impact the ICC might have on conflict resolution or peace processes. In early 2005, Moreno Ocampo met with delegations from northern Uganda in The Hague and acknowledged

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<sup>611</sup> Author interviews with Patrick Vinck, former HRC researcher, Skype (Boston) July 2014 and Marieke Wierda. For proceedings of one conference where Wierda and Prosecutor Moreno Ocampo exchanged views, see Waddell and Clark, 2007.

<sup>612</sup> Author interview with Patrick Vinck.

<sup>613</sup> Author interview with Marieke Wierda.

<sup>614</sup> Author interviews with three current or former OTP staff and two human rights organization staff who had significant knowledge of decision-making at the OTP. See also Brubacher, 2010; Nouwen, 2013.

<sup>615</sup> The Prosecutor’s handshake with President Museveni at the press conference announcing the ICC intervention sent a troubling message. In interviews I conducted with civil society members in northern Uganda, many described that handshake as an indication of the Prosecutor’s pro-government bias.

both the importance of peace and the value of traditional justice practices.<sup>616</sup> Around the same time he told a Ugandan newspaper: “As soon as there is a solution to end the violence and if the prosecution is not serving the interest of justice, then my duty is to stop investigation and prosecution... The main interest of the victims now is their life.”<sup>617</sup> In May 2005 the OTP presented evidence to the Pre-Trial Chamber to secure arrest warrants for LRA leaders, but requested that the warrants remain secret “until the LRA capacity to inflict violence was low relative to the ability of the Ugandan government to provide security.”<sup>618</sup> The warrants were made public in October, 2005, at a point when the LRA had largely shifted to the DRC.

During this early period, the OTP was internally divided on how peace processes and local views should affect their work. The Prosecutor and his staff were attentive to representatives of affected communities, including ARLPI. They also had the impression that ARLPI’s positions were not unanimously held.<sup>619</sup> Members of the OTP were thus happy to receive the HRC’s first research report, released in mid-2005, which illustrated this diversity and undermined the idea that northern Ugandans were uniformly against ICC prosecutions of the LRA.

In 2006 the OTP began to formulate how it would interpret and apply the Rome Statute provisions on “the interests of justice” and “the interests of victims.” That process resulted in its “Policy Paper on the Interests of Justice,” made public in 2007. The paper acknowledges the Prosecutor’s obligation to take victims’ interests into account before starting investigations and prosecutions. It claims the Prosecutor would “conduct a dialogue with the victims themselves as well as representatives of local communities.”<sup>620</sup> These representatives would include government, religious, and tribal leaders, international organizations, and other actors who “may

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<sup>616</sup> Office of the Prosecutor, 2005a, 2005b.

<sup>617</sup> New Vision, 2005.

<sup>618</sup> Brubacher, 2010, 274.

<sup>619</sup> In interviews with the author, two former OTP staff spoke of the following illustrative example: Investigators in northern Uganda were approached by two women. The mother told them that the ICC did not belong in Uganda because it was standing in the way of peace and reconciliation. Her daughter, a former abductee of the LRA, told investigators that she wanted the ICC to put LRA leaders in jail.

<sup>620</sup> Office of the Prosecutor, 2007, 6.

be able to provide a comprehensive overview of a complex situation.”<sup>621</sup> However, the paper also suggests that the Prosecutor would pursue investigations and prosecutions except in very exceptional circumstances. A former OTP official described these developments as the Prosecutor shifting from a more “contextualist” approach to a more “formalistic” one.<sup>622</sup> Matthew Brubacher, an investigator with the OTP in Uganda, makes a similar observation. He notes that while some experts argued that the OTP should act with flexibility when the pursuit of justice might undermine peace processes, others – including HRW – disagreed.<sup>623</sup> Brubacher concludes that the latter, “more restrictive interpretation,” was the direction the OTP ultimately decided to take in the Uganda situation and others.<sup>624</sup>

In line with this approach, from 2007 until the end of his term, Prosecutor Moreno Ocampo consistently stated that he would pursue LRA prosecutions regardless of the ongoing Juba peace process or local justice alternatives.<sup>625</sup> In doing so, he took the position that HRW had advocated from the beginning. This uncompromising approach would be applied in other situations. It would become contentious again in 2008 when the Prosecutor charged Sudan’s President al-Bashir with genocide and other crimes, despite widespread concerns that doing so would jeopardize peace negotiations and humanitarian assistance in Darfur.<sup>626</sup>

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<sup>621</sup> Ibid.

<sup>622</sup> Interview with former OTP official.

<sup>623</sup> 2010, 267

<sup>624</sup> Ibid.

<sup>625</sup> For instance, Moreno Ocampo told an audience at a conference in Nuremberg in June, 2007, that while there are “voices challenging judicial decisions, their timing, their timeliness, asking the Prosecution to use its discretionary powers to adjust to the situations on the ground... These proposals are not consistent with the Rome Statute. It is essential on the contrary to ensure that any conflict resolution initiative be compatible with the Rome Statute, so that peace and justice work effectively together” (Moreno Ocampo, 2007). Moreno Ocampo made similar comments at a conference in London in 2007, summarized in Waddell and Clark, 2007.

<sup>626</sup> Flint and de Waal, 2009. The Sudanese government expelled humanitarian organizations after the ICC issues an arrest warrant for President al-Bashir (Associated Press, 2009).

While ARLPI, HRC and HRW disagreed on victims' perspectives and interests on some issues, all three have questioned the Prosecutor's failure to seek charges against officials in the Ugandan government or military. To explain its decision, the OTP has consistently argued that violence by the government, when compared to that of the LRA, was not of sufficient "gravity" to warrant prosecution. The most notorious acts of violence allegedly committed by the Ugandan military occurred before July 2002, when the ICC's temporal jurisdiction begins. However, commentators have pointed to the mass mortality suffered in government-run displacement camps that occurred after that date, and have argued that violence by government officials warrants particular attention.<sup>627</sup> The OTP's use of the gravity criterion in the Uganda situation and others has been the focus of critical attention by several scholars.<sup>628</sup>

#### *Transparency and public awareness of OTP decision-making*

The transparency of prosecutorial decision-making in the Ugandan situation is mixed. The OTP met with some victims and community representatives to explain its actions. Between 2005 and 2007 the OTP held 25 meetings in northern Uganda and engaged with local media on several occasions.<sup>629</sup> As previously noted, the Prosecutor met two delegations from northern Uganda in The Hague in 2005. After one of those meetings, the delegation claimed, "now we have understood his position, mandates, independence and also the limitations he has in what he can do and what he has no control over."<sup>630</sup> In addition to these meetings, the OTP's 2007 policy paper was a helpful public clarification of the Office's interpretation of its mandate to consider the interests of justice and the interests of victims. But the OTP has not been clear about how it actually understood and acted on the interests of victims in northern Uganda. Nor has it provided

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<sup>627</sup> Branch, 2007; Human Rights Watch, 2011b.

<sup>628</sup> Schabas argues that the gravity criterion, which was also used to justify the OTP's decision not to initiate an investigation in Iraq, "strikes the observer as little more than obfuscation, a laboured attempt to make the determinations look more judicial than they really are" (2012, 89). Tiemessen claims that "the gravity justification has allowed the ICC to avoid politically sensitive cases of serious human rights abuses," which in turn undermines its "guarantee of the rights of victims to justice" (2014, 450).

<sup>629</sup> Office of the Prosecutor, 2007, 6.

<sup>630</sup> Office of the Prosecutor, 2005b.

adequate information about its decision not to charge Ugandan officials. Despite requests by Ugandan and international civil society organizations, the OTP has not provided a convincing account of the investigation and the decision-making process that led to this outcome.<sup>631</sup> As a result, there remains widespread suspicion that the Prosecutor had not objectively applied a gravity criterion but had cut a deal with President Museveni.<sup>632</sup>

Transparency for the OTP is complicated, since it has good reason to keep much of its investigation secret. Publicizing such information can prompt individuals to destroy evidence or put witnesses at risk. “Above all other considerations,” a senior OTP trial lawyer explains, “we must protect the safety of individuals that provide us information.”<sup>633</sup> While that principle must be respected, the OTP can be more forthcoming about the scope of investigations pursued and the criteria used to decide cases.<sup>634</sup> Indeed, the Prosecutor has been more forthcoming about investigations in situations other than Uganda.<sup>635</sup>

In addition to problems of OTP transparency, the publicity of decision-making has been weakened by limited public awareness. Victims and affected communities have struggled to access information about ICC activities, particularly in the first years of the ICC intervention. Civil society actors and commentators claim that the ICC’s early outreach efforts were muted and unsuccessful.<sup>636</sup> When ICC staff did speak publicly they sometimes faced angry denunciations by local civil society and members of the public, some of whom were misinformed about the Court’s actions and mandate.<sup>637</sup> Outreach officials ramped up their

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<sup>631</sup> See Human Rights Watch, 2011b; Schabas, 2008.

<sup>632</sup> This accusation was made in my interviews with several civil society actors in northern Uganda, conducted in June and July 2012.

<sup>633</sup> Author interview with an OTP senior trial lawyer, September 2014.

<sup>634</sup> On this argument, see Dicker and Evanson, 2012; Goldston, 2010.

<sup>635</sup> See, for instance, OTP reports on preliminary examinations in Afghanistan, Colombia and elsewhere (Office of the Prosecutor, 2013b).

<sup>636</sup> Allen, 2006. This observation was also made by members of several civil society organizations in northern Uganda in interviews with the author, June and July 2012.

<sup>637</sup> Author interviews with staff of three civil society organizations, June and July, 2012.

activities in subsequent years, engaging local media and frequently visiting affected communities. Public awareness and understanding of the ICC appears to have improved during that period: HRC researchers found that 60% of respondents were aware of the Court in 2007, compared to 27% of respondents in 2005.<sup>638</sup>

Despite these efforts and improvements, northern Ugandans lack regular access to accurate information about the ICC. As will be discussed in Section 6.4, focus group participants routinely complained that they were unaware of the Court's activities and could not understand some of its decisions.

### *Trust Fund for Victims*

The Trust Fund for Victims began operations in Uganda in 2008. It has spent between €0.7 million and €1.0 million a year from 2008 through 2012 on physical rehabilitation, psychological rehabilitation or material assistance.<sup>639</sup> While these programs may provide the ICC's most tangible impact on victims in Uganda, the mediated inclusion of victims is difficult to assess. Trust Fund officials claim to consult widely among civil society, community leaders and victims, but the views put forward in these consultations are not publicly available.<sup>640</sup> The TFV provides information on the projects it funds, but there is little public record of how these decisions are made. The extent of opportunities for advocacy by victims' representatives is therefore difficult to assess. There is no good data on public awareness of the TFV's activities in Uganda.<sup>641</sup>

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<sup>638</sup> Pham *et al.*, 2007, 47.

<sup>639</sup> This budget is not particularly large. By comparison, the United States Agency for International Development has an annual budget for Uganda of approximately \$320 million. See <http://uganda.usaid.gov/programs> (Accessed 10 October 2013).

<sup>640</sup> Author interviews with two TFV officers, in 2011 and 2012.

<sup>641</sup> In discussion groups conducted with 39 survivors of violence in three northern Uganda communities, participants either had not heard of the TFV or had very limited knowledge (Tenove and Radziejowska, 2013). This sample may not be indicative of public awareness more generally.

The Trust Fund's decision-making in Uganda has not been controversial, perhaps because of the TFV's competence or its inconspicuousness. If it had a larger budget, or if it played a role in high-profile reparations proceedings, victim inclusion would likely be a more contested issue.

### *Final observations*

The ICC's intervention in Uganda forced the Prosecutor, civil society, the Ugandan government and other interested actors to take seriously the possibility that the Court might harm victims' interests or impose an unwanted form of justice. As a result, victim inclusion in OTP decision-making became a critical issue. The Prosecutor repeatedly claimed that his office consulted with victims and affected communities, and their representatives. The OTP did consult members of ARLPI, HRC and HRW. Advocacy by these actors contributed to deliberations within the OTP, both with respect to its actions in Uganda and its policies on prosecutorial discretion.

The Prosecutor's policy developed from 2004 to 2007 to become somewhat less flexible and responsive to the context of investigations and prosecutions. This policy was developed after extensive consideration by OTP staff of its legal and operational implications, and both principled and practical arguments can be made to defend it. However, one implication of the policy is that the OTP became less responsive to victims' views or interests that did not coincide with criminal prosecutions. This approach has different implications for the three critical debates about the ICC raised earlier, and their relation to victim inclusion.

On the peace versus justice debate, the Prosecutor came to the view that – except in exceptional circumstances – he should not tailor his investigations and prosecutions to accommodate peace processes. The 2007 policy paper thus argues, “the broader matter of international peace and security is not the responsibility of the Prosecutor; it falls within the mandate of other institutions.”<sup>642</sup> The paper suggests that decisions to suspend proceedings should be addressed by the UNSC, the political body granted the authority to do so by the Rome Statute. Victims'

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<sup>642</sup> Office of the Prosecutor, 2007, 9.

interests and views would therefore need to be included in UNSC deliberations.<sup>643</sup> The following section will examine victim inclusion at the UNSC with respect to the Kenyan situation.

On the debate of international versus local justice, since 2007 the Prosecutor has consistently argued that he would pursue prosecutions even if LRA leaders were being dealt with by traditional justice practices. In such circumstances, it would be up to the ICC judges to decide whether the local justice processes rendered the OTP's cases inadmissible. Victims' views and interests would therefore need to be included in decision-making in Chambers.

On the issue of the OTP's impartiality, and the decision not to charge Ugandan officials, there is no alternate site of decision-making to challenge or review the Prosecutor's decision. There is little victims' representatives can do to influence, or even evaluate, the decision.

### **6.3 Kenya: Victims' Inclusion in the Courtroom and the Council**

The Prosecutor used his *proprio motu* power to launch an investigation in Kenya in 2010, and the ICC immediately became embroiled in national politics. Two persons accused of crimes by the ICC, Uhuru Kenyatta and Ruto Sang, won the 2013 elections. Kenyatta and Ruto challenged the ICC's legitimacy among Kenyans and also among states, and the Kenyan government has led a diplomatic campaign against the Court by African Union (AU) members. In this section I examine victim inclusion in two key decision-making sites amid this domestic and international contestation. I first look at the role of victims' legal representatives in judicial processes at the ICC, and find that they have significantly improved inclusion for a limited subset of Kenyan victims. I then look at a UN Security Council vote over whether to defer ICC proceedings against Kenyan leaders, and find that victims' interests were poorly represented and received little consideration.

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<sup>643</sup> In 2007 and 2008, UNSC members began to discuss the possibility that they would ask the ICC to defer proceedings against LRA leaders in order to secure a peace deal (Bosco, 2013, 181). The Juba peace talks collapsed before that possibility was formally addressed.

*Background: Victims' inclusion amid campaigns against the ICC*

Following the 2007 national elections, which were hotly contested by parties divided on ethnic lines, several regions in Kenya erupted in violence. The next two months saw ethnically-targeted killing, maiming, sexual violence, looting and property destruction, as well as widespread extrajudicial violence by police.<sup>644</sup> Over 1,000 people were killed, an estimated 300,000 were injured and 600,000 forcibly displaced.<sup>645</sup> The violence ended after a mediation team led by former UN Secretary-General Kofi Annan brokered a power-sharing deal between the political factions. That agreement created a Commission of Inquiry into Post-Election Violence, which in turn called for the Kenyan government to create a special national tribunal to seek accountability for the violence. It threatened to turn over evidence to the ICC if no action was taken within 105 days. The Kenyan government did not act and Annan handed over evidence to the ICC in 2009.

Prosecutor Moreno Ocampo launched a formal investigation and in 2010 named six accused persons. Three were associated with the incumbent Party for National Unity (Deputy Prime Minister Uhuru Kenyatta, civil service head Francis Muthaura, and Inspector General of the Police Hussein Ali) and three were associated with the opposition Orange Democratic Movement (former cabinet ministers William Ruto and Henry Kosgey, and journalist Joshua Sang). The OTP failed to confirm charges against Ali and Kosgey in pre-trial hearings in 2012.

Kenyatta and Ruto, who had opposed each other in the 2007 elections, joined forces for the 2013 elections in what some referred to as the “alliance of the accused.”<sup>646</sup> Many thought the indictments would be a liability for Kenyatta and Ruto, but their supporters framed the Court’s intervention as meddling by former colonial powers and the United States.<sup>647</sup> I observed a striking scene of this reframing at an ICC outreach event.<sup>648</sup> Members of a civil society group

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<sup>644</sup> Human Rights Watch, 2011a; ICJ and KHRC, 2012.

<sup>645</sup> Human Rights Watch, 2011a; Kenya National Commission on Human Rights, 2008.

<sup>646</sup> Lynch, 2013.

<sup>647</sup> See Kegoro, 2012; Lynch, 2013; Momanyi, 2013; Mueller, 2014.

<sup>648</sup> Held at the Comfort Inn, 17 July 2012.

(Bunge la Mwananchi) stood up during the meeting to attack the ICC. One exclaimed, “the ICC is a way to colonize Africa a second time!” Another accused the ICC of being funded by the United States and receiving instructions from it. A third asked why the accused persons lacked the rights enjoyed by victims of the post-election violence, and referred to the accused as “the victims of the ICC.”

Kenyatta and Ruto won the elections and are now President and Deputy President. Since 2010 there have been accusations that possible witnesses for the prosecution were being intimidated or killed.<sup>649</sup> Several key witnesses for the Prosecution have recanted their testimony or refused to testify. Lacking sufficient evidence, the Prosecutor dropped charges against Muthaura in 2013, and Kenyatta on 5 December 2014.<sup>650</sup> In the trial of Ruto and Sang, which began in September 2013, the OTP has also faced problems with witnesses changing and recanting earlier testimony.<sup>651</sup>

Victims of the post-election violence have seen little government action. No person at a high level or mid-level of responsibility for the violence has faced criminal proceedings in Kenya. Some victims have received financial assistance from the government, but it has not been equitably distributed and is woefully inadequate to victims’ needs.<sup>652</sup> Among victims of post-election violence there has been a widespread desire for perpetrators to be held accountable and for victims to receive restitution and reparations.<sup>653</sup>

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<sup>649</sup> Lynch, 2014.

<sup>650</sup> Trial Chamber V(b), 2014b. The Prosecutor had requested a suspension of the trial in order to gather further evidence, and claimed that the Kenyan government was refusing to provide necessary documents and assistance. Judges rejected that request on 3 December 2014 (Trial Chamber V(b), 2014a).

<sup>651</sup> Prosecutor Bensouda informed the Court in a December 2013 application that eight witnesses stopped cooperating with her office after the OTP disclosed their identities to defense lawyers, as required by court procedures (Office of the Prosecutor, 2013a).

<sup>652</sup> Human Rights Watch, 2013.

<sup>653</sup> See ICJ and KHRC, 2012; Robins, 2011; Tenove, 2013b.

### *Victim participation in ICC proceedings*

Victims have the right to be included as participants in ICC judicial processes. Participation enables them to be represented by legal counsel independent of the prosecution and defense. To assess whether victims' right to participation improves inclusion, I examine the victims' legal representatives in the Kenya situation and evaluate their representative claim-making, opportunities for advocacy and impact on publicity.<sup>654</sup> Due to the large number of victims who applied to participate, ICC judges grouped them together and assigned them Common Legal Representatives. For both the confirmation of charges proceedings and trials, judges assigned one CLR to all victims of each case. As of 31 August 2014, 571 victims were represented by Fergal Gaynor (*Kenyatta* case) and 489 were represented by Wilfred Nderitu (*Ruto & Sang* case).<sup>655</sup>

#### 1. Representative claim-making

Several commentators have questioned whether ICC-appointed CLRs can legitimately speak on behalf of victims.<sup>656</sup> I will assess the CLRs in the Kenya cases according to their claims to speak *for*, *as* and *about* victims.

To speak *for* victims, a representative must be responsive to them. Victims have very limited ability to authorize or hold accountable their legal representatives. Judges select CLRs and have the authority to remove or replace them. Judges make these decisions in consultation with the ICC's Victim Participation and Reparations Section (VPRS). To mitigate the lack of authorization and accountability, VPRS staff seek input from victims regarding the qualities they

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<sup>654</sup> The practice of victim participation in Kenya has differed in some ways from victim participation in other situations to date. ICC Chambers have instituted different approaches to identifying and assigning legal counsel to victims, and the ICC Registry's policies to support CLRs have developed over time. Victim participation in the Kenyan situation is considered more robust than in other situations by some scholars, civil society and ICC staff (interviews with the author). A detailed examination of victim participation in all situations is beyond the scope of this dissertation. For an overview, see Vasiliev, forthcoming.

<sup>655</sup> Women's Initiatives for Gender Justice, 2014, 250.

<sup>656</sup> Haslam and Edmunds, 2012; Kendall and Nouwen, 2013; Van den Wyngaert, 2012.

would like in a representative.<sup>657</sup> VPRS staff also periodically consult with victim participants to assess their satisfaction with their CLR, although they have very little power to change the behaviour of CLR in the absence of major failings or ethical breaches.<sup>658</sup> As a result, there is little institutional leverage to ensure that CLR is responsive to victims. Responsiveness is up to the discretion and professional ethics of the individual CLR.

While victims have limited agency in selecting or removing their legal representative, they do exert agency by being able to provide information to CLR and receive updates from them. This ongoing consultation is the fundamental basis for CLR's claims to speak *for* victims. In the Kenya case, CLR have been able to meet personally with all of their clients. They or their local staff provide or solicit information regularly, either in person or by mobile phone.<sup>659</sup> For instance, during pre-trial hearings, local staff were able to quickly solicit views from victim participants and relay this information to CLR in The Hague to use when questioning witnesses.<sup>660</sup> In another instance, when the Trial Chamber contemplated holding trials in Nairobi or Arusha rather than The Hague, and one CLR and his team contacted 155 victims to get their views. The vast majority, 97.4%, wanted trials to remain in The Hague, out of concerns that accused persons or their sympathizers could more effectively wield their influence if trials were held in Kenya or East Africa.<sup>661</sup>

The CLR and their teams are thus able to contribute to substantial two-way communication between victims and the ICC, informing victim participants and soliciting their perspectives. In the words of a former CLR's staff member, ongoing input from victims is necessary: "Otherwise you are just addressing fantasies or your own imagining, which doesn't really contribute to the

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<sup>657</sup> Author interview with Fiona McKay, Chief of VPRS, The Hague, The Netherlands, September, 2013.

<sup>658</sup> Author interview with VPRS staff, September 2013 and September 2014.

<sup>659</sup> Author interviews with three CLR and their local field staff, conducted in 2012 and 2014. Note that such consultations have been extremely limited in other situations. For instance, the CLR in the Bemba case have not been able to meet or consult their clients regularly. They represent over 5,000 people in the Central African Republic, where recurrent conflict and lack of mobile phones make consultation difficult.

<sup>660</sup> Interviews with two CLR and four CLR staff members, conducted in 2012 and 2014.

<sup>661</sup> Trial Chamber V, 2013.

trial or to the victims.”<sup>662</sup> This two-way communication is easier in Kenya than in other situation countries. While there are security risks for victim participants, they do not face a situation of active conflict as has sometimes existed in the DRC and CAR. Furthermore, victim participants in Kenya tend to have greater access to news media and mobile telephones than victims in other situations. This has allowed the CLR and their field staff to communicate with their clients more quickly, cheaply and regularly than could CLR in other situations.<sup>663</sup>

In addition to speaking *for* victims, CLR can claim to speak *about* victims’ interests on legal matters. Not all CLR have been competent lawyers or experts in international criminal law.<sup>664</sup> The VPRS therefore developed a strategy to identify competent lawyers for judges to assign. Among ICC staff and civil society, there is a general consensus that CLR in the Kenya cases have the necessary expertise to identify and advance victims’ views in judicial proceedings.

In addition to representing victims’ views, CLR can ask judges to allow victim participants themselves to present their views and concerns in Court. By doing so, CLR enable some victims to speak *as* representatives of the larger group. However, cases in the Kenya situation have not reached points at which this direct participation is possible, and so it cannot yet be assessed.<sup>665</sup>

Given the foregoing, CLR in the Kenya cases can make strong claims to represent victims, to the extent that CLR regularly consult victims, have the expertise to identify and act on their interests in complex judicial proceedings, and enable some victims to speak *as* representatives by contributing directly in court.

## 2. Opportunities for Advocacy

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<sup>662</sup> Author interview, Nairobi, Kenya, August 2012.

<sup>663</sup> These observations are based on interviews with five CLR and eight CLR field staff who work in the CAR, DRC or Kenya situations (2012-2014). There are no published analyses of the different methods and impacts of victim legal representation in different situations.

<sup>664</sup> Author interviews with civil society observers.

<sup>665</sup> It has occurred in other ICC cases. On victim participants in the Lubanga trial, see Garbett, 2013.

The mediated inclusion of victims by CLR's also depends on their opportunities for advocacy in judicial proceedings. To date, CLR's in the Kenya cases have made a range of contributions. They have delivered opening statements that focused on the impact of violence and lack of accountability on victims. They clarified judges' confusion about geographical and historical details, or issues of law in Kenya, and questioned both prosecution and defense witnesses in order to improve the quality of the trial record.<sup>666</sup> The CLR Sureta Chana, during confirmation of charges hearings, pushed the Prosecutor to pay greater attention to looting and destruction of property by questioning witnesses on these matters, as convictions on these charges could affect reparations for the victims she represented.<sup>667</sup> Chana also alerted the Court that a Kenyan politician had appeared on a local radio station and made remarks that appeared to call for retaliation against victims and witnesses.<sup>668</sup> ICC judges then raised this matter with the accused and announced that the ICC can charge individuals for interference with justice. As noted previously, CLR's were able to represent victims' views on whether trials should be held in Kenya or The Hague. Finally, as a Kenyan civil society member put it, "the CLR's managed to bring in actual illustrations, actual names of victims, and clear details of what happened to them... because of them, the victims' specific voices were heard."<sup>669</sup>

Despite these various contributions, the CLR's' impact on Kenyan proceedings will remain largely unknown until judges hand down their decisions. Judges in other cases have

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<sup>666</sup> See, for instance, CLR Wilfred Nderitu explaining the history of electoral violence in Kenya and how it relates to victims' ongoing vulnerability (Trial Chamber V(a), 2014b, 35-40), and assisting the Court to interpret provisions of the International Crimes Act of Kenya and other provisions related to the Court's power to issue summons Trial Chamber V(a), 2014a, 1-13.

<sup>667</sup> Pre-Trial Chamber II, 2011c, 41-42.

<sup>668</sup> Pre-Trial Chamber II, 2011d, 26-30.

<sup>669</sup> Author interview with Kenyan human rights organization legal officer, Nairobi, June 2012. For example, CLR Morris Anyah, in his closing statement during the confirmation of charges hearings against Uhuru Kenyatta, stated: "I will...briefly [tell] your Honours about another victim of sexual violence, because in the context of the attacks in Naivasha and Nakuru, they were the most silenced. They were the ones with untold stories that nobody could hear about and nobody had found. This is a 41-year-old woman from Naivasha, identity withheld...She is now mentally disturbed. Her uterus has been taken out. She suffers from high blood pressure, severe headaches daily. She lost all her property. That's a victim in this case, and that is what this case is about"( Pre-Trial Chamber II, 2011a, 30).

acknowledged the value of some CLR contributions to their understanding of fact and law.<sup>670</sup>

However, we currently lack evidence that CLRs and their witnesses have a significant impact on judgments.<sup>671</sup> More judgments and more analysis are necessary.

### 3. Publicity

Finally, victim legal representatives appear to have had a positive impact on the publicity of ICC judicial processes. They can assess judicial documents and arguments that would otherwise be restricted to the prosecution, defense and court staff. This empowered scrutiny on behalf of victims improves transparency. The CLRs and their staff in Kenya have also been able to improve access to information by providing regular updates and responding to questions about their own actions or the Court's activities.

In sum, the work of CLRs in the Kenya cases appears to significantly improve victim inclusion in judicial processes. However, this improvement comes with a significant caveat. Most victims of international crimes in a conflict will not have the opportunity to participate because the violence they experienced will not be included in charges against accused persons. The Prosecutor's practice is to pursue charges against a small number of people in leadership positions, and to select only those incidents most likely to yield convictions. Thus, in Kenya, only a small fraction of the victims of post-election violence could apply as victim participants in cases against Kenyatta, Ruto and others.<sup>672</sup> If people were not harmed in particular attacks in particular places on particular dates, they have virtually no opportunity to participate in judicial processes.<sup>673</sup>

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<sup>670</sup> Author interviews with two ICC judges conducted June 2012 and September 2013. See also Fulford, 2011.

<sup>671</sup> For concerns about the impact of victim participation in the Lubanga trial, see Garbett, 2013.

<sup>672</sup> The Trial Chamber instituted a new approach to representation in which CLRs were directed to communicate with a larger constituency of victims, including those registered by the ICC Registry but who were not accredited as participants by Chambers. This has somewhat expanded the number of victims who can engage with CLRs in the Kenya case, but they are still less than a fraction of 1% of the victims of the 2007-8 post-election violence.

<sup>673</sup> For a detailed analysis of this limitation, see Pena, 2013.

### *Victim inclusion at the UN Security Council*

After Kenyatta and Ruto won office the Kenyan government redoubled its diplomatic offensive against the ICC's intervention in Kenya. This reached a crescendo in late 2013. At a summit of African Union leaders in October, President Kenyatta claimed that the ICC "performs on the cue of European and American governments against the sovereignty of African States and peoples."<sup>674</sup> The AU Assembly put forward a statement castigating "the politicization and misuse of indictments against African leaders by ICC as well as at the unprecedented indictments of and proceedings against the sitting President and Deputy President of Kenya."<sup>675</sup> The AU statement called for its members to press the UNSC to have the ICC suspend proceedings against Kenyatta and Ruto.<sup>676</sup> There followed a heated campaign lobbying UNSC members, which culminated in a vote on 15 November 2013.

The vote ultimately failed, with seven supporters of the deferral<sup>677</sup> and eight non-supporters.<sup>678</sup> The UNSC thus did not suspend ICC proceedings against Kenyatta and Ruto. Given that this decision would have a significant effect on the ICC's contribution to justice for victims in Kenya, it warrants examination of the UNSC members' positions to determine the extent to which they reflect victim inclusion. This section briefly examines this decision-making, drawing

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<sup>674</sup> Gekara, 2013.

<sup>675</sup> See African Union, 2013.

<sup>676</sup> The Rome Statute's Article 16 grants the UNSC the authority to suspend ICC proceedings on a renewable one-year basis. Kenya had made such a request informally as early as 2010 and was rebuffed (Mutiga, 2011). At the 2013 AU Assembly meeting, AU members apparently voted on a motion calling for a mass withdrawal from the Rome Statute. This motion did not have sufficient support. While the vote was confidential, it has been reported that Algeria, Ethiopia, Ghana, Kenya, Malawi, Nigeria, Rwanda, South Africa, Sudan, Tanzania, Uganda and Zimbabwe supported the motion to withdraw from the ICC, and Botswana, Burkina Faso, the Côte d'Ivoire, the Gambia, Mali, Senegal rejected it (Bullock, 2013).

<sup>677</sup> Azerbaijan, China, Morocco, Pakistan, Russian Federation, Rwanda and Togo. None were ICC state parties.

<sup>678</sup> Argentina, Australia, France, Guatemala, Luxembourg, Republic of Korea, United Kingdom and United States. All except for the USA are ICC state parties.

on public comments by UNSC members after the vote, and on interviews by the author with diplomats and NGOs involved.<sup>679</sup>

The campaign over a possible deferral was championed by Kenya and Rwanda, with support from several other African states. No UNSC member that supported the deferral of proceedings made reference to Kenyan victims of post-election violence.<sup>680</sup> The interests of Kenyan victims were also ignored by these supporters of the deferral in private meetings and negotiations among UNSC diplomats in the weeks leading up to the vote, according to some participants.<sup>681</sup>

Instead of referencing victims, supporters of the deferral argued that ICC proceedings against Kenyan leaders should end because the Kenyan government was embroiled in efforts to combat terrorism in their country and in neighbouring Somalia. Several state representatives implied that ongoing cases against the leaders prevented the government from properly addressing national and international security issues. Rather than clarifying the legal applicability of the Rome Statute's Article 16 to the Kenyan situation, African state representatives framed the vote as an issue of African sovereignty and solidarity against Western meddling. Thus, the Rwandan ambassador stated, "We have always been preached to about the values of democracy and self-determination, but surprisingly, those who taught us those principles do not believe in Africa determining its fate at all."<sup>682</sup> The Kenyan representative stated that the deferral was "Africa's request," and concluded, "For Africa, the Rome Statute has failed its first crucial test in the Council and has done so in spectacular fashion, in the full glare of the African continent."<sup>683</sup>

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<sup>679</sup> The author interviewed diplomats of four states that were UNSC members in 2013. To encourage frankness, interviews were conducted with the agreement that interviewees' names and state affiliation would not be made public.

<sup>680</sup> Kenya, not a UNSC member at the time, did. "There is little doubt that the victims of the 2007 post-election violence deserve justice," said Kenya's Ambassador Kamau. "But no one recognizes that more than Kenyans themselves" (14). No mention was made of the lack of domestic justice processes to date.

<sup>681</sup> Author interview with three diplomats of UNSC member states, June and August 2014.

<sup>682</sup> United Nations Security Council, 2013, 11.

<sup>683</sup> United Nations Security Council, 2013, 13-14.

Diplomats of UNSC members that opposed the deferral all claimed, in their public justifications of their vote, that the application of Article 16 was not legally appropriate in the given context. Two opponents of the deferral, Argentina and the United States, also referenced Kenyan victims' need for justice. The US ambassador observed that "the families of the victims of the 2008 post-election violence in Kenya have already waited more than five years for a judicial weighing of the evidence to commence."<sup>684</sup> Argentina's ambassador argued that Argentinians "are the children of the mothers and grandmothers of the Plaza de Mayo, and that is why we understand that all victims have the right not to be forgotten or treated with indifference, including those in Kenya."<sup>685</sup>

In interviews, diplomats of states opposing the deferral said that their position was driven primarily by their commitment to the rule of law, including the proper application of the Rome Statute, and by the belief that the ICC promotes justice for victims in general or in the future. The particular views of Kenyan victims of post-election violence appeared not to figure prominently in their consideration. Indeed, one diplomat recognized that many of the actual victims might not desire the kind of justice that the ICC promotes, including its emphasis on due process (which could lead to the acquittal of a person that victims consider guilty).<sup>686</sup> This diplomat and others suggested that the ICC's role is to promote a norm of accountability rather than to accommodate the interests of existing victims in Kenya.

None of the diplomats could make strong claims to speak *for*, *as* or *about* Kenyan victims.<sup>687</sup> But were their decisions influenced by actors who could make such claims? Diplomats involved suggested that their decisions were significantly dictated by their governments' strategic aims or their governments' general stances on the ICC. Several diplomats acknowledged that those

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<sup>684</sup> United Nations Security Council, 2013, 8.

<sup>685</sup> *Ibid.*, 4.

<sup>686</sup> Author interview with diplomat of UNSC member state, June, 2014.

<sup>687</sup> The Kenyan government *could* arguably claim to speak *for* victims, though many victims are politically disenfranchised and see senior Kenyan leaders as responsible for crimes. Regardless, Kenya was not a member of the UNSC at the time of the vote.

opposed to a deferral banded together to coordinate their position because their governments were anxious about alienating African states as a bloc. When asked whether they met with or drew on the claims of representatives of Kenyan victims, several diplomats referred to general practices of information collection, such as reading newspapers and human rights reports. Diplomats of several states said that they would normally turn to the Coalition for the ICC, Human Rights Watch and Amnesty International for information and advocacy in support of the ICC, but that these NGOs were not significant voices in their state missions' internal decision-making lead-up to the vote at the UNSC.<sup>688</sup> Nor did any diplomat claim that they were significantly influenced by Kenyan civil society organizations, which had sent letters to UNSC members asking the deferral to be denied. UNSC members also received a letter or other communications from Fergal Gaynor, the CLR for victims in the case against Kenyatta. While several diplomats reported that his communications were not influential, diplomats of two states reported that they drew on his communications when arguing their states' position.<sup>689</sup> Gaynor provided valuable legal arguments, one diplomat said, and "the fact that he was giving the voice of victims in a discussion where the victims were not at the center was also very useful."<sup>690</sup>

Victims' interests were thereby recognized by several of the UNSC members as important both in public statements and in private debates. However, it does not appear that the interests and perspectives of Kenyan victims were a significant consideration for most of the UNSC members. While well-funded international NGOs like Human Rights Watch have significant access to some diplomats and can influence the conversation on ICC issues, they appear not to have contributed significantly to state positions in the 2013 vote. Kenyan civil society actors also appear to have had limited influence. Unexpectedly, the ICC-designated lawyer for victims – who has no formal role to advocate for victims in diplomatic decision-making – was recognized by some states as a key voice for victims, although his impact on their position is unclear. Based

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<sup>688</sup> Author interviews with diplomats of UNSC member states, June and July, 2014.

<sup>689</sup> See Gaynor, 2013.

<sup>690</sup> Author interview with diplomat of UNSC member state, July, 2014.

on this analysis, there appears to have been little opportunity for representatives with strong claims to speak *for*, *about* or *as* victims to contribute to decision-making.

Public awareness of the UNSC process in Kenya was high. The UNSC vote received extensive attention from news media, provoking heated debate among supporters and opponents of the government. Gaynor, the CLR for victims in the Kenyatta case, was able to explain the vote and its implications to clients in the months that followed. “Their general reaction was one of relief,” he claims.<sup>691</sup>

### *Final observations*

The Kenya case study examines the work of an institutionally-designated representative for victims, the CLR. Ongoing communication and consultation can give representatives legitimacy to speak *for* their clients. However, not all CLRs can or do consult extensively, and CLRs are ultimately accountable to the ICC rather than to victims. Victims’ legal representatives have significant opportunities for advocacy. They have guaranteed access to participate in judicial proceedings, and decision-making in Chambers features considerable deliberation and reasoning. Criminal trials predominately focus on the guilt of accused persons rather than victims’ interests, but CLRs have been able to augment or challenge the Prosecutor’s arguments, they have been able to lay groundwork for future reparations proceedings, and they have been able to introduce victims’ voices and experiences to ensure that they are recognized regardless of eventual verdicts. The CLRs’ work outside the courtroom is just as important to victim inclusion. By engaging victims and keeping them aware of developments at the ICC, they greatly increase the publicity of proceedings. However, only a fraction of victims in any particular situation are likely to benefit from significant interaction with CLRs.

The ultimate impact of CLRs on Kenya proceedings remains unknown. Furthermore, their impact has clearly been limited by the collapse of the cases against Kenyatta and Muthaura, at least partly due to state non-cooperation with the ICC. As will be noted in the conclusion, victim

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<sup>691</sup> Author interview with Fergal Gaynor, Skype, July 2014..

inclusion in a weak Court may not promote justice. However, when cases or accused persons are acquitted, it is important for CLR and other trusted actors to explain those developments to victims.

In contrast to ICC judicial proceedings, the UNSC does not grant participation to victims' representatives. Member states may consult with victims' representatives and consider their claims. In the 2013 vote regarding the deferral of proceedings against Kenya leaders, it appears that few state representatives significantly considered the interests and perspectives of victims. However, the claims of an ICC-appointed CLR appear to have been considered by several UNSC state officials, due to his political, expert and moral authority as a victims' representative. Leading up to the UNSC vote, there appears to have been little deliberation and reason-giving among states. Positions had been determined well in advance and no move toward consensus was achieved.

Victim inclusion in the UNSC decision must ultimately be assessed as weak. As a decision-making site in the Rome Statute institutional architecture, it appears that the UNSC should not be a place to look for significant victim inclusion.<sup>692</sup>

#### **6.4 Victims' Views of the ICC and Justice**

In Chapter Two I argued that justice is a contested and multi-dimensional concept that varies within and between societies. It should therefore be treated as the result of ongoing deliberation and negotiation among people whose lives affect one another. Particular attention should be paid to those who suffer injustice, as they can have important insights into its causes and solutions.

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<sup>692</sup> However, there are instances of UNSC responsiveness to civil society advocates on behalf of issues and affected groups. See, among others, NGO contributions to the UNSC decision to place an embargo on diamonds that were being sold to finance conflict (Smillie, 2007) and the role of civil society and women from conflict regions in the development of UNSC Resolution 1325 on Women, Peace and Security (Hill *et al.*, 2003).

To act on these principles, this section draws on the insights of survivors of violence in Uganda and Kenya. This research approach is a corollary of the basic normative claim of this dissertation—that the intended beneficiaries of a governance regime should be included in decision-making. Academic analysis is not “outside” the regime of international criminal justice, but is very much a part of it. Academics shape jurisprudence and publicly defend, criticize and promote tribunals, among other contributions. Because they contribute to this governance regime, their activities can also be held to standards of mediated inclusion regarding intended beneficiaries. In my own research I attempted to do so, in part, by conducting my research together with local NGOs in Uganda and Kenya that effectively engage victims and affected communities: the Justice and Reconciliation Program (Uganda) and the Coalition on Violence Against Women (Kenya). These organizations assisted with research and agreed to help distribute research findings to their constituencies.<sup>693</sup>

Focus group discussions challenged and enriched the conceptual framework of this dissertation, and gave practical insights into the opportunities and obstacles to inclusion in the context of the ICC’s interventions in Uganda and Kenya. While these research findings are presented near the end of this dissertation, they were in fact conducted mid-way through research. Both the articulation of the problem that this dissertation addresses and the framework of mediated inclusion it proposes were influenced by these focus group discussions.<sup>694</sup>

Fourteen focus groups were conducted with 84 individuals affected by the civil war in Uganda or the 2007–2008 post-election violence in Kenya. The focus groups were convened in seven communities that had experienced extreme violence. Participants were purposively selected to obtain the perspectives of individuals of different sexes, ages, ethnicities and experiences of violence. Discussions were semi-structured, in that all groups were prompted to discuss the status of victims, the forms of justice that victims desire, and the activities of the ICC, among other topics. Discussions were conducted in Lango, Luo or Swahili. Audio recordings were

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<sup>693</sup> For my research report for the Justice and Reconciliation Program, see Tenove and Radziejowska, 2013.

<sup>694</sup> For more on pragmatic and dialogic approaches to research, see Chapter One, Section 1.3.

translated into English and analyzed.<sup>695</sup> Focus group discussions did not simply elicit participants' initial opinions, but also provided an opportunity for participants to discuss and justify their positions, thereby revealing some of the evaluative principles that underlie individual views on justice, victimization and the ICC.

Given the small sample size of participants and the large numbers of victims in Kenya and Uganda, the study's results cannot be assumed to be representative of all victims in the two countries. However, the points of view advanced in the focus groups were consistent with published surveys of victims' opinions.<sup>696</sup> To gain further insight into the issues discussed and to contextualize the positions advanced in focus groups, interviews were conducted with members of 30 civil society organizations in Kenya, Uganda and The Hague. Background interviews were also conducted with ICC staff. The focus groups were conducted between June and August of 2012. They therefore occurred before important developments in the Kenyan situation, including the election of Kenyatta and Ruto, the suspension of Kenyatta's trial, and the UN Security Council vote on a deferral.

This section will summarize views of discussants that pertain to the social category of "victims", and to the three elements of mediated inclusion. The views of Ugandan and Kenyan participants are analyzed together to highlight similarities and differences.

#### *Constructing the constituency: Who are victims?*

Focus groups explored the criteria and consequences for identifying people as "victims of conflict."<sup>697</sup> Overall, discussions revealed general support for the ICC's identification of victims as a category of individuals who deserve social recognition and redress for the violence they

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<sup>695</sup> The research was approved by the Behavioural Research and Ethics Board of the University of British Columbia. For more on the methodology and results of these focus group discussions, see Tenove, 2013b.

<sup>696</sup> ICJ and KHRC, 2012; Pham and Vinck, 2010; Pham, Vinck, and Stover, 2008; Robins, 2011; United Nations Human Rights, 2011.

<sup>697</sup> In Kenya, we used the following phrases to refer to victims of post-election violence: *jok mane owinjo pek mar tulo* (Luo) and *waathiriwa wa ghasia za baada ya uchaguzi* (Swahili). In Uganda we referred to victims of war as *Jo ma ayalayela pa hweny oketo can ikom gi* (used for both Luo and Lango groups).

suffered. However, many discussants expressed concern that the ICC ignored many who ought to belong to this category, thereby pursuing justice for some victims and not others.

Some scholars and activists have challenged the term “victim” because of its possible connotations of passivity, dependence and powerlessness. The term “survivor” is often proposed as an alternative.<sup>698</sup> Focus group participants were asked whether they consider themselves victims and what they think of the term. All Kenyan and Ugandan participants agreed that the term “victim” was appropriate for them. Several Kenyan focus group participants claimed that while the term “victim” was accurate, it also caused them distress because it emphasized their suffering. A small number of Kenyan participants further claimed that their communities treated victims poorly out of the belief that victims impose burdens on others.

Many focus group participants argued that a victim should not be understood simply as someone harmed in the past, but rather as someone who continues to suffer because their life plan or quality of living was dramatically changed by violence. A Kenyan woman explained, “Before the violence I depended on myself but now I am helpless! As the community continues to have a good life, I am suffering... the violence really interfered with me.”<sup>699</sup> This emphasis on the ongoing suffering of victims meant that many discussants linked victim status to a moral and social right to redress. As a result, focus groups frequently argued that justice for victims should not be conceived purely in terms of accountability for perpetrators.

Discussions often led to group consensus that the ICC only recognizes some of the victims of conflict who warrant attention. Many Ugandan discussants stated that all people forced by the government into internal displacement camps were victims, and that this government action deserved attention from the Court. Furthermore, Ugandan and Kenyan discussants claimed that the ICC focused on an overly narrow window of time, therefore ignoring those people harmed in

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<sup>698</sup> This shift from victim to survivor has been a focus of feminist analyses of domestic violence (Lamb, 1999). Other scholars have argued that Africans are often depicted and labeled “victims” as a justification for Western humanitarianism and hegemony (Clarke, 2009; Mamdani, 2010; Sagan, 2010).

<sup>699</sup> Focus group participant, Vihiga, Western province, Kenya, July 2012.

early years. This was particularly problematic for many Ugandan focus group participants, who pointed to mass victimization in northern Uganda that occurred before 1 July 2002 (the beginning of the ICC's temporal jurisdiction).

In Kenya, discussants knew that the Prosecutor had initially charged just six individuals, and that some cases had subsequently been dropped. Several participants therefore argued that many victims, including themselves, would not have the opportunity to see violence against them prosecuted.<sup>700</sup> Only a few discussants were aware that this could have an impact on access to reparations. They suggested that such a development could lead to disappointment and even conflict among victims.

Because the term “victim” entails normative recognition and possible material assistance, discussants in both countries were concerned that only “real victims” be recognized. A Ugandan woman expressed this apprehension: “If assistance is to be given, then identification and registration of people with urgent needs has to be done... Otherwise some wrong people might receive assistance and the real victims will be sidelined.”<sup>701</sup> Discussions thus identified that victim status can be an object of competition and contention, particularly when material benefits may be attached.

*Representative claim-making: Who speaks on behalf of victims?*

Focus group participants frequently claimed that victims were not adequately represented. A subsistence farmer in Uganda articulated this concern: “Ever since the massacre, many people like me have been left with injuries and physical deformations. We suffer and cannot plant crops, and we have never been assisted. To me, it seems that there is nobody who will speak for us, the victims.”<sup>702</sup>

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<sup>700</sup> For instance, because charges against former Kenyan Police Commissioner Ali were not confirmed by the Pre-Trial Chamber, no victims of police violence would have these acts prosecuted by the ICC.

<sup>701</sup> Focus group participant, Lukodi village, Gulu district, Acholi sub-region, June 2012.

<sup>702</sup> Focus group participant, Barlonyo, Lira District, Lango Sub-region, Uganda, July 2012.

Focus group discussions revealed that survivors assessed representatives on multiple criteria and believed that they were capable of promoting different goods for victims. These observations would inform the typology of speaking *for*, *as* and *about*, developed in Chapter Three.

### 1. Speaking *for*

Most focus group participants in Kenya and Uganda expressed a desire for representatives who would consult frequently and respond to their requests. Several discussants argued that people who claimed to represent victims were not responsive to them. “We have had several visitors here interviewing us and getting our views but nothing comes out of it,” said a Kenyan woman. “The politicians and NGOs always give us false promises, and after we tell them our stories we don’t see them again.”<sup>703</sup>

When asked who best represented them, Kenyan and Ugandan discussants often referenced civil society organizations that engaged with them regularly and provided tangible results. In Uganda but not Kenya, a number of discussants identified religious leaders and traditional community leaders as key victims’ representatives. Many discussants in Kenya and Uganda were skeptical that elected politicians were responsive to victims. One typical comment was that politicians “only come during the campaign time when they want votes from us, but they are never there for us victims when we need them.”<sup>704</sup>

Rather than formal mechanisms for accountability, such as elections, most discussants expressed a desire for ongoing consultation by representatives. When discussants were asked about the possibility of having a legal representative at the ICC, ongoing consultation by the lawyer was identified as the most important quality of good representation.

### 2. Speaking *about*

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<sup>703</sup> Focus group participant, Ugunja, Nyanza province, Kenya, August 2012.

<sup>704</sup> Focus group participant, Lukodi village, Gulu district, Acholi sub-region, Uganda, June 2012.

For the most part, focus group participants in Kenya and Uganda expressed concern about representatives who spoke *about* victims but who were not responsive to them. Whether the ICC or the government was getting epistemically-robust policy advice did not emerge as a significant consideration in focus group discussions. However, some respondents acknowledged that a representative's expertise could be critical to their ability to act for victims. This observation usually arose when discussing legal representation. "A lawyer is good because he or she is educated on legal matters," said one Kenyan woman.<sup>705</sup> "He will know how to answer questions and what points to nail down, unlike me who will just give my whole history."

Civil society actors who work extensively with victims of violence sometimes refer to their role as one of translating victims' desires into technical or institution-specific recommendations. Doing so allows them to promote policies or challenge the claims of policy-makers. One member of a community-based organization in Lira, Uganda, described the process this way:

You begin to talk with somebody and they break down and cry from their hidden pain, and then begin to narrate their stories... You first have to listen to them, then you can translate what they are talking about in terms of reparation, compensation, rehabilitation, and put it in language that will get results.<sup>706</sup>

### 3. Speaking *as*

Focus group discussants in Kenya and Uganda frequently claimed that victims who spoke *as* representatives could add important insights to ICC decision-making. As one Kenyan man put it, "If we are represented by people affected by the violence, they would be able to understand what we are going through [and] would speak the truth."<sup>707</sup>

Some focus group participants noted that victims are rarely given the opportunity to speak publicly or contribute to policy-making. They proposed that victims' voices in these processes

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<sup>705</sup> Focus group participant, Kisumu, Nyanza province, Kenya, August 2012.

<sup>706</sup> Interview with author, conducted in Soroti district, Teso sub-region, Uganda, July 2012.

<sup>707</sup> Focus group participant, Nairobi, Kenya, July 2012.

would not only improve the outcomes but would also enhance the social recognition of victims. Along these lines, a member of an association of Ugandan women affected by civil war argued that her group's members ought to contribute to policy-making:

Most organizations that work in transitional justice and human rights seem to think that survivors cannot do things for themselves... We want to show the world that survivors or victims are the ones who know their problems best and who can advocate for justice better than a sympathizer or someone who knows about them. At the end of it all, justice is a process of our empowerment rather than the outcome of justice done.<sup>708</sup>

Finally, focus group participants in Uganda suggested a third benefit of having victims as representatives in ICC processes. They argued that justice would be advanced if perpetrators made direct apologies in public to those people they had harmed, a proposal that resonates with Ugandan traditional justice practices. Several Ugandan discussants argued that some victims ought to be present at ICC trials, not only to give testimony but to hear, assess and respond to claims by accused persons.

*Opportunities for advocacy: Do victims' interests influence decision-makers?*

Very few discussants had a clear sense of how key ICC decisions were made, and therefore had little grounds to evaluate the access or consideration given to victims' representatives. Rather than summarize focus group evaluations of opportunities for advocacy, I will highlight several issues about which discussants felt their interests deserved consideration.

First, the majority of focus group participants in Uganda supported the ICC's attempt to hold LRA leaders accountable,<sup>709</sup> and nearly all Kenyan participants supported the ICC's prosecutions

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<sup>708</sup> Interview with author, conducted in Gulu district, Acholi sub-region, Uganda, July 2012.

<sup>709</sup> This finding differs from some previous accounts, which showed less agreement on ICC prosecutions (Hovil and Quinn, 2005; Pham *et al.*, 2005; Pham *et al.*, 2007) Several factors may explain my different findings in focus groups. First, the improved security situation in northern Uganda means that people are less worried that the ICC might prompt further attacks by the LRA, and there is no peace process for the

of political leaders. When asked why the ICC should play this role, participants overwhelmingly referred to the failure of their domestic political and judicial systems to treat victims' interests seriously or to deal fairly with crimes committed by powerful individuals. In Kenya, participants repeatedly claimed that the lack of accountability for election-related crimes would not be dealt with in the absence of ICC involvement. "Those who planned the violence are in office right now," one Kenyan woman commented. "There's a lot of corruption here, meaning the courts will not do much. That's why the cases should be taken to The Hague."<sup>710</sup>

Many focus group participants thus argued that it was important for victims to contribute to trials. While some primarily saw their role as giving evidence to contribute to prosecutions, others felt it was important to explain their experiences and views to judges, accused persons, and a wider international audience. One Ugandan man argued that he would like to tell the Court about his village's attack by the LRA and subsequent hardships: "The world should know, because it will awaken the world to hear that a particular area has suffered. That way, when voices cry out again in the future, they may get attention."<sup>711</sup>

Second, many discussants were critical of decision-making by the ICC Prosecutor. Focus group participants in Uganda were almost unanimous in their criticism of the OTP's failure to prosecute Ugandan military or government officials. By not doing so, participants argued, the ICC ignores the suffering of many victims and fails to address the government impunity that contributed to conflict in northern Uganda. Discussants in Uganda were divided, however, on whether the OTP's decision to prosecute LRA leaders had undermined peace processes, or whether the ICC and greater international attention had scared the LRA out of Uganda. In focus group discussions in Kenya, many participants expressed disappointment at the limited number

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ICC to affect. Second, I conducted focus groups that encouraged discussion and possible revision of positions. Some participants who initially disagreed with ICC prosecutions of senior LRA leaders changed their position during the course of discussions, with clarification that the ICC would only address a few top leaders and that other LRA members could be addressed through other justice processes. Third, my focus groups are a small sample and may not be representative of affected communities more broadly.

<sup>710</sup> Focus group participant, Kisumu, Nyanza province, Kenya, August 2012.

<sup>711</sup> Focus group participant, Lukodi village, Gulu district, Acholi sub-region, Uganda, June 2012.

of individuals and acts that the ICC Prosecutor had targeted for prosecution. They therefore argued for greater opportunities for victims to propose charges or contribute evidence.

Third, discussants in focus groups in both countries emphasized the importance of reparations and material assistance for victims. Few discussants in either country were aware of the Trust Fund for Victims. When informed of its existence, Kenyan focus group participants were disappointed to learn that it was not funding projects in their country. Ugandan discussants were keen to learn what projects the TFV funded, and how these decisions were made. Discussions in Uganda and Kenya revealed different expectations for assistance and reparations. All Kenyan discussants called for individual assistance and reparations, often to repair property or livelihoods that had been damaged. In Uganda, many discussants argued that assistance and reparations needed to be directed at communities as well as individuals. Ugandan discussants also suggested that such reparations could help repair the social and sometimes spiritual discord in communities.

*Publicity: Victim awareness of ICC decision-making*

Many focus group participants in Uganda, and some in Kenya, claimed that they lacked sufficient information about the ICC's activities and about the actions of their own representatives. They identified two main implications of these perceived deficits in transparency and public awareness.<sup>712</sup> First, many participants felt that they were unable to evaluate ICC decisions. One Ugandan woman, who had been abducted by the LRA, said, "While we were in captivity, we heard that once we escaped back home, we would be arrested by the ICC and killed... I learned that is not true when I came home, but I don't understand why the ICC has not arrested Kony or anyone else. What is it doing all these years?"<sup>713</sup>

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<sup>712</sup> Focus group discussions could not provide a meaningful assessment of public awareness of the ICC in northern Uganda or Kenya, due to the small sample size and the fact that participants were exposed to information about the Court during the course of discussions.

<sup>713</sup> Focus group discussant, Palabek Kal, Lamwo district, Acholi sub-region, Uganda, July 2012.

Second, a vocal minority of participants expressed frustration that staff of civil society organizations and the ICC have asked them for information but have not provided feedback or delivered concrete results. This response was prominent among focus group participants in communities that are well-known sites of mass violence.<sup>714</sup> Not only does this lack of feedback cause frustration, it also prevents individuals from being able to assess – and hold to account – their own representatives. The lack of responsiveness and feedback from representatives prompted disappointment. A focus group participant poignantly articulated this feeling:

Many organizations came and did data collection, just like you are doing today, about the massacre and about victims' needs. We have been giving our views and testifying for close to six years now. But it has been a nightmare for these people to come back to us and report progress on the subject matter ... If every year is just more collecting data, one day we will stop sharing our ideas since we do not see any outcome!<sup>715</sup>

*Final observations regarding survivor's perspectives on inclusion and the ICC*

Focus group discussions with survivors of violence revealed a strong desire for inclusion and a nuanced reflection on how the ICC addresses the social category of “victims.” Most discussants in Uganda and Kenya supported the ICC’s attempt to hold leaders to account for mass violence, due to the failings of domestic and political accountability mechanisms. Many questioned the OTP’s impartiality and selection of cases. Most participants argued that criminal accountability alone would not provide justice for victims, that assistance and reparations are critical to rebuilding lives and social relations, and that the ICC needed to do more in this regard. Finally, most participants felt poorly informed about the activities of the ICC and their own representatives. One of the strongest complaints against the ICC was its limited output—its

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<sup>714</sup> These responses were common in the Ugandan villages of Lukodi and Barlonyo, well-known sites of LRA massacres, and the community of Kibera in Nairobi, Kenya.

<sup>715</sup> Male focus group participant, Barlonyo village, Lira district, Lango sub-region, July 2012.

failure to successfully investigate and prosecute those people most responsible for international crimes, and provide reparations for their victims.<sup>716</sup>

The focus group discussions also highlighted three challenge of representing victims.<sup>717</sup> First, focus group participants often lacked sufficient information to evaluate the work of the ICC. Some participants were unaware of important institutional facts, such as the existence of the Trust Fund for Victims or the reach of the Court’s jurisdiction. While most focus group participants understood the basic role of the Court, many claimed that they lacked information on its recent activities. During the focus group discussion, some participants changed their opinions in response to greater information. This dynamic underscores the difference between initial responses (elicited in most opinion polls) and the “considered opinions” that people put forward if well informed and given time to engage with alternative viewpoints. It therefore shows how *publicity* affects the views and perceived interests of members of a constituency.

Second, focus group discussions revealed a great diversity in victims’ views. For example, in Kenya, participants disagreed on who deserved to be prosecuted and who counted as “real victims.” In Uganda, victims disagreed about whether the ICC undermined peace processes in the region. There were also differences between Kenyan and Ugandan participants: traditional justice norms and practices were important for Ugandan participants but did not figure in focus groups in Kenya, for instance. It is important to acknowledge this diversity of views. However, several strategies can be used to seek greater agreement on positions, which could then be advocated in decision-making processes. One strategy is to identify normative commitments that underlie apparently competing preferences. Another strategy is to identify policy priorities, which may gain agreement even when there is a lack of normative consensus. For instance, focus group participants in Uganda came to considerable agreement over which victims should be

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<sup>716</sup> For more, see Tenove, 2013b; Tenove and Radziejowska, 2013.

<sup>717</sup> For more on this topic, see Tenove, 2013b, 32-34, where the arguments of the two following paragraphs are developed.

prioritized for assistance, given that limited material resources are available.<sup>718</sup> These strategies go beyond deriving *individuals'* considered opinions, and elicit the considered opinions of *groups* by facilitating deliberation.

Third, the discussions highlighted the representative role of academic researchers. In several focus groups, at least one participant described me as a representative. For instance, a Ugandan man, referring to me, said, "I feel this visitor who has come should help us pass on the message to the rest of the world."<sup>719</sup> A Kenyan woman requested, "Since it is easier for people like you, we are asking you to [give] our leaders our opinion."<sup>720</sup> In asking me to act as a representative, the discussants were proposing a role that might make many academic researchers uncomfortable. However, it is true that some academics do make representative claims about victims (and other groups) and that they do influence decision-making processes. Researchers from Berkeley's HRC provided a clear illustration of that role in their work in Uganda. More broadly, academics can contribute to mediated inclusion by using their own expertise, resources and research efforts to represent constituencies, and by contributing to processes of publicity. Whether or not they act on these opportunities, the fact that they exist presents academics with important ethical considerations. I reflect further on these issues in Section 7.2.

## 6.5 Conclusion

*Summary of case studies: The inclusion of Ugandan and Kenyan victims*

The ICC's interventions in Uganda and Kenya show a complex picture of the mediated inclusion of victims. The two case studies show a variety of types of representatives, with different claims

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<sup>718</sup> During discussions, several focus groups came to agree that the following categories should be prioritized for assistance: people with permanent disabilities, women who had been abducted by the LRA and who bore children while in captivity, those whose family members were killed, and, above all, orphans and widows. See Tenove, 2013b, 22-23.

<sup>719</sup> Focus group participant, Lukodi village, Gulu district, Acholi sub-region, Uganda, June 2012.

<sup>720</sup> Focus group participant, Nairobi, Kenya, July 2012.

to speak *for, as* and *about* victims. While the Court did not necessarily respond to victims' opinions or act on their interests, actors that represent victims did make contributions to judicial, bureaucratic and diplomatic decision-making processes.

In the Ugandan situation, local and international civil society actors stepped forward as self-appointed advocates of victims. They made competing claims about victims' interests and perspectives, based on different forms of legitimacy. The Acholi Religious Leaders Peace Initiative and Berkeley's HRC employed different practices of speaking *for* victims, generating claims about victims' interests and perspectives that partly overlapped and partly competed. Members of ARLPI had significant legitimacy as representatives among Acholi populations, but they advanced views that were not necessarily supported by all or even most northern Ugandans. The HRC researchers spoke *for* a broader constituency of victims and affected communities through public opinion surveys, but were not authorized by or accountable to the constituency. Human Rights Watch added to the debate by drawing on their expertise to speak *about* policies that would advance victims' interests, but did so as part of an advocacy agenda that was not limited to or responsive to northern Ugandan victims.

The Kenyan situation featured an institutionally-designated representative, a role created and funded by the ICC. Common Legal Representatives are accountable to ICC judges and bureaucrats, but can legitimately claim to speak *for* victims when they consult extensively and are responsive to requests. Some CLR's have done this and have also gone beyond their mandated role, advocating for victims in donors' offices, the news media and the UNSC, and not just in the ICC courtroom. However, the CLR's can only speak *for* a subset of victims, and often have limited ability to engage them. Victim legal representatives are an important contribution to victim inclusion at the ICC but only part of the picture.

The two case studies show limited opportunities for victims to speak *as* representatives in decision-making processes. Victims did not directly contribute to the UNSC debate over the deferral of ICC proceedings. The ICC's OTP consulted victims and invited northern Ugandan delegations to The Hague that included victims of violence, but these were ad hoc gestures and not a reliable avenue for representation by victims. The CLR's can invite victims to present their

views and concerns in ICC judicial processes, providing a formalized but limited opportunity for victim representatives, but this has not occurred in the Ugandan or Kenyan proceedings.

While none of these advocates make claims that provide a complete or uncomplicated representation of victims in Uganda and Kenya, they were not the abstract or imaginary representations of victims that some scholars criticize.<sup>721</sup>

Actors who represented victims had differing opportunities for advocacy in decision-making processes. The institutionally-designated CLR's have an established role in court proceedings, and judges must consider and address their arguments. By contrast, self-appointed civil society actors were only able to contribute at the discretion of decision-makers in the ICC's OTP and the UNSC. It was up to decision-makers to grant access and consider views of civil society advocates. Civil society actors appeared to have been seriously considered by the OTP, at least on some decisions and at some times. UNSC members, by and large, did not seem to significantly consider the positions of victims' representatives. These are very different institutions and decision-making processes, of course, with different mandates and a different relationship to victims. The OTP operates within an institution whose existence and legitimacy is linked to victims as its intended beneficiaries. Victims are not the intended beneficiaries of the UNSC, although they may at times be invoked in moral and legal argument.

The Ugandan and Kenyan cases demonstrate several challenges with respect to the third element of mediated inclusion, publicity. The transparency of decision-making varied. The OTP explained some decision-making processes through public justifications and policy papers, but other decisions remained obscure. UNSC members voted publicly and made public justifications, but the motives for states' decisions were not fully or credibly explained. Judicial decision-

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<sup>721</sup> I refer to this formulation by Fletcher (forthcoming) because it is a particularly sophisticated analysis of the representation of victims in international criminal justice. Our accounts don't fundamentally contradict each other. Fletcher examines all uses of the term "victims" in the discourse of international criminal justice, and many of these uses are cursory references by actors that are not (primarily) victims' advocates. I focus on the claims of actors that consistently advocated for or shed light on victims' interests in important decision-making processes.

making is much more transparent, as judges must address the arguments put forward by the parties and by the victim legal representatives in their reasons for judgment.

In addition to transparency deficits, victims in Kenya and especially Uganda faced limitations in access to information. This made it difficult for many individuals to assess the ICC or their own civil society representatives, thereby undermining their ability to develop informed positions or to hold actors to account. It is therefore important for CLR or other actors in Kenya to provide reliable information and regular updates to the victims with participant status.

### *Institutional design, statutory implementation and victim inclusion*

The Uganda and Kenya case studies show strengths and weaknesses in victim inclusion, and they illustrate the importance of institutional design. Victim-related provisions in the Rome Statute have shaped the ICC's institutional structure, internal policies and judicial decisions. They created a new actor, the CLR, capable of advocating in judicial proceedings and sometimes beyond. They created the Trust Fund for Victims, which has provided assistance to tens of thousands of individuals. Other provisions required the Prosecutor to address the "interests of victims" in a variety of decisions, thereby shaping the OTP's policies.

The Rome Statute also created or empowered inter-state decision-making processes that have a considerable impact on victims, including the Assembly of State Parties and the UNSC. These sites do not formally include victims' representatives in decision-making, and decision-makers do not have a legal requirement to take victims' interests into account.

Victim-related provisions in the Rome Statute provisions have been implemented in ways that only partly achieved the aims of their advocates. Despite having a right to reparations, no victims have yet received them. Prosecution of sexual and gender violence has been ineffective due to OTP policies and errors. Victims are represented in judicial proceedings, but to this day there is debate among State Parties, judges and ICC staff about whether to limit the CLR's role in judicial processes and their funding to consult with victims.

Nevertheless, when compared to previous international criminal tribunals, the ICC clearly offers greater opportunities for victim inclusion. That inclusion contributes to justice for victims. In

Uganda, victims' representatives such as ARLPI were able to force the Prosecutor to publicly address and consider victims' interests that they might have ignored. The OTP did not adopt ARLPI's proposed policies, but did take actions to mitigate risks against victims, such as delaying the announcement of LRA arrest warrants until doing so was less likely to endanger them. Also in Uganda, tens of thousands of victims have benefited from the Trust Fund, receiving surgeries and other critical aid that they might not have obtained had the TFV not been promoted by a handful of dedicated advocates in the Rome Statute negotiations. In Kenya, the government continues to be pressured by states and civil society to provide accountability and reparations to victims, who, without the ICC's attention, might have received as little attention as did victims of previous ethnic clashes in the country.

Survivors of violence in Kenya and Uganda expressed concern about the ICC's capacity to hold to account individuals responsible for mass violence. A Ugandan civil society member referred to the ICC as "the barking dog that does not bite."<sup>722</sup> Victims and civil society members also expressed concern about the ICC's ability to deliver meaningful reparations, and highlighted the yawning gap between victims' needs and the Trust Fund's budget for assistance. In short, victim inclusion alone is not enough – the ICC must also be able to effectively achieve the mandates it was given.

### *Inclusion and justice in a global political system*

Victim inclusion and ICC efficacy are not only determined by the Court's institutional design and its internal policies. Factors external to the ICC also have a significant impact. Many of these factors will limit the inclusion of intended beneficiaries of other governance regimes as well. For instance, victim inclusion is undermined by illiteracy and limited access to information in northern Uganda, but these factors would also challenge inclusion of these individuals in governance regimes such as public health or economic development. Furthermore, some decision-making sites belong to multiple global governance regimes. For instance, the UNSC plays a steering role in several global governance regimes. Indeed, it may be difficult to

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<sup>722</sup> Author interview conducted in Soroti, Teso sub-region, July 2012.

determine which constituencies deserve normative priority in decision-making, since UNSC decisions can have extremely wide affectedness. As a site of weak deliberation, intense bargaining, and extensive and wide-ranging impact, the UNSC is an important but challenging site for inclusion.

In the concluding chapter that follows, I build on my analysis of the creation and operations of the ICC to assess the relationship between victim inclusion and the capacity for the ICC to promote “justice for victims.” I also address the ICC’s democratic legitimacy.

## **CHAPTER 7: CONCLUSION: THE PRACTICE, DESIGN AND THEORY OF INCLUSION IN GLOBAL GOVERNANCE**

One day in March 2005, I visited the Special Court for Sierra Leone with three people whose lives had been deeply marked by the civil war in their country. We passed through concrete blast walls and a metal detector operated by UN guards. Before us a manicured lawn led to the courthouse, with its sweeping silver roof designed by British architects to resemble the scales of justice. Inside we watched the trial through a bulletproof glass wall. My companions were impressed by the proceedings, by the jurists in their black and red robes, and by the sight of three rebel leaders, once feared, now dressed in suits and listening patiently. By the end of the day, however, their admiration of the tribunal had turned to questioning. One, a children's rights advocate who had been a child soldier in the war, said, "I'm happy for the Special Court, but we have to question whether it is true justice." He continued, "Justice not just in the sense of fair proceedings, not just looking at the atrocities committed and punishing the perpetrators, but looking at how it serves the victims who have suffered so much... We have to ask, 'Who is this justice for?'"

This dissertation was motivated by a concern about injustices people face in many parts of the world and by the observation – made by my Sierra Leonean colleague and others – that the intended beneficiaries of global governance often do not receive the assistance they want or need. I have therefore asked how global governance, including international criminal justice, might assist those who face injustice.

The principal aim of this dissertation has been to explain how our concerns about justice and democracy in global governance can be productively addressed as questions of inclusion, and to suggest how constituencies might be included through representation in global governance decision-making. In making those arguments, I proposed that some global governance regimes have categories of "intended beneficiaries," which are central to these regimes' rules and authority contests. I suggested actors, institutional design features, and contexts that might

promote the inclusion of these intended beneficiaries. I then examined the social construction of “victims of international crimes” and their inclusion in the creation and operations of the International Criminal Court.

In this concluding chapter, I summarize and extend my key arguments, identify some of its limitations, and comment on contributions I make to existing scholarly literature.

## **7.1 Justice for Victims and Democratic Legitimacy: Assessing the ICC**

Many supporters of the ICC declare that it promotes justice for victims. More critical voices argue that the discourse of international criminal justice constructs abstract or imaginary victims and often ignores – or even harms – the actual people who suffer from conflict and oppression. This dissertation clarifies how we can understand and evaluate these claims.

The “victim of international crimes” is indeed a social category that is constructed by international criminal justice. However, it is not inherently good or bad for categories of people to be identified and to become the focus of governance institutions. It can be valuable to identify previously unrecognized categories of people who suffer similar injustices and vulnerabilities. Doing so may help members of that category - and those who wish to assist them – to take political action and design appropriate governance responses. However, it can also be disempowering to assign people to a category and govern them unresponsively. The question that needs to be asked is whether members of the social category are activated as a constituency and included in decision-making.

In the case of victims of international crimes, many actors make claims to speak on behalf of victims or their interests. We need to critically assess these claims, keeping in mind that there are different normative goods that they might promote and therefore different standards of legitimacy. We also need to assess whether strong representative claims can actually influence decisions that affect victims. My analysis of the Rome Statute negotiations revealed that certain civil society members and state officials made strong expert and normative claims when

promoting victim-related provisions. Partly as a result, the Statute provides the legal framework for a court that is more responsive to victims' interests and perspectives than previous international criminal tribunals. These provisions could enable the ICC to more adequately address victims of sexual violence, to give greater voice or consideration to victims in decisions by the Prosecutor and Chambers, to better protect victims that the Court interacts with, and to provide some of the reparative justice that victims often desire.

The implementation of these provisions has been difficult and controversial. The ICC's interventions in Uganda and Kenya illustrate strengths and weaknesses in victims' inclusion in different decision-making processes.

In Uganda, some of the most prominent representative claims about victims were made by the Acholi Religious Leaders Peace Initiative, Human Rights Watch and the Human Rights Center at the University of California, Berkeley. None of their claims provided a complete or straightforward representation of affected communities in northern Uganda, but they had significant validity to speak *for* and *about* – and very occasionally *as* – this constituency. All three had opportunities to advocate these claims at the OTP. Regarding the publicity of decision-making, the OTP often publicly explained its actions and it faces legitimate constraints to transparency. However, on some important issues, such as the failure to charge members of the Ugandan government or military, transparency has been lacking. Furthermore, victims have faced serious obstacles to accessing even basic information about the ICC and its actions, particularly in the early years of the Court's intervention.

During the key early years of the ICC's intervention in Uganda, the Prosecutor acknowledged the importance of the "interests of victims" and made some decisions to minimize harm that the OTP's actions might cause them.<sup>723</sup> Ultimately, however, the OTP adopted a policy approach that is generally unresponsive to victims' desires for alternatives to ICC prosecutions. As a result, concerns about the ICC's impact on peace processes or alternate forms of justice appear to

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<sup>723</sup> Such as the Prosecutor's decision to delay the release of arrest warrants against the LRA until the security situation improved in northern Uganda.

have received little consideration in the Prosecutor's decision-making. This lack of flexibility in the OTP's approach is defensible, particularly if alternate decision-making sites enable responsiveness to other interests and desires of victims. For instance, the UNSC can consider victims' interests in peace, and ICC judges can decide that cases against individuals are inadmissible if those cases have been addressed by alternate justice approaches. However, the UNSC's responsiveness to victims appears limited, and Chambers' responsiveness to victims' desires in these matters is untested.

Regarding the Kenya situation, my analysis of the UNSC vote on a deferral of ICC proceedings suggests that the UNSC lacks mechanisms to ensure that strong representative claims regarding victims will be included in decision-making. I therefore argue that the UNSC must be considered a weak site of victim inclusion. My examination of the Common Legal Representatives for victims suggests that they can make an important contribution to victim inclusion, particularly if they consult robustly and provide information to their clients. However, only a fraction of victims can take advantage of victim participation, and the impact CLR's have on judicial processes is still unclear. Even if that impact is significant, victim legal participation does not ensure victim inclusion at the ICC, because non-judicial decision-making processes also have a significant impact on victims.

While I identify certain weaknesses in victim inclusion, I do not suggest that all decision-making processes in international criminal justice should be maximally inclusive of victims.<sup>724</sup> ICC judges cannot convict and punish people according to the desires of victims: doing so would undermine important normative functions of criminal trials,<sup>725</sup> and would violate rules that have sufficiently widespread legitimacy to secure the acceptance of the 122 states that have ratified the Rome Statute. The OTP cannot simply act on instructions from victims' representatives, but

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<sup>724</sup> For a thoughtful consideration of the threats that "victim-focused reasoning" can have on international criminal justice, see Robinson, 2008.

<sup>725</sup> These include the ability of trials to establish robust accounts of guilt, to provide an alternative to cycles of revenge among groups in conflict, or to signal in advance to individuals what will be permissible and impermissible activity. For further consideration of the normative goods of fair criminal trials in international criminal justice, see Gardner, 2007; Luban, 2010.

must take into account its statutory mandate and the availability of evidence. The UNSC has its own statute, its own legitimate practices, and constituencies other than victims that deserve inclusion. I therefore do not argue for international criminal justice to be *victim-centred*. I argue instead that victims' interests and perspectives alongside be considered alongside other considerations, though they may sometimes need to be prioritized. Moreover, victims should have opportunities to learn about and evaluate decision-making processes that significantly affect their lives. For that reason, processes that improve the publicity of ICC – both in terms of transparency and public awareness – are also important for inclusion.

### *Victim inclusion and justice*

Decision-making processes that include a constituency are more likely to promote justice for that constituency, I argued in Chapter Two. By being included, a constituency can alert decision-makers to injustice and demand redress, advance or protect its interests in decision-making, and negotiate what justice is. A brief assessment of the ICC suggests that the Rome Statute's victim-related provisions could support victims' abilities to promote justice in these ways, but that these possibilities are undermined by the way the provisions have been implemented and by the Court's overall operational deficits.

#### 1. Can victims seek redress for injustice?

The ICC can investigate and prosecute violence without approval of great powers or the UNSC, provided the accused persons are nationals of a State Party or the crime took place on the territory of a State Party. In other words, powerful states do not need to create a new tribunal for each situation of mass violence, as was the case prior to the ICC. Victims and their representatives can provide information to the Prosecutor that could prompt her or him to launch a preliminary examination and, if appropriate, a formal investigation. However, in practice, opportunities for victims to seek redress from the ICC are quite limited. To date, most ICC situations have been triggered or requested by the state government on whose territory the crimes took place (Uganda, DRC, CAR, Mali and Côte d'Ivoire), or by the UNSC (Sudan and Libya). The sole exception is the Kenya situation. It is possible that governments will refer cases to the ICC out of concern for victims in their borders, or that the UNSC would refer cases on behalf of

victims. However, this need for victims to have the support of the UNSC or their state government is not significantly different from the pre-ICC situation.<sup>726</sup>

Within the situations the ICC addresses, the Prosecutor focuses on a few acts and a few individuals who are most responsible. The OTP has resisted giving victims a formal say through their legal representatives in decisions about investigations and charges.<sup>727</sup> When investigating, the OTP claims to consult with victims, civil society organizations, local leaders, and other individuals with knowledge of victims' interests and perspectives.<sup>728</sup> No in-depth examination of this consultative process and its impact on the Prosecutor's decisions has been published, and it is beyond the scope of this dissertation. More research is needed to determine whether victims have a meaningful opportunity to contribute to the Prosecutor's decisions about cases to pursue within situations.

The Rome Statute therefore allows victims to request that the ICC should intervene and ask the Prosecutor to investigate violence they suffered, and the Court and the Prosecutor have the authority to respond to such requests. In practice, however, it does not appear that victims have meaningful opportunities to prompt action on their behalf.

## 2. Can victims advance their interests in decision-making?

The Rome Statute directs the Prosecutor to consider the "interests of victims" and gives victims the right to advance their views and concerns in judicial processes. During trials, victims' legal representatives have played (at least) four roles: alerting judges to threats against victims, making submissions that might contribute to future claims for reparations, challenging the Prosecutor's decisions regarding charges, and enriching the trial records' account of victims'

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<sup>726</sup> Moreover, the Prosecutor appears to act less impartially when situations are triggered by state referrals or the UNSC (Tiemessen, 2014).

<sup>727</sup> This was most clear in the case against Thomas Lubanga (Ferstman, 2012; Women's Initiatives for Gender Justice, 2012b).

<sup>728</sup> Office of the Prosecutor, 2007, 2010. Zappalà (2010) has proposed that more formal channels should exist for victim representatives to inform and question the OTP about investigations and charges, as well as possible for a review by Chambers.

views and experiences.<sup>729</sup> It is not yet clear how significantly victim participation affects judicial decisions, in part because so few cases have been completed. The reparations proceedings will likely offer the most significant opportunity for the inclusion of victims' views and interests, but none of these proceedings have yet been completed. More empirical analysis of CLR's impact on proceedings and reparations is needed, as well as victim participants' own evaluations of their legal participation is necessary.

Victim inclusion in judicial proceedings will have little impact on victims' lives, however, if the Court cannot function effectively. The OTP's poor track record on achieving convictions and securing reparations for victims is therefore concerning.<sup>730</sup> To address this issue requires changes at the ICC. Commentators have called for improvements in the quality of investigations and the efficiency of court proceedings, and there are indications that these are occurring.<sup>731</sup> The Court's effectiveness is also highly dependent on state support and cooperation, from its budget to its ability to take custody of accused persons. Much needs to be done.<sup>732</sup> I disagree, however, with the claim that victim inclusion itself has significantly undercut the Court's effectiveness.<sup>733</sup>

Victim legal participation and the Trust Fund require significant resources and attention from Chambers and the Registry. Certainly, some of their processes were inefficient and, although

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<sup>729</sup> See Catani, 2012, See also the description of CLR's contributions to judicial proceedings in the Kenya cases, in Chapter Five, Section 5.3.

<sup>730</sup> The efficacy of the ICC cannot be judged on the percentage of cases that end in convictions rather than acquittals, because fair trials will sometimes lead to acquittals. However, in every conflict the ICC has examined, it appears incontrovertible that there were massive violations of human rights and humanitarian law. The lack of convictions for the vast majority of this violence suggests serious efficacy problems.

<sup>731</sup> Evans-Pritchard, 2013; Whiting, 2013; Wouters and Chan, 2012.

<sup>732</sup> The ICC has also lacked support from the UNSC, Arbour observes: "There has been little real political and no financial support extended to the court in support of Security Council referrals, and this lack of practical support has undermined the court's credibility as an efficient and powerful institution" (2014, 200).

<sup>733</sup> This claim was made by several officials of States Parties in interviews with the author (The Hague and New York, 2012-2014). Civil society actors who follow issues of victim participation speak of various attempts by certain State Parties and some officials within the Court to reduce CLR participation in trials or the funding of CLR activities in situation countries to engage their clients. (Author interviews in The Hague, 2013). See also Vasiliev, forthcoming.

important improvements have been made, more changes are necessary. However, these programs are a fraction of the ICC's budget.<sup>734</sup> Furthermore, reparations, assistance and legal participation are extremely important from the perspective of many victims. To strip away these Court functions to make up for budget shortfalls in other areas would be a clear instance of a global governance institution ignoring its intended beneficiaries.

### 3. Can victims contribute to discussions about what justice entails?

The ICC's intervention in Uganda revealed that victims might not always desire the justice that the ICC promotes. As I show in Chapter Six, there has been considerable diversity in the views of northern Ugandans about whether LRA leaders should be tried by the ICC. The negotiation of justice is not simply an argument for or against the ICC's intervention, however. Rather, it requires that the ICC recognize the legitimacy of some alternative forms of justice, and create policies that accommodate or even promote the ability of individuals and communities to pursue alternatives. It does not appear that the ICC's intervention in Uganda significantly undermined local practices of justice; indeed, some argue that the ICC's intervention and the backlash against it promoted greater attention to, and funding for, these local processes.<sup>735</sup> However, the Prosecutor and the ICC more broadly have not acted to accommodate or coordinate with local justice practices.<sup>736</sup> Several scholars and civil society actors have proposed ways in which ICC and local justice processes could be promoted in a complementary fashion, and these proposals emphasize significant victim inclusion in both ICC and local justice processes.<sup>737</sup>

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<sup>734</sup> The VPRS and the OPCV, the two units that facilitate victim participation, were estimated to receive in total €3.1 million of the Court's €122 million budget in 2013 (Assembly of State Parties, 2014).

<sup>735</sup> This claim was made by several civil society actors that I interviewed in northern Uganda. Similarly, Nouwen writes: "In response to the ICC's intervention, international researchers and NGOs working in Uganda offered their assistance to traditional and religious leaders in making their case for traditional justice" (2013, 147).

<sup>736</sup> For instance, ICC Judge Daniel Nsereko publicly rejected the idea that local justice processes could address LRA leaders, though he did not dismiss such processes for those not accused of crimes against humanity (New Vision, 2009). See also Nouwen, 2013.

<sup>737</sup> See, for instance, Ogora and Murithi, 2011; Roach, 2013b.

The Rome Statute negotiations offer another example of debate over conceptions of justice. Here, victims' advocates successfully argued for a shift away from previous international criminal tribunals toward a more reparative approach, which includes victim participation in judicial processes as well as opportunities for assistance and reparations. This shift was possible, in part, because the new approach aligned with many domestic legal systems and with developments in international human rights law. It was also possible because this was a constitutional moment, when rules and expectations were open to revision. Negotiations over justice undoubtedly became more difficult once the Statute was finalized, and as the ICC's jurisprudence developed. It is nevertheless important to maintain some flexibility and opportunities for accommodation, so particular victim constituencies have opportunities to discuss what justice entails and how the ICC might promote it.

In sum, international criminal justice should not be equated with justice for victims. The ICC cannot deliver the manifold forms of justice that victims desire, and the Court must also advance other normative functions. But the ICC and the broader governance regime may be able to promote justice for victims in important ways. It may advance forms of justice that victims do desire, in terms of accountability or reparations and assistance. It may improve the political context or rule of law in countries where it intervenes, thereby creating better conditions for victims to seek justice by other means than the ICC. It may simply recognize that mass violence was wrong, and bring attention to those who suffered from it. At the same time, the ICC may also disempower alternative forms of justice and expose victims to harm. Ultimately, whether the ICC advances justice for victims must be continually reevaluated, as different victim constituencies are affected by the Court or seek to have injustices against them redressed by it.

### *The ICC and democracy in the global political system*

Global governance institutions can promote or undermine democracy. To evaluate their impact, as I argued in Chapter Two, we need to assess them in two ways. First, we must examine the extent to which they include or exclude in their own decision-making the groups that they significantly affect. My analysis in Chapters Five and Six thus focused on whether the ICC is responsive to victims. Second, global governance institutions can systemically promote or

undermine democratic functions in state and sub-state *demoi*. Such empirical analysis is beyond the scope of this dissertation, though I intend to pursue it in future research. For now, I will make several preliminary observations.

First, the ICC might improve democratic functions across *demoi* by protecting individuals from political violence that renders them incapable of democratic agency. If the ICC deters mass violence, we could argue that this indeed occurs. However, the deterrent effect of the ICC remains unproven.<sup>738</sup> Both the Uganda and Kenya cases show mixed evidence. In Uganda, scholars disagree about the ICC's impact on the Juba peace process.<sup>739</sup> There is also disagreement about whether the ICC's continued attention has helped reduce state violence in northern Uganda.<sup>740</sup> In Kenya, the elections in 2013 were much less violent than in 2007, but it is unclear whether the ICC's involvement played a significant role. Certainly, the ICC offers no certitude of declining violence, as is clear from ongoing conflict in the CAR, DRC and Libya. It is also possible that the ICC might deter state violence more generally in the world by promoting and enforcing an international prohibition of Rome Statute crimes. Here, too, the empirical evidence is unclear.<sup>741</sup>

Second, ICC interventions might improve democracy of state governments, perhaps by fortifying the rule of law and removing political figures prone to committing mass violations. These effects are also unproven, and the Ugandan and Kenyan cases are unpromising. There is no indication that democracy has improved in either country since the ICC's intervention.<sup>742</sup> Indeed, the Court

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<sup>738</sup> Mullins and Rothe, 2010; Sikkink, 1993; Vinjamuri, 2010.

<sup>739</sup> Atkinson, 2010; Otim and Wierda, 2008; Wegner, 2012.

<sup>740</sup> Several civil society actors that I interviewed and participants in focus groups claimed that the ICC's attention had reduced violence in northern Uganda by the Ugandan military. I have not yet seen compelling evidence either that state violence has significantly decreased, and that this was partly caused rather than simply coinciding with the ICC's intervention.

<sup>741</sup> For a consideration of the Rome Statute's impact on non-Party States and State Parties, see Bower, 2012.

<sup>742</sup> Though one could also argue that democracy would have further deteriorated without the involvement of the ICC.

appears to have triggered the partnership of accused persons, Uhuru Kenyatta and William Ruto, who in office have overseen several undemocratic developments such as a crackdown on human rights organizations.<sup>743</sup>

Third, the ICC might help victims and their families recover from violence by recognizing and bringing attention to their suffering, or by providing forms of assistance and rehabilitation. It is possible that those who benefit from reparations or the Trust Fund's assistance may be more capable of political participation in their communities. Here, too, we lack evidence.

Further empirical research is thus required to assess the ICC's possible contribution to democracy. As the ICC addresses more situations, and as researchers bring more rigorous and diverse methods to bear, we will gain greater insight.

At a conceptual level, the approach I put forward differs from some of the existing criticisms of the ICC's democratic legitimacy. Those accusations come from different quarters and are justified in different ways. President Kenyatta and other public figures in Kenya argue that the Court violates the democratic will of the Kenyan people.<sup>744</sup> Several conservative American scholars argue that the United States government would violate its people's popular sovereignty if it ratified the Rome Statute, since the ICC does not follow American constitutional principles and the Prosecutor would be able to prosecute Americans without being democratically accountable to them.<sup>745</sup> They also argue that the ICC lacks democratic legitimacy because it can prosecute nationals of states that have not ratified the Rome Statute.<sup>746</sup> Other scholars are concerned that the ICC imposes rules on people in ways that violate basic democratic practices

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<sup>743</sup> For an analysis of these developments, see Lynch, 2014.

<sup>744</sup> For instance, the political party of Kenyatta and Ruto passed a motion calling on the government to withdraw from the Rome Statute and suspend its cooperation because the Court, which they claim is being used to attack and undermine the independence of African countries. See Standard Digital News, 2013. This claim is seriously undermined by the fact that an elected Kenyan government ratified the Rome Statute.

<sup>745</sup> Bolton, 2001; Goldsmith, 2003.

<sup>746</sup> Morris, 2002. This can happen even without a referral from the UNSC, such as if nationals of a non-party state committed crimes on the territory of a State Party.

of collective deliberation and decision-making. For instance, Branch argues, “even if the Acholi were eventually to call for international prosecution, such prosecution would only be legitimate if it were in response to this prior deliberative process and not by fiat of the Ugandan government and the ICC prosecutor.”<sup>747</sup>

All of these arguments share the claim that democratic legitimacy requires that members of a pre-constituted polity provide democratic “consent” to governance rules that affect them. Democratic theorists refer to this as a “self-legislation” model. It is based on a compelling fiction: that at some point, we actively consent to the rules and political institutions that structure our lives. However, with very few exceptions, we live in polities whose fundamental rules were created by people of other times and places, and our elected leaders – if we did elect them – can rarely make fundamental changes. Furthermore, this approach ignores the fact that in an interdependent world, we are frequently affected by decisions beyond our borders. For these reasons, I argue, we need to surrender some of this (partly fictional) democratic sovereignty in order to address collective problems at the global level. At the same time, we need not accept the ICC’s democratic legitimacy, given our present uncertainty about its actual capacity to systemically promote democratic functions.

## **7.2 Designing Inclusive Global Governance**

In Chapter Four, I identified several factors that could make global governance institutions more or less inclusive of intended beneficiaries. My empirical analysis of the ICC supports several of those arguments and yields important insights into how representative claim-making, opportunities for advocacy and publicity might be promoted in global governance.

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<sup>747</sup> Branch, 2007, 194.

### *Representing intended beneficiaries*

A variety of actors make representative claims regarding victims of international crimes. Assessing these claims according to my typology of speaking *for*, *as* and *about* a constituency yields several insights that may apply to other global governance regimes.

First, there can be productive interactions between different types of actors that make different types of representative claims about a constituency. In the Rome Statute negotiations, civil society actors – including international advocacy organizations, members of the transnational women’s movement, and experts affiliated or unaffiliated with academic institutions – lobbied state delegations. As I argued in Chapter Four, some commentators treat civil society as representatives of transnational constituencies or even of humanity, and contrast them to government officials pushing state interests. My analysis reveals a different picture. There were extensive crossovers and collaborations between civil society and state actors. State officials did not just advocate for their own governments; some advocated for victims’ interests, sometimes as their governments’ policies and sometimes due to their personal commitment to victims’ issues. This occasional independence of diplomats is frequently ignored in IR scholarship. My theoretical approach opens up this situation to analysis and normative evaluation. We can compare the quality of representative claims of civil society actors – and other advocates of intended beneficiaries – according to the typology of speaking *for*, *as* and *about* constituencies.

Second, my framework highlights the difficult issue of representing constituencies that are very diverse or that do not yet exist. This situation occurred in the Rome Statute negotiations. Because actors were advocating for future victims of crimes, they could only speak *about* victims’ interests, and could not claim to speak *for* or *as* future victims. Although advocates for victims’ rights were geographically diverse, they did not promote great diversity in conceptions of justice. For these reasons, the claims that advocates made about victims’ interests might differ significantly from the interests and perspectives of the actual victims that the ICC would address in the future. This illustrates an important consideration for the design of global governance institutions that aim to assist categories of intended beneficiaries that are very diverse or do not

yet exist: there may need to be mechanisms to enable institutions to respond flexibly to the interests and desires of specific or future constituencies.<sup>748</sup>

Third, my analysis of the ICC highlights the role of the ICC-appointed victim legal representatives. Here, too, my typology of representation allows us to go beyond simplistic claims that individuals in this role are either faithful representatives of victims or subservient to the ICC. Instead, we can focus on the actual practices that representatives use to engage their constituencies, and assess the impact of gatekeeping mechanisms by the authorizing institution on the quality of representative claim-making. As I will argue below, a comparative study of institutionally-designated representatives at different IOs may reveal institutional design elements that promote strong – or weak – representation for intended beneficiaries.

Fourth, my analysis highlights the role of academics as representatives. Researchers from Berkeley's Human Rights Center played an important role in speaking *for* victims and affected communities in northern Uganda. Their opinion surveys enabled several thousand members of the constituency to voice their perspectives on the ICC and transitional justice issues. There were limitations to this form of representation, as detailed in Chapter Six, but it helped decision-makers understand the diversity of opinions in a population that was sometimes represented as having homogenous beliefs and interests. Academics also contributed to the Rome Statute negotiations, often playing the more familiar role of speaking *about* a group by drawing on their expertise. These actions by academic researchers highlight the fact that scholars can contribute to the inclusion of intended beneficiaries in a variety of ways. In addition to making representative claims, they can improve the publicity of global governance decision-making by using their

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<sup>748</sup> The victim-related provisions in the Rome Statute partly address this future diversity. First, the Statute promotes a more expansive conception of justice than previous tribunals, with reparative as well as retributive dimensions, and it can therefore overlap with a greater variety of approaches to justice of future victims. Second, the Statute introduced provisions that would enable decision-making by the Prosecutor and Chambers to be more inclusive of victims' interests and perspectives, introducing some responsiveness and flexibility. Finally, the Rome Statute includes the principle of complementarity, according to which the ICC will only prosecute individuals when national jurisdictions fail to do so. However, as I have argued, the implementation of these provisions has yielded only limited responsiveness to diverse victim constituencies.

status and expertise to access relevant information and convert it into forms that are more widely accessible and comprehensible.

Academic researchers may have ethical obligations to responsibly represent the people they study. Indeed, several participants in focus groups in Uganda and Kenya described me as their representative, identifying me as someone with an opportunity to put forward their views and interests. Carpenter, in her thoughtful inquiry into the potential ethical issues and policy implications that come from researching vulnerable groups, argues that “researchers who take seriously the humanity of their subjects will... aim for a more meaningful and politically active engagement with those individuals whose time they share through the research process.”<sup>749</sup> Some academic disciplines, perhaps anthropology above all, give extensive consideration to the ethical, methodological and political ramifications of producing knowledge about individuals and groups.<sup>750</sup> This reflection is much less common in IR.<sup>751</sup> Research for this dissertation prompted my own reconsiderations of the representative role of the academic, as well as the obligations that researchers might have to people they engage with who are in need of assistance.<sup>752</sup>

### *Opportunities for advocacy*

My framework of mediated inclusion focuses attention on the contributions that representatives can make to decision-making processes, as well as the quality of claims they make about a constituency. My analysis of the creation and operation of the ICC highlights factors that can improve the chances for representatives to have significant opportunities for advocacy, the second element of mediated inclusion.

First, the Rome Statute negotiations demonstrated ways that civil society organizations can have significant influence. The Victims’ Rights Working Group and the Women’s Caucus had

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<sup>749</sup> Carpenter, 2012, 369.

<sup>750</sup> See, for instance, Clifford and Marcus, 1986; Scheper-Hughes, 1995.

<sup>751</sup> Though it has been addressed by some scholars, particularly those engaged with feminist IR. See, for instance, Ackerly *et al.*, 2006; Baines, 2004.

<sup>752</sup> For my reflections on some of these issues during research in Kenya, see Tenove, 2012a.

extensive access to decision-makers over long periods of time. Because there were significant deliberative moments during the negotiations, these civil society actors were able to mobilize their moral and expert authority, as well as their organizational capacity and resources. However, their ability to persuade was not sufficient to secure results. They also relied on collaboration with powerful state delegations that could advance their positions in negotiations through arguing *and* bargaining.

Second, my analysis of ICC operations shows different designs of access for representatives of victims in different decision-making sites, yielding different opportunities for advocacy. The formal or legal standing of representatives is critical. The ICC's OTP and member states of the UNSC consulted victims at their own discretion. As a result, they have the ability to selectively engage or ignore victims' representatives that put forward strong or challenging claims. In the cases I examined, the OTP was much more responsive to diverse representatives of victims than were UNSC members. One reason, I would argue, is that victims are the intended beneficiaries of the international criminal justice regime and claims about their interests and perspectives therefore have much more authority for actors within the regime than those outside it. A second reason is that the Rome Statute explicitly mandates the OTP to consider the "interests of victims," and gives Chambers some authority to oversee that responsiveness.

The CLRs for victims enjoy considerable access to decision-making. The Rome Statute and Rules of Procedure and Evidence give CLRs standing to contribute to judicial processes, which judges have tended to interpret as an opportunity to significantly contribute to most stages of proceedings. There are limitations to the quality of responsiveness by CLRs to their clients, and there has been great diversity in the quality of contributions that CLRs have made to judicial processes. However, because CLRs have a statutory right to participate, and because trials are significantly deliberative processes, CLRs have significant opportunities for advocacy.

#### *Publicity: transparency and public awareness*

My analyses of the Rome Statute negotiations and ICC operations illustrate challenges to achieving publicity in global governance decision-making. The Rome Statute negotiations had a high degree of transparency, as civil society actors had access to most phases of the negotiating

process. This transparency helped limit the opportunities of state delegations to put forward narrow or self-interested justifications for their positions. But transparency does not necessarily encourage deliberation among participants, particularly if participants will be criticized by outside audiences for shifting from their initial positions. Transparency in negotiations must be carefully designed.

Transparency must also be carefully designed in institutional units such as the ICC's OTP. The OTP can legitimately keep confidential much of the information derived from investigations. However, because the OTP has considerable discretion about its choice of investigations and prosecutions, it should give credible and sufficiently detailed accounts of how decisions are made. Achieving a proper balance between confidentiality and transparency may require innovative practices. For instance, panels of trusted but independent reviewers may be used, such as the World Bank's Independent Evaluation Group.<sup>753</sup>

There are also difficult questions about how to achieve sufficient public awareness among the intended beneficiaries of global governance institutions. On the one hand, meaningful inclusion requires that people have sufficient information to understand and evaluate decision-making. On the other hand, the intended beneficiaries often face significant obstacles, including limited access to credible news media, limited access to information and communication technologies, and poor levels of education. Robust and innovative outreach by IOs can help. But it may also be necessary to design other processes to empower constituency members to develop informed opinions and communicate them.

### *Contributions to IR scholarship*

This dissertation builds on and contributes to IR scholarship on transnational advocacy and the role of civil society in global governance. I have identified many factors that likely influence the capacity of transnational advocates – including but not limited to NGOs – to promote the

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<sup>753</sup> This role is partly filled by the ICC's Pre-Trial Chamber. However, judges do not review decisions by the Prosecutor *not* to open *proprio motu* investigations, and have little oversight over the selection of charges within situations.

interests and perspectives of constituencies in global governance decision-making. The approach I take provides an alternative to a focus on the promotion of *norms*. Actors often promote norms by making claims about how particular groups will benefit from them. But, to date, IR scholarship rarely focuses on whether the intended beneficiaries of a norm actually support the norm or the actor who is allegedly advocating it on their behalf.

This dissertation also contributes to IR literature on the design of global governance institutions. I draw on and integrate recent studies of IOs' accountability, transparency and accessibility to civil society actors. Several IR scholars have argued that we need to pay closer attention to *whom* IOs are accountable, transparent or accessible, and I do so by focusing on intended beneficiaries.<sup>754</sup> My analysis of IOs indicates that we need to pay closer attention to the institutional design of gatekeeping mechanisms, which not only determine the access that civil society actors have to IO decision-making, but which can also influence the quality of representative claims that those actors make about their constituencies. I also argue that we need to pay greater attention to the institutionally-designated representatives that are created or supported by IOs. These representatives may play an important role in promoting the inclusion of intended beneficiaries, particularly if they can make strong representative claims and are granted significant opportunities for advocacy. However, if these institutionally-designated representatives make weak claims, have little influence, or displace stronger advocates of intended beneficiaries, they may undermine inclusion.

#### *Limitations of the ICC as a case study*

While my analysis of the ICC yields important insights into how one important IO relates to its intended beneficiaries, I cannot make strong claims about the generalizability of my findings. The ICC may differ significantly from other global governance institutions in its inclusion of its intended beneficiaries, for several reasons.

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<sup>754</sup> Along a similar line, Scholte argues that a global governance institution should be considered appropriately accountable to the extent that it is “transparent to those affected, consults those affected, reports to those affected and provides redress to those who are adversely affected” (2011a, 17).

First, international criminal justice may arguably be an idiosyncratic regime because one of its central processes, the criminal trial, puts significant limitations on the inclusion of victims' interests. Criminal trials focus on the fair determination of the guilt or innocence of the accused person, and key normative functions of criminal trials would be undermined if such questions were decided according to victims' interests or desires. However, to a significant extent, debates about the legitimate and illegitimate forms of inclusion of intended beneficiaries likely exist in all global governance regimes. In the human rights regime, actors often argue against redefining human rights according to the preferences or understandings of particular cultures. In economic development, decision-makers have often excluded the preferences and interests of particular constituencies, emphasizing their own expertise in addressing poverty or improving a state's fiscal balance.<sup>755</sup> These restrictions on inclusion have in turn been contested, and many IOs have adopted institutional mechanisms to be more inclusive of their intended beneficiaries in policy-making. The ICC therefore may not be idiosyncratic in this regard.

Second, victims of international crimes are not typical of all intended beneficiaries in global governance, in that they tend not to act as communities or polities to achieve collective aims. A contrast can be made to the mobilization by indigenous communities to gain recognition and greater opportunities for self-government through international law.<sup>756</sup> While it is true that international criminal justice sometimes addresses crimes against communities (e.g. an attack on a village) or cultural groups (e.g. genocide), the criminal justice process tends to individualize victims rather than empower them to act as political collectives. Indeed, this is a common criticism of international criminal justice. Intended beneficiaries that engage with international organizations as well-established political communities, and that may benefit as communities, may warrant different processes of inclusion.

Third, not all global governance institutions have intended beneficiaries that are central to their existence, rules and legitimacy. In such cases, it may be more difficult for them to acknowledge

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<sup>755</sup> Escobar, 2011; Ferguson, 1990; Scholte, 2005.

<sup>756</sup> Henderson, 2008; Kymlicka, 2007.

the people they affect as a constituency warranting inclusion, and more difficult for the constituency's representatives to mobilize authority and to influence decision-making. To return to the example used in Chapter Two, the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights was not created to address the predicament of people with diseases such as HIV/AIDS. It took several years for advocates of this constituency to successfully argue that its interests and perspectives should influence global rules on intellectual property. Global governance institutions without clear "intended beneficiaries," as I have developed the term, may therefore require different processes or pathways to become inclusive of people they significantly affect.

### *Opportunities for further research*

This dissertation's framework of mediated inclusion, and the theoretical articulation of links between inclusion and justice and democracy, opens up many issues for further research. Several research strategies can be used to develop more generalizable claims about the actual possibilities for the inclusion of intended beneficiaries in global governance. To build on the framework and findings of this dissertation, and to make further contributions to IR literature on transnational advocacy and the institutional design of global governance, two avenues of research would be particularly fruitful.

The first would be a large-N comparison of different IOs and their design features that affect opportunities for the inclusion of their intended beneficiaries. As noted in Chapter Four, many IOs provide access to civil society organizations and other actors to advocate on behalf of affected constituencies. Some offer mechanisms for intended beneficiaries to make direct contributions to policy implementation or to seek redress for harm an IO has causes. A broad comparative study would map the variation in access given to advocates for intended beneficiaries or to beneficiaries themselves, and the type of policy decision they can contribute to. It would examine the gatekeeping mechanisms that determine access to decision-making, and that may preferentially include or exclude certain types of advocates or representative claims. It

would include a comparison of institutionally-designated representatives.<sup>757</sup> It would also describe the variation in transparency mechanisms. Once this variation is mapped, it will be possible to investigate *why* different IOs take these different approaches. For instance, the variation may be significantly shaped by IOs' policy areas, by their state memberships, by the types of intended beneficiaries they address, or other factors.<sup>758</sup> More ambitiously still, a comparative study could assess the impact that different mechanisms and processes of inclusion have on IO behaviour.

A second research approach would be in-depth case studies of particular IOs and their relationship to their intended beneficiaries, focusing on the social construction of categories of intended beneficiaries, the quality of representative claims of prominent advocates, the means by which these advocates influence decision-making, and the public awareness of intended beneficiaries about global governance. In-depth case studies can shed light on how inclusion mechanisms affect IO behaviour and – critically – how the quality of inclusion shapes the impact of IOs on their intended beneficiaries. In-depth studies can also trace the processes by which inclusion at IOs is negotiated and designed.

To give an example of such an in-depth case study, one could examine the creation and operation of global governance for climate-displaced migrants.<sup>759</sup> As a result of climate change, not only will individuals be displaced, so will entire communities and even some small island states. There are currently several major international efforts to design new laws, norms and institutions to assist or manage migration provoked by climate change.<sup>760</sup> The design of governance will depend in part on how the category is represented in negotiations. Some civil society

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<sup>757</sup> Examples that may warrant particular study include UN-appointed Special Envoys and Special Representatives, the representatives of indigenous peoples who act as Permanent Participants on the Arctic Council, and representatives of affected communities on the board of the Global Fund to Fight AIDS, Tuberculosis and Malaria.

<sup>758</sup> For an exemplary study of the access of non-state actors in general to IOs, and not only access by those that advocate intended beneficiaries, see Jönsson and Tallberg, 2010; Tallberg *et al.*, 2013.

<sup>759</sup> The author has received a post-doctoral fellowship to conduct this research.

<sup>760</sup> International Organization for Migration, 2009.

organizations and states have advocated for a modification of the 1951 Refugee Convention to create protections for individual displaced persons.<sup>761</sup> Other states and civil society actors have claimed that climate-related displacement is an economic issue to be dealt with through development assistance.<sup>762</sup> Interestingly, several states and the UNHCR are developing a comprehensive framework, called the Nansen Initiative on Disaster-Induced Cross-Border Migration, and are consulting with affected communities as well as states and experts.<sup>763</sup> An in-depth case study could trace the construction of climate-displaced migrants as a category of intended beneficiaries, assess the representation of their interests and perspectives in negotiations, and examine the design of global governance institutions to assist them, including design features that may facilitate or limit inclusion in decision-making.

These and other research projects can draw on the framework developed in this dissertation to investigate the relationship between particular global governance institutions and their intended beneficiaries, and to understand the design and impact of inclusion – and exclusion – in global governance more generally.

### **7.3 Justice and Democracy in Global Politics**

The regulative capacity of global governance has expanded significantly in recent decades. To address many current transnational problems we require new or more effective global governance. This expansion of global governance poses practical and conceptual questions about how we might promote justice, and how we might govern ourselves democratically. I argue that both issues are, to a significant extent, problems of inclusion. In developing this theoretical argument, and in examining opportunities for transnational constituencies to be included in global governance, this dissertation contributes to debates in democratic theory over

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<sup>761</sup> Republic of the Maldives, 2006.

<sup>762</sup> Asian Development Bank, 2012; Hartmann, 2010.

<sup>763</sup> The Nansen Initiative Secretariat, 2013.

representation and global democracy. I will describe these contributions shortly, but I will first identify limitations in my consideration of inclusion.

While this dissertation has emphasized normative goods promoted by inclusion, further study is needed on two possible hazards of inclusion. First, I did not investigate those possible situations when inclusion in a governance institution might undermine justice or democracy. This could occur in several ways. Processes of inclusion might co-opt constituencies or representatives, leading them to accept the legitimacy or aims of a particular governance body and thereby neglect key interests of the constituency. Such accusations have been made, for instance, against some civil society organizations that engage or partner with IOs.<sup>764</sup> Processes of inclusion could also cause fissures within constituencies and polities, particularly if some groups are better represented or are treated preferentially. These fissures could exacerbate injustices faced by some constituency members, or could undermine processes of collective will-formation and collective decision-making within a polity. Indeed, such accusations have been made against the IMF, the World Bank, and other development organizations. Their programs – though allegedly created to reduce poverty – have been accused of increasing poverty among some constituencies and of significantly limiting states’ capacities to enact their own anti-poverty policies.<sup>765</sup> The response by these organizations and many of their supporters is to improve processes to include those who experience poverty.<sup>766</sup> However, these processes may not work, or may legitimate institutions whose overall impact remains negative. More empirical and theoretical research is required into these possible dangers of inclusion, and to identify when exit rather than inclusion is preferable.

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<sup>764</sup> See, for instance, Dany, 2014; Johns, 2004; Jordan and van Tuijl, 2006b  
Martens, 2005.

<sup>765</sup> For this accusation see, for instance, Barnett and Finnemore, 2004, 45-72; Stiglitz, 2003.

<sup>766</sup> For a consideration of this shift, which includes mechanisms such as Poverty Reduction Strategy Papers, increased consultation of impoverished communities and greater civil society access, see Ebrahim and Herz, 2011; Woods, 2007.

Second, I did not systematically examine trade-offs between the principle of inclusion and other normative goods. Possible trade-offs were identified in the ICC case study, including concerns that victim legal participation might undermine normative functions of criminal trials or might drain the ICC of much-needed resources. Such tensions and trade-offs will undoubtedly be common in other governance areas. It is important to recognize, however, that there is a difference between being responsive to a constituency's interests and devoting extensive resources to consulting a constituency about their interests. To take an extreme example, if the ICC Trust Fund used its entire budget to consult victims about the reparations they desired, leaving no funds for the reparations themselves, we could say that undue emphasis on processes of inclusion undermined the actual inclusion of victims' interests. Further inquiry is needed to explore possible trade-offs between inclusion and other normative goods, and to examine how processes of inclusion can themselves be designed to mitigate these trade-offs.

#### *Representing and including transnational communities of shared fate*

Global governance can help address injustices and vulnerabilities that affect people in multiple states. These individuals can be said to belong to transnational communities of shared fate. Acts of representation are required to identify communities of shared fate that deserve attention, and to activate them as political constituencies capable of inclusion in decision-making. Political representation can thus be constructive. Representatives can identify a constituency, persuade its members and other people about the constituency's qualities, and influence governance that shapes the lives of constituency members. This dissertation gives several examples of this process, including the categorization of people of many different social situations and experiences of violence as "victims of international crimes." This category has enabled some people to gain assistance, recognition, and opportunities to see perpetrators held to account, but it has also exposed people to unwanted interference in their lives or communities.

Representation is therefore double-edged. By assigning people to social categories or targeting them for governance, representation can be beneficial or harmful, empowering or disempowering. I therefore follow other democratic thinkers in investigating the construction of groups through representation. I also propose how representation can promote inclusion in large-

scale governance through the framework of mediated inclusion. My typology of speaking *for*, *as* and *about* constituencies extends work in democratic theory on different roles of representatives, and suggests how we might focus on the normative goods that representative claims, and acknowledge their multiple and competing standards of legitimacy.

Because of the constructivist nature of representation, and because different types of representation can promote different normative goods, we can rarely identify a single best representative claim. A “conversation” model of representation is required, which accepts that the claims put forward by a representative cannot immediately be assessed as legitimate or not, but must face competing representative claims, and will be endorsed, criticized, modified and rejected by a constituency over time. This conversation model also allows us to address situations in which advocates represent future constituencies, such as the advocates for future victims during the Rome Statute negotiations. More inquiry into systems of representation that can facilitate such conversations is necessary.

#### *Pathways to global democracy*

This dissertation contributes to scholarship in democratic theory by proposing a framework for improving the contribution of global governance to democracy, and by examining whether and how this might be achieved in practice. It therefore joins a small but expanding literature that explores the design and practice of global democracy rather than simply justifying or theorizing it. Indeed, in some ways the pursuit of global democracy must be driven by the evolving structures of global governance that exist. New institutions and forms of interdependency can create democratic deficits, but they can also create new means to pursue inclusion, collective will-formation and collective decision-making.

This dissertation also contributes to recent scholarship that takes a systemic approach to conceptualizing democracy. Figuring out how to promote democratic governance in an interdependent world is a challenge. Because states often oppress their own citizens and are dangerous to those beyond their borders, and because we participate in transnational economies, environments and communication networks, we must expand democracy beyond the state. We must therefore think of democracy systemically, and look at how functions of inclusion,

collective will-formation and collective decision-making can be promoted across many *demoi* and sites of decision-making. At the same time, I argue that the democratic state can be a tremendous engine of democracy, enabling individuals to contribute to robust processes of will-formation and collective decision-making. Global governance institutions that impinge on the autonomy of democratic states can nevertheless improve democracy, provided that in doing so they make an overall improvement to democratic functions in the global political system.

### *Inclusion and justice in global politics*

Can justice be institutionalized at a global level? In many ways, global justice makes little sense. Justice is too specific to cultures and even individuals to be standardized and enforced around the world. Moreover, institutionalization has a tendency to freeze unequal power relations among groups, and inequalities in global politics are vast. And yet, global governance rules and institutions *must* be created to promote justice transnationally. Transnational collective action is required to address forms of shared vulnerability and injustice that are created by existing global governance, and to address threats such as war, nuclear weapons and climate change, as well as genocide and other forms of mass violence. In such cases, transnational cooperation must be institutionalized and to some degree enforced. However, experience has shown that attempts to promote justice globally have inevitable costs and risks, and have the potential to become instruments of injustice.

I therefore argue that global governance will be more likely to promote justice if it is inclusive of those it significantly affects. To achieve that inclusion, we must learn to identify transnational communities of shared fate, recognize them as constituencies that deserve inclusion, and design processes to empower their inclusion.

My approach to justice – with its emphasis on inclusion and exclusion – focuses our attention on the institutional design of global governance. The principle of inclusion also requires an ethic of attentiveness and reflexivity. Global politics is continually changing and new communities of shared fate are continually produced as people across state borders affect each other's lives. Amid this flux, no final theory of justice or perfect institutional form can be agreed upon or achieved. The principle of inclusion is sufficiently flexible to apply to this instability. It directs

our attention to those who are excluded, and asks why this is the case and what might be done about it. This principle therefore prompts difficult questions of citizens and institutional decision-makers, and brings an appropriately restless and critical perspective to examine global politics in our times.

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## Appendix: List of Interviews

*All listed interviewees signed a consent form, deposited with author. Those who requested not to have their name used are listed by position or organization. Those who requested anonymity are not mentioned by name or position.*

- Akwenyu, Joseph: Legal adviser, Uganda Victims' Foundation. Interviewed in Kampala, Uganda, June 21, 2012.
- Anyah, Morris: International criminal lawyer, (former) Common Legal Representative, Kenya Case II. Interviewed in The Hague, The Netherlands, June 5, 2012.
- Atiba-Davies, Gloria: Head of Gender and Children Unit, Office of the Prosecutor, International Criminal Court. Interviewed in The Hague, The Netherlands, September 4, 2013.
- Bitti, Gilbert: Senior Legal Adviser to the Pre-Trial Division, International Criminal Court; (former) Senior Member of French Delegation, Rome Conference. Interviewed in The Hague, The Netherlands, July 13, 2011.
- Bornand, Elena: Legal Officer, Ministry of Foreign Affairs of Chile. Interviewed by Skype, June 24, 2014.
- Branch, Adam: Senior Research Fellow, Makerere Institute of Social Research. Interviewed in Kampala, Uganda, July 16, 2012.
- Carboni, Montserrat: Permanent Representative to the ICC, Fédération internationale des ligues des droits de l'Homme. Interviewed in The Hague, The Netherlands, August 30, 2013.
- Carranza, Ruben: Director, Reparative Justice Program, International Center for Transitional Justice. Interviewed by Skype (New York), June 23, 2014.
- Case Managers to a Common Legal Representative for Victims, International Criminal Court. Interviewed in The Hague, The Netherlands, May 25, 2012 and September 4, 2013.
- Danieli, Yael: Director, Group Project for Holocaust Survivors and their Children. Interviewed in New York, United States, June 19, 2014.
- Defense Counsel, International Criminal Court. Interviewed in The Hague, The Netherlands, July 20, 2011.
- Diplomats (6), State Missions and Delegations to the United Nations. Interviewed in New York, United States, June, July, 2014.
- Dolan, Chris: Director, Refugee Law Project, School of Law - Makerere University. Interviewed in Vancouver, March 18, 2014.

Ferencz, Ben: International law scholar and activist. Interviewed in New York, United States (2010) and Kampala, Uganda (2012).

Field Staff Members for Common Legal Representatives for Victims, International Criminal Court. Interviewed in Nairobi, Kenya, July 24 and 25, 2012.

Gaynor, Fergal: Common Legal Representative for Victims, Kenya Case II, International Criminal Court. Interviewed by Skype-phone, July 31, 2014

Gilissen, Jean-Louis: Common Legal Representative for Victims, Katanga Case, International Criminal Court. Interviewed in The Hague, The Netherlands, July 8, 2011

Gitau, Judy: Programme Officer, International Cooperation, International Commission of Jurists, Kenya. Interviewed in Nairobi, Kenya, June 12, 2013.

Gonzalez Rivas, Gabriela: Senior Officer, Victims Protection and Representation Section, International Criminal Court. Interviewed in The Hague, The Netherlands, July 13, 2011.

Program Officers, Trust Fund for Victims, International Criminal Court. Interviewed in The Netherlands and Uganda, 2011 and 2012.

Kamara, Maria Mabinty: Kenya Field Outreach Coordinator, International Criminal Court. Interviewed in Nairobi, Kenya, Aug 6, 2012.

Kaul, Hans-Peter: Judge, Pre-Trial Chamber, International Criminal Court; (former) Head of German Delegation to Rome Conference. Interviewed in The Hague, The Netherlands, August 29, 2013.

Kirsch, Philippe. Chairman of the Rome Conference (Committee of the Whole of the 1998 Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court) and the Preparatory Commission for the Court (1999-2002), ICC President and Appeals Chamber judge (2003-2009). Interviewed in Winnipeg, Canada, 20 November 2010.

Legal Advisers (5), State Parties to the Rome Statute. Interviewed in The Hague, The Netherlands, 2012 and 2013.

Legal officer, Office of the Public Counsel for Victims, International Criminal Court. Interviewed in The Hague, The Netherlands, July 12, 2011.

Legal officer, Women's Institute for Gender Justice. Interviewed in The Hague, The Netherlands, July, 2011.

McKay, Fiona: Chief of the Victims Participation and Reparations Section, International Criminal Court; (former) Coordinator of Victims' Rights Working Group, CICC. Interviewed in The Hague, The Netherlands, September 4, 2013.

Members, Women's Advocacy Network. Interviewed in Gulu, Uganda, July 3, 2012.

Member of Latin American State Delegation to the Rome Conference; September, 2014.

Member of State Delegation to the Rome Conference. Interviewed by Skype (New York), November 12, 2014.

Moisy, Severine: Head of Mission, Avocats San Frontières. Interviewed in Kampala, Uganda, June 21, 2012.

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