

# THREE ANGRY MEN: JURIES IN INTERNATIONAL CRIMINAL ADJUDICATION

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*To date, no international criminal tribunal has seriously considered using a jury trial. In the International Criminal Court (ICC), for example, a panel of judges appointed by the Assembly of States Parties acts as the fact finder. In this Note, Amy Powell examines the theoretical justifications for a jury in the context of international criminal adjudication. She concludes that the use of a jury—or, at a minimum, the integration of the important values underpinning the institution of the jury—would greatly benefit the ICC by protecting important principles of justice.*

## INTRODUCTION

Enthusiasm for international criminal adjudication steadily rose over the latter half of the twentieth century, culminating in the entry into force of the Rome Statute of the International Criminal Court (Rome Statute), which created the International Criminal Court (ICC) in July 2002.<sup>1</sup> Established as a response to the most horrific crimes of the twentieth century, the world's first permanent international criminal court seeks to "put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes."<sup>2</sup> In addition, however, the international community was concerned about both finding the full truth and providing fair treatment to the accused.<sup>3</sup> Because the ICC serves several purposes, its rationale and legitimacy depend upon its ability to provide truly fair trials. By way of comparison, extrajudicial action might be sufficient

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\* Copyright © 2004 by Amy Powell. J.D., 2004, New York University School of Law. I greatly appreciate the comments and advice of Professors Larry Kramer and Rachel Barkow. Special thanks to Evelyn Sung, Valerie Roddy, Joi Lakes, Julie James, Jesse Devine, and the rest of the indefatigable staff of the *New York University Law Review*, as well as to Daveed Gartenstein-Ross for his love and encouragement. All errors are of course my own.

<sup>1</sup> Rome Statute of the International Criminal Court, *opened for signature* July 17, 1998, 37 I.L.M. 999 (entered into force July 1, 2002) [hereinafter Rome Statute]; see also Marlise Simons, *Without Fanfare or Cases, International Court Sets Up*, N.Y. TIMES, July 1, 2002, at A3. In March 2003, eighteen judges were sworn in, and a prosecutor was named in April. Chris Lombardi, *Hot Seat: New Prosecutor Will Be Key in Building Credibility for International Criminal Court*, A.B.A. J., July 2003, at 16; Marlise Simons, *Court with a Growing Docket, But No Chief Prosecutor Yet*, N.Y. TIMES, Mar. 16, 2003, International, at 4. The Court's first investigation involves war crimes in the Congo. *War-Crimes Panel to Take on Congo Case*, N.Y. TIMES, Jan. 28, 2004, at A5.

<sup>2</sup> Rome Statute, *supra* note 1, at 1002.

<sup>3</sup> See *infra* notes 41–46 and accompanying text.

to accomplish the goal of punishing perpetrators, but might not ensure a fair trial for defendants or find the full truth.<sup>4</sup>

There is profound disagreement about the minimum requirements for providing defendants with a fair trial. This disagreement is often particularly marked between representatives of common-law and civil-law systems. The negotiating parties at Rome compromised, and, as a result, the ICC's procedures include important elements of both common-law and civil-law adjudication.<sup>5</sup>

Despite worldwide enthusiasm, the United States remains hostile to the ICC. The United States initially supported the court and actively participated in its negotiation and development.<sup>6</sup> In the final days of the negotiations, however, U.S. representatives were unable to push through provisions that were key to U.S. support for the ICC,<sup>7</sup> and were surprised by an amendment prohibiting reservations to the treaty.<sup>8</sup> Although President Clinton signed the treaty at the end of his presidency, he recommended that it not be submitted to the Senate for ratification unless crucial changes were made.<sup>9</sup> With Congress balking even before ratification was suggested, President Bush was happy to withdraw Clinton's signature and announce a hostile American policy of noncooperation with the ICC.<sup>10</sup>

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<sup>4</sup> Occasionally, nonjudicial means have been chosen to deal with the very worst crimes, even when judicial means were available. In the wake of apartheid, for example, South Africa's Truth and Reconciliation Commission opted to seek the full truth in lieu of meting out punishment to the accused. See generally Stephen Landsman, *Alternative Responses to Serious Human Rights Abuses: Of Prosecution and Truth Commissions*, 59 LAW & CONTEMP. PROBS. 81 (1996) (suggesting that, under certain circumstances, international criminal tribunal should respect State's decision to use truth commission in lieu of prosecutions).

<sup>5</sup> See Robert Christensen, *Getting to Peace by Reconciling Notions of Justice: The Importance of Considering Discrepancies Between Civil and Common Legal Systems in the Formation of the International Criminal Court*, 6 UCLA J. INT'L L. & FOREIGN AFF. 391, 395 (2002).

<sup>6</sup> See H.R.J. Res. 89, 105th Cong. (1997) (expressing Congress's belief that international criminal court would further U.S. interests and calling for United States to advance proposal at U.N.); John Seguin, Note, *Denouncing the International Criminal Court: An Examination of U.S. Objections to the Rome Statute*, 18 B.U. INT'L L.J. 85, 86–88 (2000) (describing U.S. involvement in negotiation).

<sup>7</sup> See Theodor Meron, *The Court We Want*, WASH. POST, Oct. 13, 1998, at A15 (describing final American attempts to amend treaty).

<sup>8</sup> See Rome Statute, *supra* note 1, at 1066 ("No reservations may be made to this Statute."); *Is a U.N. International Criminal Court in the U.S. National Interest?: Hearing Before the Subcomm. on Int'l Operations of the Senate Comm. on Foreign Relations*, 105th Cong. 15 (1998) [hereinafter 1998 Senate Hearing] (statement of Hon. David Scheffer, Ambassador-At-Large for War Crimes Issues).

<sup>9</sup> See Statement on the Rome Treaty on the International Criminal Court, 37 WEEKLY COMP. PRES. DOC. 1 (Jan. 8, 2001).

<sup>10</sup> See Elizabeth Becker, *U.S. Suspends Aid to 35 Countries Over New International Court*, N.Y. TIMES, July 2, 2003, at A12 (noting U.S. suspension of military aid to thirty-

One of the reasons for U.S. opposition to the ICC is the lack of a jury trial.<sup>11</sup> There was never any serious consideration of the use of jury trials in the negotiations leading up to the creation of the ICC. Some observers regard the jury trial as an odd and undesirable accident of Anglo-American history, neither necessary nor appropriate to international justice.<sup>12</sup> Yet Americans are equally contemptuous in their dismissal of nonjury systems as profoundly unjust.<sup>13</sup> Further-

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five countries that did not grant U.S. citizens immunity before International Criminal Court (ICC)); Marc Grossman, American Foreign Policy and the International Criminal Court, Remarks to the Center for Strategic and International Studies (May 6, 2002) (describing current U.S. foreign policy vis-à-vis ICC), <http://www.state.gov/p/9949.htm>. In 2003, the United States secured a promise of immunity for American servicepeople for one year, Felicity Barringer, *U.N. Renews U.S. Peacekeepers' Exemption from Prosecution*, N.Y. TIMES, June 13, 2003, at A18, but China threatened to veto the extension of this exemption amid outcry over abuse at Abu Ghraib, Colum Lynch, *China May Veto Resolution on Criminal Court*, WASH. POST, May 29, 2004, at A22. The United States ultimately withdrew the renewal in June 2004, after only four nations on the Security Council had agreed to back it. Colum Lynch, *U.S. Abandons Plans for Court Exemption*, WASH. POST, June 24, 2002, at A20.

<sup>11</sup> See Briefing Transcript, U.S. Dep't of Defense, Background Briefing on the International Criminal Court (July 2, 2002), [http://www.defenselink.mil/news/Jul2002/t0702\\_2002\\_t0702icc.html](http://www.defenselink.mil/news/Jul2002/t0702_2002_t0702icc.html). Several Congressional Hearings made reference to the lack of basic constitutional guarantees, including trial by jury. See *The International Criminal Court: Protecting American Servicemen and Officials from the Threat of International Prosecution: Hearing Before the Senate Comm. on Foreign Relations*, 106th Cong. 5, 23 (2000) [hereinafter 2000 Senate Hearing] (Statement of Caspar Weinberger, former Secretary of Defense, and remarks of Ruth Wedgwood, Professor of Law, Yale Law School); *1998 Senate Hearing*, *supra* note 8, at 10, 32 (prepared statement of Sen. John Ashcroft and statement of Lee Casey, attorney, Hunton & Williams); *Markup on a Resolution Urging the Government of Ukraine to Ensure a Democratic, Transparent, and Fair Election Process Leading up to the Upcoming Parliamentary Elections; and Hearing Entitled "The U.N. Criminal Tribunals for Yugoslavia and Rwanda; International Justice or Show of Justice?": Markup and Hearing Before the House Comm. on Int'l Relations*, 107th Cong. 32 (2002) [hereinafter 2002 House Hearing] (remarks of U.S. Rep. Ron Paul) ("[T]here is no right to trial by jury. So our [C]onstitution is thrown out.").

<sup>12</sup> See, e.g., Gary T. Sacks & Neal W. Settergren, *Juries Should Not Be Trusted to Decide Admiralty Cases*, 34 J. MAR. L. & COM. 163 (2003) (arguing that complexity of admiralty cases and interest in uniformity compel use of judges, not juries, as fact-finders); Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403 (1992); see also T.R. Goldman, *A World Apart? U.S. Stance on a New International Criminal Court Concerns Rights Groups*, LEGAL TIMES, June 8, 1998, at 1. Goldman quotes one commentator who is unconcerned with the ICC's lack of a jury:

"The only thing the court doesn't have is a jury. You are tried by judges," says [David] Stoelting, [vice chair of the American Bar Association's International Law Committee] . . . . Stoelting says criticism that the court's due process requirements are less stringent than U.S. standards are [sic] unjustified. "They meet or exceed our standards . . . ."

*Id.*

<sup>13</sup> See, e.g., *2002 House Hearing*, *supra* note 11 (Remarks of U.S. Rep. Ron Paul) (doubting courts' ability to do justice without due process protections). This is not to say that Americans are overwhelmingly enthusiastic about juries. Recent years have seen increasing complaints about juries as decisionmakers. See Mark Curriden, *Putting the*

more, the criminal jury is not a peculiarly Anglo-American institution. It is currently in use in at least fifty-four countries and dependencies.<sup>14</sup> Still other national systems incorporate lay decision-making in other ways.<sup>15</sup>

This Note will not address the argument that U.S. accession to the ICC would be unconstitutional,<sup>16</sup> nor will it engage in a general defense of international tribunals. Rather, this Note assumes that an international criminal tribunal is appropriate for certain crimes and argues that the future development of international criminal adjudication should include the possibility of a jury trial. While not a perfect solution, the right to a jury trial would reduce some of the imbalances of the ICC's current design. At the very least, this Note argues, the ICC should consider more seriously the values underlying the use of a jury and seek to accommodate those in its process, because the direct participation of the citizenry in international criminal trials offers invaluable advantages.

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*Squeeze on Juries*, A.B.A. J., Aug. 2000, at 52, 53. Nonetheless, the United States remains nationally committed to criminal juries in particular.

<sup>14</sup> Neil Vidmar, *A Historical and Comparative Perspective on the Common Law Jury*, in *WORLD JURY SYSTEMS* 1, 3 (Neil Vidmar ed., 2000).

<sup>15</sup> See *infra* note 191 (discussing use of lay assessors in Continental systems).

<sup>16</sup> For arguments in favor of U.S. accession to the ICC, see generally Lynne Miriam Baum, *Pursuing Justice in a Climate of Moral Outrage: An Evaluation of the Rights of the Accused in the Rome Statute of the International Criminal Court*, 19 WIS. INT'L L.J. 197 (2000), Paul D. Marquardt, *Law Without Borders: The Constitutionality of an International Criminal Court*, 33 COLUM. J. TRANSNAT'L L. 73 (1995), Scott Andreason, Note, *The International Criminal Court: Does the Constitution Preclude Its Ratification by the United States?*, 85 IOWA L. REV. 697 (2000), Beth Fain, Comment, *The International Criminal Court: An Eminent Impact on a Hesitant United States*, 35 TEX. TECH. L. REV. 163, 167 (2004), Regina Horton, Note, *The Long Road to Hypocrisy: The United States and the International Criminal Court*, 24 WHITTIER L. REV. 1041 (2003), and Seguin, *supra* note 6. For arguments critical of the ICC and opposing U.S. participation, see Lee A. Casey, *The Case Against the International Criminal Court*, 25 FORDHAM INT'L L.J. 840 (2002), Lee A. Casey & David B. Rivkin, Jr., *The Limits of Legitimacy: The Rome Statute's Unlawful Application to Non-State Parties*, 44 VA. J. INT'L L. 63 (2003), Jeremy Rabkin, *The Politics of the Geneva Conventions: Disturbing Background to the ICC Debate*, 44 VA. J. INT'L L. 169 (2003), Steven T. Voigt, *The United States Must Remain Steadfastly Opposed to the Rome Treaty International Criminal Court*, 12 WIDENER L.J. 619 (2003), Andrew J. Walker, *When a Good Idea is Poorly Implemented: How the International Criminal Court Fails to be Insulated from International Politics and to Protect Basic Due Process Guarantees*, 106 W. VA. L. REV. 245 (2004), and Cara Levy Rodriguez, Note, *Slaying the Monster: Why the United States Should Not Support the Rome Treaty*, 14 AM. UNIV. INT'L L. REV. 805 (1999). There are many scholars who advocate a variety of changes in the ICC, either before, after, or irrespective of U.S. ratification. See, e.g., Christensen, *supra* note 5, at 412-21 (recommending greater specificity in ICC roles and procedures); Jacob K. Cogan, *International Criminal Courts and Fair Trials: Difficulties and Prospects*, 27 YALE J. INT'L L. 111, 137-39 (2002) (suggesting that ICC and other international courts should adopt rules of procedure and evidence more favorable to accused, view substantive rights of accused more sympathetically, and provide defense attorneys with more resources).

Part I provides an overview of the Rome Statute of the ICC, highlighting features borrowed from “inquisitorial” civil-law systems.<sup>17</sup> Part II briefly sketches the main features of jury-based systems and examines the functions of the criminal jury in order to identify the pros and cons of jury-based systems. Part III transplants these arguments into the international context to scrutinize specifically the advantages and disadvantages of juries in international criminal adjudication. Part IV offers some general suggestions on implementation. The Note concludes by suggesting some avenues for future thought on incorporating the advantages of jury trials without adopting juries.

## I

### THE INTERNATIONAL CRIMINAL COURT: THE BASICS

The Rome Statute incorporates both common-law and civil-law features into the ICC, but several observers have noted that this blending appears to have been done in a haphazard, unprincipled way.<sup>18</sup> Regardless of the merits of this criticism, the combination of the two systems is in many ways wholly new and will appear curious to the casual observer who is familiar with any one national judicial system.

Most important to my analysis is the composition and scope of authority of the Court.<sup>19</sup> There are eighteen judges,<sup>20</sup> no two from the same State,<sup>21</sup> elected by a two-thirds majority of the Assembly of States Parties,<sup>22</sup> and eligible to serve for exactly nine years.<sup>23</sup> The judges are organized into Pre-Trial, Trial, and Appeals Divisions.<sup>24</sup> The Prosecutor’s Office is institutionally independent from the judiciary<sup>25</sup> and is elected by an absolute majority of the States Parties to serve for a nonrenewable term of nine years.<sup>26</sup> The prosecutor is responsible for investigation and prosecution of the enumerated crimes.<sup>27</sup> The Assembly of States Parties can remove a judge or the

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<sup>17</sup> For a brief explanation of these systems, see *infra* note 57 and accompanying text.

<sup>18</sup> See, e.g., Christensen, *supra* note 5, at 415–16.

<sup>19</sup> This is the barest sketch of the ICC. For a more comprehensive summary of the Rome Statute, see generally HUMAN RIGHTS WATCH, A SUMMARY OF THE KEY PROVISIONS OF THE ICC STATUTE (1998), available at [http://www.hrw.org/campaigns/icc/docs/stat\\_sum\\_ltrhd.pdf](http://www.hrw.org/campaigns/icc/docs/stat_sum_ltrhd.pdf).

<sup>20</sup> Rome Statute, *supra* note 1, at 1020.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 1021.

<sup>23</sup> *Id.* at 1022.

<sup>24</sup> *Id.* at 1019.

<sup>25</sup> *Id.* at 1024.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

prosecutor upon a finding of “serious misconduct or a serious breach of his or her duties.”<sup>28</sup>

Members accept the Court’s jurisdiction over certain crimes when committed by their nationals or on their territory.<sup>29</sup> The Court also has jurisdiction over any matter referred by the Security Council with no further preconditions.<sup>30</sup>

The Rome Statute defines four kinds of crimes that can be prosecuted in the ICC: aggression, war crimes, genocide, and crimes against humanity.<sup>31</sup> Both aggression and war crimes are of diminished importance for the time being. Aggression cannot be prosecuted until the Assembly adopts a definition, and consensus on that definition seems distant.<sup>32</sup> Additionally, fear of political prosecutions led States to push for a seven-year opt-out of the Court’s jurisdiction over war crimes.<sup>33</sup> Genocide is defined as it was in the Genocide Convention and posed few difficulties during negotiations.<sup>34</sup> The definition of

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<sup>28</sup> *Id.* at 1026. Removal of a judge requires a two-thirds majority of the States Parties and a two-thirds majority of the other judges. *Id.* Removal of a prosecutor requires an absolute majority of the States Parties. *Id.*

<sup>29</sup> *Id.* at 1010.

<sup>30</sup> *Id.* at 1010–11. These bases for jurisdiction are not as broad as they may seem since the Court accepts the principle of complementarity: It will not exercise jurisdiction where a national court is making or has made a good-faith effort to investigate or prosecute the offense. Specifically, the Court will not take action unless those States with jurisdiction are unable or unwilling to do so. *Id.* at 1012. Unwillingness includes attempts to shield the accused from criminal responsibility, unjustified delay, and lack of impartiality. *Id.*

<sup>31</sup> *Id.* at 1003–04. Article 9 allows the Assembly to draw up detailed “elements of crimes,” *id.* 1009–10, which will be applied by the Court, *id.* at 1015.

<sup>32</sup> *Id.* at 1004; Leila Nadya Sadat, *The Legacy of the ICTY: The International Criminal Court*, 37 NEW ENG. L. REV. 1073, 1074 n.4 (2003) (noting that no clear consensus has emerged from discussions to date).

<sup>33</sup> Rome Statute, *supra* note 1, at 1068; Melissa K. Marler, *The International Criminal Court: Assessing the Jurisdictional Loopholes in the Rome Statute*, 49 DUKE L.J. 825, 833–34 (1999). In other words, States can choose to avoid war crimes jurisdiction for seven years. The treaty provides definitions of thirty-four war crimes in international conflict and sixteen war crimes in non-international conflicts; it contains no generic formulation of a war crime. Rome Statute, *supra* note 1, at 1006–09. There is also a definition of commander responsibility, *id.* at 1017, and a restriction on the use of superior orders as a defense, *id.* at 1019. From the initial declarations, however, it appears that few States are availing themselves of the opt-out provision. See Rome Statute of the International Criminal Court: Declarations, <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp> (last visited Oct. 23, 2004). Of these initial declarations, only France and Colombia opted out under Article 124. *Id.* This seven-year opt-out period appears to be nonrenewable, see HUMAN RIGHTS WATCH, *supra* note 19, at 2, so it is unlikely to alleviate concerns of nations that fear political prosecutions, like the United States and Israel, since the rest of the world seems unlikely to cease criticism seven years hence.

<sup>34</sup> Compare Rome Statute, *supra* note 1, at 1004, and HUMAN RIGHTS WATCH, *supra* note 19, at 6, with Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* Dec. 9, 1948, art. 2, 78 U.N.T.S. 277, 280. See also John F.

“crimes against humanity” was more contentious and more ambiguous in the final treaty text. As a threshold matter, the crime must be committed pursuant to a “widespread or systematic attack.”<sup>35</sup> The Rome Statute enumerates acts that qualify as crimes against humanity, and also provides a generic definition of the term.<sup>36</sup>

Proceedings in the ICC can be initiated by referral of the Security Council, by referral of a State Party, or by the prosecutor’s own initiative.<sup>37</sup> After concluding that there is a reasonable basis for an investigation, the prosecutor must seek the authorization of a Pre-Trial Chamber.<sup>38</sup> States Parties generally have a duty to cooperate in investigations.<sup>39</sup> The Pre-Trial Chamber then must confirm the charges before trial.<sup>40</sup>

Trial procedures and evidence are governed by rules adopted by the Assembly of States Parties<sup>41</sup> as well as the Statute. Both provide broad protections for the victims and the rights of the accused, including prohibitions of arbitrary detention and cruel and degrading treatment,<sup>42</sup> a right against self-incrimination,<sup>43</sup> and a right to counsel.<sup>44</sup> Trials cannot be conducted in absentia.<sup>45</sup> There is a presumption of innocence, and the burden on the prosecution is to prove its case beyond a reasonable doubt.<sup>46</sup> The Statute expresses a preference for oral evidence.<sup>47</sup>

The Trial Chamber, a panel of three judges, makes decisions.<sup>48</sup> The judges seek unanimity but can make decisions by majority.<sup>49</sup>

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Murphy, *The Quivering Gulliver: U.S. Views on a Permanent International Criminal Court*, 34 INT'L LAW. 45, 53 (2000).

<sup>35</sup> Rome Statute, *supra* note 1, at 1004–05. These consist of multiple acts carried out pursuant to a State or organizational policy. *Id.* at 1005.

<sup>36</sup> *Id.* at 1005 (defining broadly crimes against humanity as “inhumane acts of a similar character intentionally causing great suffering or serious injury to body or to mental or physical health”).

<sup>37</sup> *Id.* at 1010.

<sup>38</sup> *Id.* at 1011. The Pre-Trial Chamber can consist of either a single judge or a panel of three judges. *Id.* at 1023. Rulings are made by a majority of the panel. *Id.* at 1045.

<sup>39</sup> *Id.* at 1051.

<sup>40</sup> *Id.* at 1035. When the accused is absent, presence of defense counsel at the confirmation is only required when “the Pre-Trial Chamber determines that it is in the interests of justice.” *Id.* at 1036.

<sup>41</sup> Rules of Procedure and Evidence, ICC Doc. ICC-ASP/1/3 (Sept. 2002).

<sup>42</sup> See Rome Statute, *supra* note 1, at 1030–31.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 1031.

<sup>45</sup> *Id.* at 1037.

<sup>46</sup> *Id.* at 1040.

<sup>47</sup> *Id.* at 1041–42.

<sup>48</sup> *Id.* at 1023.

<sup>49</sup> *Id.* at 1045.

Their deliberations are secret,<sup>50</sup> but a written, reasoned decision must be issued.<sup>51</sup> Final decisions of conviction or acquittal may be appealed by either the prosecutor or defendant on grounds of errors of fact, law, or procedure.<sup>52</sup> Appeals also may be taken as to decisions of jurisdiction, admissibility, detention, or any other issue that significantly affects “the fair and expeditious conduct of the proceedings.”<sup>53</sup> The Appeals Chamber is made up of five judges<sup>54</sup> who make decisions by a majority.<sup>55</sup>

The ICC courtroom process will look very familiar to any common-law lawyer.<sup>56</sup> The most significant differences, at least to American observers, include the role of the prosecutor, the availability of prosecutorial appeals, and the nature of the fact-finder. These aspects of the ICC are modeled after the inquisitorial systems of Europe.<sup>57</sup> These civil-law systems are both more trusting and more demanding of government, placing enormous power and confidence in an independent judiciary and prosecutor. In the ICC, both judges and the prosecutor are vested with power as neutral arbiters. The prosecutor is the primary investigating authority for both the prosecution and the defense, and prosecutorial appeals are available. The investi-

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<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 1047–48.

<sup>53</sup> *Id.* at 1049.

<sup>54</sup> *Id.* at 1023.

<sup>55</sup> *Id.* at 1049. The Appeals Chamber also must issue a reasoned decision and publish dissenting opinions. *Id.*

<sup>56</sup> See 2000 Senate Hearing, *supra* note 11, 29 (Remarks of Ruth Wedgwood, Professor of Law, Yale Law School) (“There is . . . a civil war going on in the Yugoslav War Crimes Tribunal, the civil lawyers against the common law lawyers. And basically the common law lawyers have won. The Yugoslav tribunal’s procedure looks a whole lot like an American courtroom. And frankly, so does the ICC.”).

<sup>57</sup> Rather than a match between equal opponents, such tribunals are inquisitorial; they are conducted as an inquest to solve a crime and find the truth. (Some scholars assert that the words “inquisitorial” and “adversarial” are used in such divergent ways that they are of little use. Rudolph B. Schlesinger, *Comparative Criminal Procedure: A Plea for Utilizing Foreign Experience*, 26 BUFF. L. REV. 361, 362 (1977). This Note is indeed making broad and simplistic generalizations about inquisitorial systems because of its primary focus, the decision-making body.) In such systems, the State is responsible for investigating and laying out the facts, rather than relying upon the efforts of interested parties. See Ennio Amodio & Eugenio Selvaggi, *An Accusatorial System in a Civil Law Country: The 1988 Italian Code of Criminal Procedure*, 62 TEMP. L. REV. 1211, 1213 (1989). At trial, the decision-maker—a professional judge, sometimes the same judge who oversaw the investigation—mainly reviews the investigative dossier, a written compilation of the findings of the investigation. These professionally trained judges are critical to the legitimacy of the process. Their appointment and advancement is intentionally nonpolitical in order to preserve their independent judgment. William B. Ewald, *What’s So Special About American Law?*, 26 OKLA. CITY U. L. REV. 1083, 1099–100 (2001). Inquisitorial systems do not attempt to segregate decisions of law and decisions of fact.

gation is a long, judicially overseen process, but the trial is still the centerpiece of the case.<sup>58</sup>

There was no serious discussion in Rome of actually including a jury, nor does it appear that there has ever been such a discussion during the creation of any of the major international criminal tribunals in the last century. Nuremberg was conceptualized as a military tribunal founded on the authority of the conquering nations.<sup>59</sup> The Yugoslav and Rwandan tribunals make use of professional panels of judges not dissimilar to those to be used by the ICC.<sup>60</sup> An early American Bar Association Task Force report on the development of an international criminal tribunal, summarily dismissed the possibility of utilizing a jury:

Because the jury system as it is employed in the United States is basically unknown to the civil law world, it is likely that only trial by the court would be feasible. Also, the impracticability of attempting to empanel a jury before an international criminal court would seem an insurmountable obstacle to its use.<sup>61</sup>

This rationale suggests three obvious challenges to trying international crimes before a jury: the perceived provinciality of jury systems in those parts of the world that do not use them; the theoretical difficulties of selecting such a jury; and the practical difficulty of empanelling a jury, a process that could be both expensive and politically thorny.

## II

### THE VALUE OF A JURY IN COMPARATIVE AND PROVINCIAL PERSPECTIVE: AN APOLOGY

This Part examines the justifications and drawbacks of criminal juries, particularly as compared to civil-law decision-making bodies. Part A describes the key features of jury systems: lay membership, cross-sectionality, deliberation, impartiality, locality, and natural affinity to adversary systems. Part B examines the various functions of a jury to identify its unique values.

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<sup>58</sup> See *supra* notes 38–51 and accompanying text.

<sup>59</sup> See Casey, *supra* note 16, at 856–57 (quoting The Nuremberg Trial, 6 F.R.D. 69, 107 (1946)).

<sup>60</sup> See Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended), arts. 11–14, 23, at 7–9, 12 (Apr. 2004), <http://www.un.org/icty/legaldoc/index.html>; Statute of the International Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., Annex, arts. 10–12, 22, U.N. Doc. S/RES/955 (1994) [hereinafter Statute of the ICTR].

<sup>61</sup> Am. Bar Ass'n, *American Bar Association Task Force on an International Criminal Court, New York State Bar Association: Joint Report with Recommendations to the House of Delegates*, 27 INT'L LAW. 257, 274 (1993).

### A. Features of a Jury

The criminal jury is by no means a single, homogeneous institution; the guarantee of trial by jury varies widely in form and substance in those nations where it exists.<sup>62</sup> The guarantee is probably strongest in the United States, where the Constitution provides for the use of juries in nearly all civilian cases where the defendant does not waive that right.<sup>63</sup> In contrast, most nations use jury trials only for the most serious offenses, such as homicide.<sup>64</sup>

Despite this variety, there are at least six common features of the criminal jury, which in turn affect the jury's several functions. First, a jury usually is made up of laypersons. Indeed, one of its key values is the incorporation of a community ethic that counters the oppressiveness of strict legalism.<sup>65</sup> Second, jurors are chosen at random from the community. Increasingly, the law honors a cross-sectional ideal of a jury, in which every section of the relevant community is repre-

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<sup>62</sup> See Vidmar, *supra* note 14, at 5–6 (describing widely variant institutional and cultural differences in criminal-trial juries around world). For an in-depth discussion of the origins of the criminal-trial jury, see generally THOMAS A. GREEN, *VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY 1200–1800* (1985).

<sup>63</sup> See U.S. CONST. art. III, § 2 (“The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed . . . .”); *id.* amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .”); see also Vidmar, *supra* note 14, at 11 (suggesting that Constitutional guarantee and deep cultural socialization contribute to pre-eminence of jury in American justice). The guarantee excludes only the pettiest offenses, such as traffic violations.

<sup>64</sup> In England, for example, only certain indictable offenses are tried before a jury in the Crown Court, and the list of indictable offenses is shortening. See Sally Lloyd-Bostock & Cheryl Thomas, *The Continuing Decline of the English Jury*, in *WORLD JURY SYSTEMS*, *supra* note 14, at 53, 61–66 (describing erosion of indictable offenses triable by jury in England). A similar categorization of offenses as “indictable” (usually tried by jury) or summary (usually tried by judges) prevails in other former British colonies, such as Australia. Michael Chesterman, *Criminal Trial Juries in Australia: From Penal Colonies to a Federal Democracy*, in *WORLD JURY SYSTEMS*, *supra* note 14, at 125, 129–32. Newer jury systems, like those of Russia and Spain, also limit the jurisdiction of the jury court to the most serious crimes. See Stephen Thaman, *Europe’s New Jury Systems: The Cases of Spain and Russia*, in *WORLD JURY SYSTEMS*, *supra* note 14, at 319, 325.

<sup>65</sup> See PAUL H. ROBINSON & JOHN M. DARLEY, *JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW* 5–7 (1995) (stressing importance of community values in justice system); see also M.D.A. Freeman, *The Jury on Trial*, 34 *CURRENT LEGAL PROBS.* 65, 90 (1981) (describing jury as “a mechanism by which the court’s output of justice may be balanced with community sentiment”); Kenneth W. Simons, *The Relevance of Community Values to Just Deserts: Criminal Law, Punishment Rationales, and Democracy*, 28 *HOFSTRA L. REV.* 635, 639–41 (2000) (explaining more complicated relationship between community views, retributive justice and utilitarian concerns).

sented.<sup>66</sup> Third, the system values deliberation.<sup>67</sup> As compared to judicial deliberation, jury deliberations are more communal and less scientific. While jurors lack professional training, it is generally thought that they take their deliberative responsibilities seriously. A unanimity requirement forces serious deliberation.<sup>68</sup> Many jurisdictions, including two American states, have abandoned the unanimity requirement, usually in favor of allowing ten of twelve to convict, or a similar large majority.<sup>69</sup>

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<sup>66</sup> See JEFFREY ABRAMSON, *WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* 99–100 (First Harvard Univ. Press 2000) (1994). This ideal is undercut somewhat by the prevalence of challenges for cause, peremptory challenges, and stand-asides, which result in less than random juries. For an overview of the kinds of challenges available in common-law countries, see Vidmar, *supra* note 14, at 32–36. All systems have some means of challenging jurors for cause. *Id.* at 33–34. American judges perform the most vigorous juror screening for biases in *voir dire*. *Id.* at 34. An increasing number of countries have abolished peremptory challenges (those without cause given) entirely. *Id.* at 34. In most countries that have maintained them for either the prosecution, the defense or both, peremptory challenges are practically circumscribed by the absence of information about jurors. *Id.* at 35. Such qualifications of the cross-sectional ideal are justified as serving other ideals in the selection process, such as impartiality. At the very least, it is generally recognized that jurors should not be disqualified by race or gender. See *id.* at 28 (arguing that universal eligibility is becoming general rule across borders). In U.S. law, the seminal cases are *Virginia v. Rives*, 100 U.S. 313 (1879), which declared unconstitutional race-based jury selection, *Batson v. Kentucky*, 476 U.S. 79 (1986), which held unconstitutional race-based peremptory challenges, and *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994), which held unconstitutional gender-based peremptory challenges. This point merits serious qualification since the extent to which these ideals have been achieved is a matter of considerable debate. Furthermore, at different points in history, various countries have discussed or allowed special juries, consisting entirely of women, entirely of experts or partially of foreigners. See Vidmar, *supra* note 14, at 22–26.

<sup>67</sup> ABRAMSON, *supra* note 66, at 8.

<sup>68</sup> When unanimity is required, jurors must take account of all views and hear all voices in ways that would not occur when a majority or supermajority suffices. See *id.* at 182–83; see also *infra* notes 81–84 and accompanying text.

<sup>69</sup> See Vidmar, *supra* note 14, at 26, 31 (describing trend away from unanimity requirement). Brazil's system, in which jurors simply vote by ballot to find a majority, is exceptional among world jury systems. See ABRAMSON, *supra* note 66, at 205. Scotland also convicts by a simple majority, but, unlike the Brazilian system, allows the jury to deliberate. Peter Duff, *The Scottish Criminal Jury: A Very Peculiar Institution*, in *WORLD JURY SYSTEMS*, *supra* note 14, at 249, 269–72. Gerry Maher argues that this trend is a dangerous dilution of the right to trial by jury and of the prosecution's burden to prove guilt beyond a reasonable doubt. Gerry Maher, *The Verdict of the Jury*, in *JURY UNDER ATTACK* 40, 45–52 (Mark Findlay & Peter Duff eds., 1988). In such jurisdictions, for example, a conviction, rather than a hung jury, results from an unbudging ten to two vote for conviction. See *id.* at 42–43. This undoubtedly dilutes the defendant's right to a jury in order to lessen the prosecution's burden, but its importance can be exaggerated. See ABRAMSON, *supra* note 66, at 202 (arguing that liberals overstate threat from abolishing unanimous verdict requirements); HARRY KALVEN JR. & HANS ZEISEL, *THE AMERICAN JURY* 487–88 (1971) (noting that five percent of American jury deliberations result in hung juries); Kate Marquess, *Juries Hang up on Close Calls, Study Says*, ABA JOURNAL E-REPORT, Oct. 18, 2002, WL 1 No. 40 ABAJEREP 3 (Oregon and Louisiana allow nonunanimous jury verdicts in noncapital felony trials); Michael J. Saks, *What Do Jury Experiments Tell Us About*

The fourth common characteristic of jury systems is an impartiality requirement.<sup>70</sup> All jurisdictions have challenges for cause when a juror is known to have an interest in the case or the parties.<sup>71</sup> In most jurisdictions, however, such challenges are fairly rare, since little information is known about the jurors beforehand. Jurors are trusted to reveal any personal connection to the case themselves.<sup>72</sup>

Fifth, jurors typically are local to the place where the crime was committed.<sup>73</sup> Generally, juries are drawn from the area, however loosely defined, in which the crime was committed, and locality is considered crucial to the jury's role. Rather than eschewing variant justice, jury systems embrace the idea that justice might be peculiarly local, holding the law directly accountable to the local citizenry.<sup>74</sup>

Finally, a jury typically is part and parcel of a particular kind of adversarial system.<sup>75</sup> The parties are relied upon to flesh out the evidence and the judge is merely a neutral referee. Law and fact are

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*How Juries (Should) Make Decisions?*, 6 S. CAL. INTERDISC. L.J. 1, 40–41 (1997) (finding consistently low percentage of hung juries in federal jury trials); *see also* Roger Parloff, *Race and Juries: If It Ain't Broke . . .*, AM. LAW., June 1997, at 5 (sounding cautionary note that such statistical studies exaggerate significance of hung juries). *But see* Edward P. Schwartz & Warren F. Schwartz, *And So Say Some of Us . . . What to Do When Jurors Disagree*, 9 S. CAL. INTERDISC. L.J. 429, 437–38 (2000) (showing that rates of hung juries may vary widely across regions and localities, with study of nine California counties finding 13.0% rate and study in Oregon finding 0.4% rate).

<sup>70</sup> The principle of impartiality is also in some tension with the cross-sectional ideal since the preservation of impartiality makes a completely random selection impossible.

<sup>71</sup> *See* Vidmar, *supra* note 14, at 32–34.

<sup>72</sup> *Id.* In addition to simple personal bias, extensive media coverage can be extremely prejudicial. *See id.* Jury systems have two approaches to combating this kind of prejudice. First, new trial procedures can be adopted to prevent prejudice. American systems usually allow extensive voir dire, and attorneys frequently challenge those who have any exposure to media coverage. Jeffrey Abramson argues persuasively that American courts have been too quick to excuse any juror who has been exposed to publicity about the case. The result may be that only the ill-informed and unconscientious, the last people we want to entrust with deliberative decision-making, are seated on juries in high profile cases. *See* ABRAMSON, *supra* note 66, at 53. Various systems allow for other methods like change of venue and even postponing the trial until popular passions abate. Second, the system can try to restrict the media. While anathema in the United States, extensive restrictions on media reports about ongoing investigations and trials are common in the rest of the world. For example, England's Contempt of Court Act of 1981 bars the media from publishing prejudicial information before or during a trial. Lloyd-Bostock & Thomas, *supra* note 64, at 78. Similar sanctions are available in Australia. *See* Chesterman, *supra* note 64, at 145.

<sup>73</sup> This is sometimes known as the vicinage requirement. As early as the Constitutional Convention, it was weakened in American law. *See* ABRAMSON, *supra* note 66, at 22–36. The Sixth Amendment does include a vicinage requirement, but allows the legislature to define the scope of the district wherein the crime was committed. *See supra* note 63.

<sup>74</sup> *See supra* note 65. There is a tension between the tabula rasa juror and the ideal of a jury of one's peers. It seems unjust either to import jurors with no connection to the crime or to strike jurors that happen to be well-informed. *See* ABRAMSON, *supra* note 66, at 45–55.

<sup>75</sup> *See* Vidmar, *supra* note 14, at 14–16.

distinguished so that jurors are responsible only for determining the facts.<sup>76</sup> Furthermore, fact-finding must be condensed into a fairly short trial and deliberation period so that the laity may return to their lives.<sup>77</sup>

### B. Functions and Value of the Jury

The qualities of a jury described above (lay, cross-sectional, deliberative, impartial, local, and adversarial) are emphasized differently among nations, and this differing emphasis affects the jury's several functions. There are at least three separate functions of the criminal jury. First, the interposition of a group of laypersons stands between the accused and the power of the State. This interposition has two components: First, jury fact-finding prevents abuse by the State in the form of trumped-up charges and corrupt prosecutors; second, juries sometimes act directly on the law through nullification. In both instances, the jury serves to connect the institution of justice to community values, bringing the administration of the law under the direct influence of the people served. Second, the jury provides benefits to the jurors. It is an institution through which people govern themselves and learn the ideals of citizenship and equality. Finally, the jury serves the appearance of justice, legitimating the law in the eyes of the populace who are its final arbiters.

#### 1. Standing Between the Accused and the State

##### a. Fact-Finding

Jury fact-finding is meant to prevent abuse of the criminal justice powers of the State.<sup>78</sup> Jurors are not State actors. They do not have an institutional or personal stake in the outcome of a trial, but rather have a stake only in the freedom of a fellow citizen and the rule of law.<sup>79</sup>

The jury has unique qualities that enhance the effectiveness of fact-finding. The ideal of democratic deliberation supposes that jurors transcend their initial loyalties, weigh the issues, and find facts as

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<sup>76</sup> This is most true of the American system, which relies institutionally, in most facets, on a sharp separation of law and fact, with a hierarchy of judges primarily responsible for interpreting law and jurors responsible for interpreting facts.

<sup>77</sup> See Vidmar, *supra* note 14, at 14.

<sup>78</sup> Originally, the jury of one's peers was meant literally to include those who might have personal knowledge helpful to the trial. ABRAMSON, *supra* note 66, at 27. Such information aided the court in accurate fact-finding. This qualification has become cause for disqualification. Vidmar, *supra* note 14, at 32.

<sup>79</sup> See Gerard N. Magliocca, *The Philosopher's Stone: Dualist Democracy and the Jury*, 69 U. COLO. L. REV. 175, 189 (1998).

objectively as possible.<sup>80</sup> The requirement of unanimity reinforces this deliberative ideal. Jurors must be open-minded to reach any decision at all, and a multimember body will benefit from the unique thought processes and perspectives of several people.<sup>81</sup> A requirement of unanimity also protects the presumption of innocence, as it forces the prosecutor to convince multiple reasonable people of the defendant's guilt, thereby reducing the likelihood of mistaken convictions.<sup>82</sup> There is, however, a trade-off with the democratic quality of adjudication, since a minority of jurors can prevent a decision.<sup>83</sup> A move to majority verdicts has alleviated this concern somewhat, since it is meant to prevent rogue jurors from hijacking a jury.<sup>84</sup>

Civil lawyers more often conclude that this is an idealization of the jury's fact-finding benefits, claiming that jurors are ignorant, inaccurate, and biased,<sup>85</sup> more akin to populist lynch mobs than the open-minded deliberative body portrayed in the film *12 Angry Men*.<sup>86</sup> Bureaucratic oversight and an inquisitorial focus, they might argue, are less costly means of preventing the kind of corruption and abuse that juries are meant to combat. The supposed ignorance of jurors is a major cause for concern in some countries.<sup>87</sup> Certainly the law does

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<sup>80</sup> Jeffrey Abramson concludes that the system has tipped too far in favor of the representational ideal and argues cogently that deliberation allows jurors to draw upon their unique backgrounds and experiences to "transcend [their] starting loyalties" and seek truth. See ABRAMSON, *supra* note 66, at 8, 102–04.

<sup>81</sup> SCOTT PLOUS, THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING 211–14 (1993). Mirjan Damaška, for example, describes the jury as a coordinate decision-making body where a single level of laypersons applies community standards, as opposed to a hierarchical model where a professional corps of judges is organized into a hierarchy and each judge applies a set of technical rules. MIRJAN DAMAŠKA, THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS 16–46 (1986); Mirjan Damaška, *Structures of Authority and Comparative Criminal Procedure*, 84 YALE L.J. 480 (1975).

<sup>82</sup> See Maher, *supra* note 69, at 48.

<sup>83</sup> But see Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261 (2000) (arguing that unanimous juries are more democratic because they encourage deliberation between jurors).

<sup>84</sup> See John Jackson, *Making Juries Accountable*, 50 AM. J. COMP. L. 477, 481 (2002). Majority verdicts do not address the democratic problem created when a randomly chosen group of jurors refuses to apply the laws enacted by a truly representative legislature. See *infra* notes 100–12 and accompanying text.

<sup>85</sup> See ABRAMSON, *supra* note 66, at 3–4 (summarizing common complaints about jury systems). More colorfully, Christie Davies has suggested that juries are "about as reliable as an examination of the entrails of a ritually sacrificed free-range rooster," Christie Davies, *Trial by Judges*, NAT'L REV., May 24, 1993, at 46, and further described the jury, in another acerbic flight of verbal fancy, as "an oracle, a secret anonymous conclave swayed by unknown and unknowable prejudices and mental aberrations," *id.* at 47.

<sup>86</sup> 12 ANGRY MEN (Metro-Goldwyn-Mayer 1957).

<sup>87</sup> The complexity of modern fraud cases, for example, has prompted a call for nonjury adjudication in England. Lloyd-Bostock & Thomas, *supra* note 64, at 67–68.

not appear to be the result of simple reason, accessible to anyone,<sup>88</sup> and jurors are untrained in the complexities of modern law and inexperienced in forensic fact-finding.<sup>89</sup> Finally, jurors are thought to be more likely to vote according to their personal biases and popular sentiment than trained professionals.<sup>90</sup> In ethnically diverse societies, juries are plagued by the appearance of racial prejudice,<sup>91</sup> and this appearance is not entirely without substance.<sup>92</sup> At the very least, jury opponents argue, absent State misconduct, there is nothing to suggest that juries are actually superior fact-finders.

While there is reason to doubt that juries always act like the ideal model, there also is reason to think that they usually behave responsibly. American jury research indicates that evidence and argument generally have a much greater influence on a jury's decision than do the jurors' pre-existing attitudes.<sup>93</sup> For the most part, the actual problems seem to stem from jurors' misunderstanding of judicial instructions, rather than willful disregard for the evidence.<sup>94</sup> Overall, there is little reason to believe that juries are less accurate than judges. Indeed, Professors Kalven and Zeisel show that juries and judges are more likely to agree on verdicts than to disagree.<sup>95</sup> As a last resort,

<sup>88</sup> See ABRAMSON, *supra* note 66, at 88 (describing shift from relatively simple natural law to complex positive law).

<sup>89</sup> See, e.g., Phoebe C. Ellsworth & Alan Reifman, *Juror Comprehension and Public Policy: Perceived Problems and Proposed Solutions*, 6 PSYCHOL. PUB. POL'Y & L. 788, 788–92 (describing both scientific and lay complaints about jury decision-making).

<sup>90</sup> See *id.* at 790–91 (showing widespread lay misperceptions of racial bias in American juries). There is deep cynicism in some communities about the abilities of jurors to render impartial justice. See ABRAMSON, *supra* note 66, at 103–04.

<sup>91</sup> ABRAMSON, *supra* note 66, at 102–04.

<sup>92</sup> Although many claims of race-based justice are specious, see Nancy S. Marder, *The Interplay of Race and False Claims of Jury Nullification*, 32 U. MICH. J.L. REFORM 285 (1999), others seem obvious. The refusal of all-white Southern juries to convict white Ku Klux Klan members of crimes against blacks and Communists is a plain example. See ABRAMSON, *supra* note 66, at 61–62.

<sup>93</sup> Jackson, *supra* note 84, at 480 & n.13; Saks, *supra* note 69, at 10.

<sup>94</sup> Rather than revealing an unalloyed fault, this may reflect the fact that the jury is simply less rule-bound than a judicial decision-maker and more likely to resort to the equities. See *supra* note 65 and accompanying text.

<sup>95</sup> See KALVEN & ZEISEL, *supra* note 69, at 104–17. Unsurprisingly, they also found that most disagreements were caused by differential assessments of evidence. *Id.* at 112. A great difference in leniency of juries or judges might provide some grounds for believing that one is more accurate than the other (although such evidence could not conclude which fact-finder is more accurate). Research leaves it unclear, however, whether juries are more likely than judges, as a general matter, to be lenient. In America, generally speaking, juries convict more often than judges, JAMES LEVINE, *JURIES AND POLITICS* 123–27 (1992), but these statistics could very well reflect some degree of self-selection. Different kinds of cases go to different fact-finders; i.e., defense lawyers take stronger cases to the jury. Furthermore, these statistics differ dramatically from the findings made by Kalven and Zeisel in the 1960s, which indicated that juries were slightly more lenient than judges, KALVEN & ZEISEL, *supra* note 69, at 104–17, and which may suggest a change in the activity of prose-

the power of judges to overturn guilty verdicts cabins the jury's discretion, which otherwise might become an instrument of populist vengeance.

Furthermore, as nonstate actors, jurors are institutionally less subject to corruption (although it may be more difficult to maintain security for large numbers of jurors than for a single judge).<sup>96</sup> A unanimity requirement in combination with a randomly chosen cross-section goes a long way towards preventing the hijacking of a jury by group prejudice.<sup>97</sup> In the United States, extensive voir dire is used to weed out jurors with real prejudices. Other States rely upon the conscientiousness of the jurors and unanimity requirements.<sup>98</sup> Outside of actual racial animus or prejudice, different perspectives influenced by ethnicity should be valuable in deliberations.<sup>99</sup>

This is not to say that there are no costs to jury trials. Skeptics are correct in asserting that civil-law systems are not systemically corrupt and that they may provide a more uniform application of the law. The choice of a jury system means that uniformity sometimes will be subordinated to other concerns: a community ethic, an additional check on official corruption, and community participation.

### b. Law-Finding and Jury Nullification

Although juries were traditionally law-finding as well as fact-finding bodies, this use of the jury lost favor long ago.<sup>100</sup> In the United States, jurors usually are instructed that they are responsible only for determining the facts and must apply the relevant law whether or not they agree with it. Nonetheless, in many courts,

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cutors and political culture as much as jurors. In Ireland, on the other hand, juries historically were notorious for their low rate of returned convictions, especially in rural areas. See John D. Jackson et al., *The Jury System in Contemporary Ireland: In the Shadow of a Troubled Past*, in *WORLD JURY SYSTEMS*, *supra* note 14, at 283, 285–88. In short, it may be impossible to draw broad conclusions about jury toughness/leniency because it seems to hinge to a large extent on the legal culture of the time and place. American jury research shows declining leniency, but the same is not true in other countries. Kalven and Zeisel make clear that juries are not necessarily more pro-defendant than judges. Rather, "it is non-rule minded; it will move where the equities are. And where the equities are at any given time will depend on both the state of the law and the climate of public opinion." KALVEN & ZEISEL, *supra* note 69, at 495.

<sup>96</sup> See, e.g., Jackson, *supra* note 95, at 302–09 (discussing resort to bench trials in Northern Ireland for cases related to Troubles of past 30 years because of widespread jury intimidation).

<sup>97</sup> See ABRAMSON, *supra* note 66, at 193–96.

<sup>98</sup> Vidmar, *supra* note 14, at 32–34.

<sup>99</sup> See Nancy S. Marder, *Juries, Justice & Multiculturalism*, 75 S. CAL. L. REV. 659, 678–700 (2002) (empirical study observing positive effects of diversity on jury deliberations).

<sup>100</sup> See ABRAMSON, *supra* note 66, at 67–68.

including American courts, juries retain the capacity to nullify the law, to render a "verdict according to conscience" with respect to an acquittal. Two factors protect this function: the inscrutability of verdicts and the unappealability of acquittals.<sup>101</sup> Neither trial nor appellate judges in most common-law jurisdictions can inquire into a jury's reasoning.<sup>102</sup>

Although jury deliberations remain largely cloaked, nullification seems to occur in at least two ways. In rare instances, jurors will find a defendant not guilty in clear contradiction of the law as applied to the facts.<sup>103</sup> More commonly, juries will deliberately misconstrue the facts in order to place the defendant or events in a different category; for example, convicting for manslaughter when the law justifies a murder conviction. An opposite form of nullification occurs when a jury convicts even where the law is not satisfied.<sup>104</sup>

Opponents of jury trials find nullification to be a particularly objectionable aspect of the jury system. Problems of juror bias are magnified when jurors have the power to subvert the decisions of a democratically elected legislature. A lawyer in a civil-law system might argue that citizens should instigate legal reform through the ballot box, not the jury box.<sup>105</sup> Those opposed to jury nullification rightly observe that its history is checkered. Although jury enthusiasts can point to triumphs like the acquittal of William Penn in England or Peter Zenger in America, skeptics can point to tragedies like the acquittal of lynch mobs by white juries during Reconstruction. More modern American cases, like the repeated failure to convict Dr. Kevorkian, are controversial and have no clear moral gloss. The only certainty is that, in any jury system, juries occasionally will nullify.<sup>106</sup>

Even judicial systems that utilize juries are wary of nullification and admonish jurors not to act lawlessly.<sup>107</sup> In Spain, for example, juries issue special verdicts: Rather than being asked to render a final

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<sup>101</sup> See Kate Stith-Cabranes, *The Criminal Jury in Our Time*, 3 VA. J. SOC. POL'Y & L. 133, 140–42 (1995).

<sup>102</sup> Cf. Jackson, *supra* note 84, at 477–82 (describing trend away from historical unaccountability of juries).

<sup>103</sup> This may occur either because the law seems unjust on its face, because the jury objects to the harsh sentence, or because the law seems overinclusive in a particular case.

<sup>104</sup> Since such nullification is not protected from appeals, it probably occurs less often.

<sup>105</sup> See ABRAMSON, *supra* note 66, at 3–4.

<sup>106</sup> See ABRAMSON, *supra* note 66, at 95 & n.4.

<sup>107</sup> The American judiciary in recent years has combated nullification actively, not least because of nullification's promotion by fringe groups trying to achieve political ends in the jury box. See ABRAMSON, *supra* note 66, at 58–59 (describing activities of Fully Informed Jury Association and its effects on trials). Such activities are by no means the only basis for criticism of jury nullification. High profile acquittals can often lead to assertions that the jury was nullifying the law.

verdict, jurors are given a list of factual questions to answer.<sup>108</sup> Spanish courts demand a rationale for jury decisions and force juries to correct their decisions if the given rationales seem defective.<sup>109</sup> These juries serve as mechanical fact-finders, and their acquittals are reversible.<sup>110</sup>

On balance, however, modern manifestations of jury nullification tend to enhance democracy. First, lay jurors bring a community ethic to the process. This contrasts with the most criticized aspect of inquisitorial systems—that they are too bureaucratic, mechanical, and removed from the people.<sup>111</sup> Second, a small but powerful role for the jury in finding the law checks prosecutorial power. Representative democracy is not a panacea for government misconduct, especially when significant power is entrusted to unelected officials. Average citizens have no direct responsibility for the creation of the law, and as a consequence it can drift away from them. Juries are a radical but fair correction to a cumbersome bureaucracy; a correction that is unavailable in a system that relies solely on professionals.<sup>112</sup> At least in the national context, the danger inherent in jury nullification—the occasional unjustified subversion or misinterpretation of the law—is outweighed by the checks nullification places on official misconduct and error.

## 2. Benefits to the Juror

The citizen has a right to participate in decision-making by the criminal justice system, as she does in any other lawmaking activity. In several countries, the right of the citizen to deliver justice is the guiding principle behind the jury system.<sup>113</sup> In such countries, certain indictable offenses always are tried by a jury, regardless of the wishes

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<sup>108</sup> See Thaman, *supra* note 64, at 338.

<sup>109</sup> *Id.* at 344–46.

<sup>110</sup> Even so, they sometimes act in defiance of the law. *See id.* at 341 n.96.

<sup>111</sup> *See id.* at 351 (expressing hope that adoption of new jury systems will breathe life into overly mechanical, bureaucratic systems of Europe).

<sup>112</sup> Additionally, a legislative lawmaking body may be insufficient because it inevitably writes overinclusive laws, simply because legislators do not come face-to-face with the infinite variety of individual cases that arise. *See Rachel E. Barkow, Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PENN. L. REV. 33, 61–62 & 61 n.132 (2003). A jury with the power to nullify effectively corrects the laws in cases that the legislature did not foresee. *Id.* Its power to do so is limited by appellate review, especially when it tries to expand a category of proscribed activity. The jury's power to correct an overinclusive proscription prevents punishment from following the violation of a law unjustly drafted.

<sup>113</sup> Chesterman, *supra* note 64, at 134. Scotland emphasizes the democratic value of the jury over its other functions in other ways. For example, a simple majority makes decisions in Scotland. Duff, *supra* note 69, at 249.

of the defendant.<sup>114</sup> Civil-law systems without lay assessors<sup>115</sup> offer citizens no role at the adjudication stage.<sup>116</sup> But the administration of the law is of no less democratic importance than the creation of law, particularly when laws are ambiguous and require interpretation. In order to protect the citizenry's right to influence the law, therefore, civil-law systems tend to emphasize concrete, technical codes over broadly worded statutes.<sup>117</sup> These codes constrain judicial discretion, as does the heightened technical training that judges receive. In reality, many scholars have noted that common-law and civil-law nations are moving closer together in this regard.<sup>118</sup>

Jury participation also may provide less obvious benefits to the juror. Alexis de Tocqueville famously argued that juries foster citizenship and a spirit of republicanism.<sup>119</sup> When called to serve as jurors, citizens come together to deliberate and make decisions about justice in a forum where all voices must be heard and all minds swayed. Jeffrey Abramson has called it a "school where citizens learn[ ] the virtues of self-government."<sup>120</sup>

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<sup>114</sup> Duff, *supra* note 69, at 254. Peter Duff argues that this difference, among others, proves that variations in jury systems are simply a matter of legal culture, not deep-seated legal principles. *Id.* at 281–82. While culture undoubtedly plays a role, Duff overstates his case. Nations with nonwaivable jury guarantees prioritize the functions of the jury (and therefore their deep-seated legal principles) differently, placing the benefits to the juror and legitimacy above protection of the accused. The American system subordinates this right of the juror to the right of the defendant, allowing the defendant to waive a jury trial when she does not believe it to be in her best interests.

<sup>115</sup> For a brief explanation of the role of lay assessors, see *infra* note 191.

<sup>116</sup> They maintain that citizens appropriately participate in lawmaking only through the political process. Cf. James W. Diehm, *The Introduction of Jury Trials and Adversarial Elements into the Former Soviet Union and Other Inquisitorial Countries*, 11 J. TRANSNAT'L L. & POL'Y 1, 8–9 (2001) (noting legislature's dominant position over courts).

<sup>117</sup> *Id.*

<sup>118</sup> See Ewald, *supra* note 57, at 1087. The United States, for example, has several highly complex codes, and civil-law systems are relying increasingly on judicial precedent to assist in interpretation. *Id.* at 1087–88.

<sup>119</sup> See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 275 (J.P. Mayer ed., George Lawrence trans., HarperPerennial 1988) (1850).

<sup>120</sup> ABRAMSON, *supra* note 66, at 89 (detailing public benefits of previously used law-making jury). A related argument is that of Sherman Clark, who argues that criminal jury participation makes citizens directly responsible for the State's acts of justice. It forces them to face directly those policies of justice that are easier to support or condemn in the abstract and thus educates them about governance. See Sherman J. Clark, *The Courage of Our Convictions*, 97 MICH. L. REV. 2381, 2381–82 (1999).

### 3. Appearance of Justice

Some commentators attach primary importance to the jury's legitimating function.<sup>121</sup> The institution of direct democracy embodied in a jury allows the citizenry to pass judgment; the jury is an institution that makes all citizens feel like they have a stake and a voice in the system. Arguably, public respect for the rule of law derives, at least in part, from the judiciary's sharing of power with the public.<sup>122</sup>

In contrast, Jeffrey Abramson encourages legal scholars not to make too much of the appearance of justice, especially not at the expense of the actuality of justice.<sup>123</sup> It could also be argued that the appearance of different justice for different people does more to undermine than to enhance the legitimacy of the law. Certainly, the occasional spectacular instance of unjustified (or apparently unjustified) jury nullification provokes cynicism about popular justice.<sup>124</sup> Inquisitorial systems prefer strict judicial review of fact and law in accordance with democratic principles.

Furthermore, in a jury system requiring unanimity, a single person can subvert the purposes of a democratic legislature. This is a fundamental conceptual difference, difficult to resolve through logical comparison of the systems. Western European systems rely heavily on a vanguard of professional civil servants, technically trained, to ensure uniform application of the law.<sup>125</sup> The American system in particular distrusts professional elites and prefers to inject direct democracy wherever plausible.<sup>126</sup> Since the legitimization function is based entirely on appearance, and both jury-based and judge-based systems have plausible roots in democratic theory, there is probably

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<sup>121</sup> See Hon. Irving Kaufman, *Foreword: Jury Selection in the Fifth Circuit*, 20 MERCER L. REV. 347 (1969) (quoting Green v. United States, 356 U.S. 165, 215–16 (1958) (Black, J., dissenting)).

<sup>122</sup> See B. Lynn Winmill, *To My Russian Colleagues*, THE ADVOCATE, Dec. 2002, at 8, 10.

<sup>123</sup> ABRAMSON, *supra* note 66, at 89.

<sup>124</sup> See generally Steven M. Warshawsky, *Opposing Jury Nullification: Law, Policy, and Prosecutorial Strategy*, 85 GEO. L.J. 191 (1996) (opposing and relating history of jury nullification). Michael Saks argues that the civil jury protects judicial legitimacy even in cases with bizarre damage awards because juries act as lightning rods, deflecting criticism from judges and institutions to individual jurors. Michael J. Saks, *Public Opinion about the Civil Jury: Can Reality Be Found in the Illusions?*, 48 DEPAUL L. REV. 221, 239–40 (1998). The same could be true about unpopular criminal verdicts. Only in an entrenched jury system, however, can we conclude confidently that criticism of juries will not result in an impeachment of the greater justice system. Saks's conclusion seems reasonable in the U.S. context, but may not hold true for new jury systems.

<sup>125</sup> See Ewald, *supra* note 57, at 1097–101.

<sup>126</sup> *Id.*

no compelling logical argument for choosing one over the other in the abstract. The choice hinges on how high a value a society places on participatory decision-making on one hand and uniformity on the other. Different problems may create different needs for participation and uniformity.<sup>127</sup> In short, a judicial system appears legitimate to its constituents when it is consistent with their legal culture and history.

### III TRANSPLANTING JURIES INTO THE INTERNATIONAL CONTEXT

What is to be made of the curious assertion by some Americans that the United States cannot participate actively in an agreement that would subject American citizens to the jurisdiction of a court without a jury? The American jury objection, although it is somewhat strategic, is not purely a case of misdirection.<sup>128</sup> The jury trial is deeply rooted in American culture and traditions. Most Americans, for example, would be puzzled to hear that the ICC provides as much or more due process as American courts, but does not have a jury trial.<sup>129</sup> More importantly, the above discussion suggests that the institution of the jury is not simply an accident of Anglo-American history, but instead resonates with deep principles of justice. While the jury surely is not the only way to provide justice and protect these principles, it is often an effective way, and it affords advantages that other systems do not.

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<sup>127</sup> For example, post-Revolutionary America was fixated on rule by the people in all things and wholeheartedly embraced the jury system, but postcolonial African nations, accustomed to racist all-white juries, abolished jury systems across the continent. See Neil Vidmar, *The Jury Elsewhere in the World, in WORLD JURY SYSTEMS*, *supra* note 14, at 427.

<sup>128</sup> The jury objection is surely subordinate to two others: (1) the general objection that U.S. citizens should be made generally subject to non-Article III courts, especially for crimes committed within the territorial jurisdiction of the United States—a view not without support in the caselaw, *cf.* *United States v. Balsys*, 524 U.S. 666, 698 (1998) (holding that Fifth Amendment did not apply to defendant not tried in United States court but noting, in dicta, that situation would be different if United States were acting in concert with foreign prosecution); and (2) fear of politically motivated prosecutions of American servicemembers that might hamper American ability to deploy forces around the world. See Briefing Transcript, *supra* note 11; William J. Haynes II, Speech to San Francisco World Affairs Council (May 30, 2002) (transcript available at <http://www.defenselink.mil/speeches/2002/s20020530-Haynes.html>) (detailing U.S. objections to final form of ICC).

<sup>129</sup> See, e.g., *Treaty Watch: Court of No Appeal*, NAT'L REV., July 29, 2002, at 16 (concluding that limitations on ICC's power are likely to be insufficient to meet U.S. concerns).

### A. The Current Structure Is Insufficient

There are legitimate reasons for concern about the current structure of the ICC. In an international criminal court, as in any criminal court, there is a risk of prosecutorial misconduct and abuse of power.<sup>130</sup> Given the ugly nature of the crimes that the ICC was created to adjudicate, there is a risk that the Court's procedural safeguards could be overwhelmed by the world's moral outrage—that a trial could become a sham, mere victor's justice. As discussed in Part II, the drafters of the Rome Statute conscientiously attempted to protect defendants with a full panoply of procedural rights.<sup>131</sup> Defense counsel, however, lacks the power of the prosecutor, and, as in many inquisitorial systems, must depend on the fairmindedness of the prosecutor.<sup>132</sup> Such inequality opens the door to gross abuses of power. The question is not whether the judicial structure of the ICC is perfect, but whether the international community could improve upon it. At present, the ICC seems to place far too much faith in the good intentions of judges and prosecutors. This Note argues that a jury trial would ameliorate some of the inequities and dangers that inhere in the current design.

The fact that the prosecutor is elected by the Assembly of States Parties is insufficient to ensure the requisite fairmindedness on her part. Those who seek the position have the admirable goal, after all, of "put[ing] an end to impunity" for these crimes.<sup>133</sup> The ICC prosecutor is overseen at every stage by the judiciary, but her power to

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<sup>130</sup> One scholar argues the contrary—that there is no need to protect the accused from the State because there is no international State. See Baum, *supra* note 16, at 228. The Court, however, wields the power of a State while having none of its democratic legitimacy. Although the Court depends upon the cooperation of member States, States have agreed to enforce its decisions without subjecting them to their own normal checks, like review by their appellate courts or trial by jury. The stateless nature of international law enhances rather than diminishes the argument for community involvement.

<sup>131</sup> See *supra* notes 42–47 and accompanying text.

<sup>132</sup> Kenneth Gallant fairly details the various ways in which defense counsel lacks power equal to the prosecutor. For instance, defense counsel are not guaranteed funding for factual investigation. Kenneth S. Gallant, *The Role and Powers of Defense Counsel in the Rome Statute of the International Criminal Court*, 34 INT'L LAW. 21, 21 (2000) (noting lack of funding guarantees and omission of "a clear determination of privileges and immunities of defense counsel and staff to investigate the facts of cases in the states in which evidence is or may be located or in which the alleged crimes occurred"); see also Christensen, *supra* note 5, at 417–18 ("The imbalance between the Prosecutor and defense in the ICC is an injustice carried over from the ICTY."); Cogan, *supra* note 16, at 121–31 (describing difficulties encountered by defense counsel in Yugoslav Tribunal and in *Lockerbie* trial). Cogan concludes that the lack of enforcement power of the ICC may seriously undermine fair trials. He argues that the current international scene lacks watchdogs for the rights of defendants. *Id.* at 114. Properly understood, a jury could be a moral watchdog of last resort.

<sup>133</sup> See *supra* note 2 and accompanying text.

initiate investigations independently has prompted waggish visions of a “global Ken Starr.”<sup>134</sup> She is not accountable to the people, as in some American state systems, but neither is her appointment apolitical, bureaucratic, and merit based, as in many civil-law systems. One can argue that civil-law impartiality is superior to common-law accountability, but election by diplomatic representatives serves neither end.

Even assuming a well-intentioned prosecutor, the fairness of ICC adjudication ultimately rests on the impartiality of the professional judges and their commitment to consistency. Such impartiality and consistency is anything but a given. First, the Rome Statute affords the judges potentially enormous power, given their authority to develop rules of law and procedure unconstrained by stare decisis.<sup>135</sup> Second, although ICC judges cannot seek re-election, they do have personal interests in their future careers. While any international lawyer wants a reputation of fairness above all, no one wants to be “the guy who voted to acquit Slobodon Milosevic.” Some judges undoubtedly will be nominated and elected for purely political reasons, maybe even because they are hostile to war crimes law. In short, a panel of judges will be replete with its own set of biases and personal interests.<sup>136</sup>

Since the judges are selected in much the same manner as the prosecutor (by the same body, through a similar process, for the same term), their personal and institutional interests may be similar. And a judge may develop an allegiance to a prosecutor that he works with in every case and whose judgment he trusts. In short, the positions are so similar that it may be difficult for the judges to exercise independent judgment. Also, in many cases, judges may see themselves as representing the interests of their respective nations or of the nations that pushed to elect them.

Prior experience with international criminal tribunals, although not conclusive, does suggest that the current structure of the tribunal

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<sup>134</sup> See Neil King Jr., *Gulliver's Travails: How America Got Ambushed in Vote on War-Crime Court*, WALL ST. J. EUR., July 24–25, 1998, at A1.

<sup>135</sup> See Christensen, *supra* note 5, at 414–15.

<sup>136</sup> We could, of course, simply depend upon the biases of elected judges to cancel each other out, or count upon the wisdom of the diplomats to select judges of the appropriate political bent. The primary problem is that such an argument sacrifices the moral high ground of the inquisitorial judge. The judges’ professionalism, independence, and competence are key to the ideal of the independent professional judiciary. Nor does the argument preserve some notion of democratic election procedures, since diplomats are not democratic representatives in any meaningful sense.

is vulnerable to abuse.<sup>137</sup> Three incidents in particular suggest the potential for politicization of the process. First, in 2000, a nationalist Croatian group filed a complaint for war crimes against President Clinton with the International Criminal Tribunal for the Former Yugoslavia (ICTY).<sup>138</sup> The Croatian World Congress (CWC) appears to have been unconcerned about Clinton's alleged transgressions. Rather, the CWC was opposed to the indictment of Croatian General Ante Gotovina for atrocities allegedly committed during a 1995 offensive against the Serbs.<sup>139</sup> Since Clinton had supported offensive action by Gotovina, the argument was that he should stand shoulder to shoulder with Gotovina.<sup>140</sup> It is unclear what the CWC hoped to accomplish. Perhaps they hoped that an overzealous prosecutor would take up the complaint and bring the United States in on the side of Gotovina. Or perhaps they just hoped to undermine the legitimacy of the tribunal by making it look like equally culpable leaders were immune. In any case, no investigation was undertaken, but it is not difficult to imagine that a prosecutor who was eager to shore up the legitimacy of the tribunal or undermine United States interests might pursue this type of politicized complaint. The prospect of a trial before American jurors might curb such a prosecutor's zeal, since a conviction in that setting would seem unlikely.

In an earlier incident in the ICTY, a complaint was taken a step farther, when Prosecutor Louise Arbour formed a committee to investigate alleged war crimes committed during the NATO bombing campaign over Kosovo.<sup>141</sup> The investigation was demanded by China and Russia, who had opposed the liberation of Kosovo, and also by a group of human rights activists.<sup>142</sup> Rather than quietly file the complaint, as was done with the CWC complaint, the investigatory committee "applied the same criteria . . . that the Office of the Prosecutor

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<sup>137</sup> There is much scholarly interest, for example, in the treatment of defense counsel, who lack power equal to the prosecutor in all of the extant international criminal tribunals. See *supra* note 132.

<sup>138</sup> Letter from Dr. Simun Sito Coric, President, Croatian World Congress, to Carla Del Ponte, Prosecutor, International Criminal Tribunal for the Former Yugoslavia (July 4, 2000), <http://www.crowc.org/english/news/article.asp?id=2>. Peter Grier, *Disorder in the Court*, AIR FORCE MAG., Oct. 2002, at 36, 39.

<sup>139</sup> Grier, *supra* note 138, at 39.

<sup>140</sup> *Id.*

<sup>141</sup> See Casey, *supra* note 16, at 848; see also Press Release, Office of the Prosecutor, Int'l Criminal Tribunal for the Former Yugoslavia, Prosecutor's Report on the NATO Bombing Campaign, ICTY Doc. PR/P.I.S./510-e (June 13, 2000), <http://www.un.org/icty/pressreal/p510-e.htm>; Int'l Criminal Tribunal for the Former Yugoslavia, *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia* (released June 13, 2000) [hereinafter NATO Report], <http://www.un.org/icty/pressreal/nato061300.htm>.

<sup>142</sup> See Casey, *supra* note 16, at 848.

(OTP) has applied to the activities of other actors in the territory of the former Yugoslavia.”<sup>143</sup> Ultimately, the investigation concluded that there was insufficient evidence to proceed.<sup>144</sup>

While the resulting opinion is articulate and well-reasoned, it is open to multiple cynical interpretations. American observers tend to view the investigation as naked anti-Americanism, a shot across the bow of NATO peacekeeping forces, and a warning to stay out of future conflicts.<sup>145</sup> Others, in contrast, see Justice Arbour’s decision not to proceed as an example of victor’s justice or the submission of an allegedly impartial tribunal to a dominant military force. It is quite possible that Arbour viewed the opinion as an opportunity to bolster the tribunal’s legitimacy by taking seriously a claim against NATO, while also firmly rejecting it. Finally, the opinion may have been a convenient and legitimate way to dispose of ultimately frivolous claims. In the end, it is impossible to get inside the mind of the prosecutor, but the complaints at least show the precarious political position in which a prosecutor might find herself.<sup>146</sup> It is not difficult to imagine a prosecutor attempting to ride the waves of public opinion to keep her job, secure her future, or simply to protect the Court from a frontal assault by outraged member States. A jury would serve as a safety valve for various political pressures, both taking the heat off the prosecutor and preventing her from abusing power in pursuit of political ends.

A frontal assault on the International Criminal Tribunal for Rwanda (ICTR) serves as another example of the vulnerability of international tribunals to political pressure. Jean-Bosco Barayagwiza was accused of various violations of international humanitarian law during the Rwandan genocide.<sup>147</sup> After he was held without trial for well over a year, the Appeals Chamber of the Tribunal ordered his release because the extended pretrial detention violated international human rights standards. The Court explained: “Nothing less than the integrity of the Tribunal is at stake in this case. Loss of public confi-

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<sup>143</sup> See NATO Report, *supra* note 141, ¶ 5.

<sup>144</sup> *Id.* at ¶¶ 90, 91.

<sup>145</sup> See, e.g., Casey, *supra* note 16, at 848–50.

<sup>146</sup> See Betsy Pisik, *Tribunal Holds Off on Investigating Kosovo Bombing*, WASH. TIMES, Mar. 9, 2000, at A13 (quoting Arbour’s successor as Prosecutor, Carla del Ponte, on unlikely possibility of indicting NATO officials: “I know that if I must open an inquiry, I will put myself in a bad position. . . . I am a prosecutor, I have jurisdiction and I cannot ignore complaints”). Indeed, Arbour found herself accused of politicking at every turn, including following the indictment of Slobodon Milosevic. Christopher Black & Edward S. Herman, *Louise Arbour: Unindicted War Criminal?*, CANADIAN DIMENSION, Mar. 2000, at 31.

<sup>147</sup> All of the following facts regarding Barayagwiza’s case are taken from Cogan, *supra* note 16, at 134–35.

dence in the Tribunal . . . would be among the most serious consequences of allowing [Barayagwiza] to stand trial in the face of such violations of his rights.”<sup>148</sup> Outraged at the possible release of a mass murderer, Rwanda halted all cooperation with the tribunal, bringing the entire operation to a standstill. Unsurprisingly, the prosecutor submitted a motion for reconsideration and the Appeals Court reversed, citing the discovery of new evidence.<sup>149</sup> Many have speculated that the Court chose to sacrifice “the integrity of the Tribunal” in order to salvage its future existence.<sup>150</sup> While the Barayagwiza scenario is not one that could be avoided by the use of juries, it does show the incredible pressure that can be brought to bear on the judges and the prosecutor.<sup>151</sup>

One could argue that, rather than showing the potential for politicization, at least two of the above incidents suggest that an international court will act impartially and fairly in the face of politics. The problem is that there are no institutions sufficient to ensure that the court will act fairly, and these incidents show the need for something more than reliance on the good faith of member States and the fair-mindedness of judicial officials. There is considerable leeway in the law for application of personal values—for the use of will, rather than judgment. In describing application of the principle of proportionality, Justice Arbour candidly admitted:

The answers to these questions are not simple. It may be necessary to resolve them on a case by case basis, and the answers may differ depending on the background and values of the decision maker. It is unlikely that a human rights lawyer and an experienced combat

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<sup>148</sup> Prosecutor v. Barayagwiza, Case No. ICTR-97-19-AR72, Appeals Chamber, International Criminal Tribunal for Rwanda, Nov. 3, 1999, ¶ 112, <http://www.ictr.org/ENGLISH/cases/Barayagwiza/decisions/dcs991103>.

<sup>149</sup> Barayagwiza v. Prosecutor, Case No. ICTR-97-19-AR72, Appeals Chamber, International Criminal Tribunal for Rwanda, Mar. 31, 2000, ¶¶ 74–75, <http://www.ictr.org/ENGLISH/cases/Barayagwiza/decisions/dcs20000331.htm>.

<sup>150</sup> Arguably, the Rwandan government did the right thing by subverting the judicial process in order to prevent a mass murderer’s escape with impunity; it is difficult to harbor sympathy for Barayagwiza. If one takes this view, however, one must admit the judicial process to be a mere sham, a cover for extrajudicial action, and a tremendous waste of resources. It would be cheaper and more honest for States to utilize extrajudicial action or military tribunals. If we are to attempt to administer international law judicially, we must treat it as *law*, not as a puppet show to amuse human rights lawyers.

<sup>151</sup> Imagine what would happen if the tribunal actually acquitted someone like Barayagwiza, widely believed to be a genocidal maniac. Rwanda might threaten the Court again and get results by forcing the prosecutor to appeal the acquittal. A jury-based acquittal, on the other hand, not subject to reversal by the appellate chamber, would be immune from such pressure, and the future of the tribunal would be slightly more insulated. The Court could honestly point out that it was powerless to change the decision of the people of Rwanda, and the Rwandan government could blame only its own citizens.

commander would assign the same relative values to military advantage and to injury to noncombatants. Further, it is unlikely that military commanders with different doctrinal backgrounds and differing degrees of combat experience or national military histories would always agree in close cases.<sup>152</sup>

This is exactly the sort of fuzzy fact-finding, requiring moral judgment, that many common-law countries leave to a jury.

### B. *Empanelling an Unbiased Jury*

There are two possible approaches to empanelling a fair jury in an international criminal tribunal. One is to create a truly international jury, made up of laypeople from around the world; the other to select a local jury from the nation where the crime was committed. An international jury is an idea that reflects the truly universal nature of these crimes and the emergence of international society. It is unclear, however, that it is at all theoretically desirable. A jury, after all, is premised on the idea of judging one's own community. An international jury would do the opposite—create the appearance of justice imposed from the outside, made up of jurors with no understanding of the relevant community ethos. And the expense and political complications of selecting jurors from all over the world and bringing them to the Hague makes using an international jury exceptionally difficult.

A jury local to the place the crime was committed poses its own set of problems. The heinousness and systematic nature of a crime like genocide makes it unlikely that anyone truly local is completely objective. Choosing jurors from elsewhere in the nation would dilute the community ethos objective, but might help prevent bias. The selection of a jury pool should be random. Extensive American-style voir dire could be conducted to prevent the empanelling of jurors with ingrained racial biases or personal losses from the events precipitating the prosecution. To maintain fairness and prevent adversaries from ranging off topic, the judge could conduct a general voir dire.<sup>153</sup> So, instead of open season (How much money do you make in a year? Have you ever read *Les Miserables*?), the judge could focus more nar-

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<sup>152</sup> See NATO Report, *supra* note 141, ¶ 50.

<sup>153</sup> In its effort to maintain impartiality, the ICC should not attempt to control the press or the release of information, as many other criminal systems do. See *supra* note 72. Regardless of the merits of censorship during a murder investigation in London, the utmost need exists for extensive media coverage of war crimes and genocide. Attempts to control the spread of such information or to convince member States to control it would only hamper the efforts of the ICC.

rowly on the questions of impartiality and animus (Have you lost any family in the recent conflict? What do you think of the French?).

There remains the question of the fairness of a local jury to a foreign defendant. When serious crimes are committed by foreigners, or by nationals in an ethnicized conflict, it might be difficult or impossible to empanel a jury that can truly be impartial. If all jurors are of the nationality or ethnicity of the victim, they may identify only with the victim and no one may be willing to put forward the other perspective. If all jurors are of the nationality or ethnicity of the defendant, they may be unwilling to condemn their own, especially if they hold the same animus as the perpetrator.

One possible solution is the jury *de medietate linguae*, the system developed by English courts as early as the fourteenth century, whereby if the defendant was a foreign merchant, half of the jury consisted of foreigners.<sup>154</sup> If a unanimity or near-unanimity requirement were imposed on an international criminal jury, such a group of people might be forced to use their unique experiences while also “transcend[ing] their starting loyalties” to reach a common conclusion.<sup>155</sup> The scholar Daniel Van Ness, who proposes the use of such a half-and-half jury for some American trials, puts forth several justifications for their original use, two of which seem relevant here: empathy and impartiality.<sup>156</sup> A half-and-half jury grants a defendant jurors who might have unique understanding of his circumstances, as well as empathetic jurors to ensure against irrational bias from members of the other ethnic group. Van Ness also identifies two reasons for the current use of the half-and-half jury, which he calls “credibility” and “justice.”<sup>157</sup> He argues that the source of judgment must not be systemically vulnerable to criticism of racism or cultural bias. The half-and-half jury shields the judicial system from criticism from both the victim’s community and the community of the accused, promoting public confidence. Just as importantly, it incorporates the ethical voice of the entire community. The half-and-half jury affirms

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<sup>154</sup> See Daniel W. Van Ness, *Preserving a Community Voice: The Case for Half-and-Half Juries in Racially-Charged Criminal Cases*, 28 J. MARSHALL L. REV. 1, 35–37 (1994) (describing historical evolution of jury *de medietate linguae*).

<sup>155</sup> See *supra* note 80 and accompanying text.

<sup>156</sup> Van Ness, *supra* note 154, at 37–39. Van Ness proposes a new rule allowing a half-and-half jury when venue is changed, so that half of the jury is made up of members from the transferring county, in part because of the unique challenges presented by racially charged cases. *Id.* at 53–55. One need not support Van Ness’s conclusion about American juries to conclude that they would be desirable in cases of international crimes related to ethnicized conflicts. American jurors, even those of radically different backgrounds, share common national experiences and expectations about justice that are less likely to be found on two sides of international or interethnic conflict.

<sup>157</sup> *Id.* at 47–53.

group identity as more than racist baggage; it is a particular perspective and set of common experiences that can be related to those without the same perspective. This is consonant with Abramson's ideal jury; it utilizes unique viewpoints of jurors, but requires them to "transcend [their] starting loyalties."<sup>158</sup>

There are at least two dangers in such an approach. First, it may be that no consensus could be reached in certain cases and that juries would always hang. That result would be a sad commentary on the possibility of justice by jury anywhere and on the possibility of international law supported by democratic institutions. We can hope that identity is something less than hatred and something more than politics. It would be possible to experiment with a jury trial, perhaps in one of the extant ad hoc tribunals, provided a rule were established that if a jury hung (or if two juries hung), the case would be given to a trial chamber. With appropriate safeguards in place and sufficient instruction to jurors, such a jury could function in international criminal cases both to provide justice to the accused and to allow democratic participation in decision-making.

Second is the danger of lost legitimacy. Juries are supposed to embody impartial justice, not identity politics. Imperial England imposed juries on her colonies, insisting that only Englishmen pass judgment on Englishmen.<sup>159</sup> It is not surprising, therefore, that most African colonies abolished the jury after independence as a vestige of a twisted, racist justice system.<sup>160</sup> To some, a nationality quota would stink of the same racism. However, unlike colonial justice, this system would work equally in the opposite direction. When the Western victors of interventionist wars accused Third World leaders of war crimes, the accused had their own nationals on the jury. A unanimity or near-unanimity requirement would still require that a defendant be condemned by his own nationals as well as those of the victim. And if his crimes were committed entirely against his own people, his own people would sit in judgment. A jury *de medietate linguae* would not be premised on mere identity politics. In the sorts of cases where it could be used, the groups in question are not separated simply by ethnicity, and the differences in their life perspectives are not the differences of diverse peoples living together in pluralist societies. They are on separate sides of a conflict and may serve different sovereigns. The groups have more fundamentally different perspectives, both of which must be taken into account to reach a just result.

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<sup>158</sup> See *supra* note 80 and accompanying text.

<sup>159</sup> See Vidmar, *supra* note 127, at 426–27.

<sup>160</sup> *Id.* at 427.

A final and serious potential problem with a local jury is the lack of institutions and traditions to support it. Most systems depend largely upon the oath of service and the historical importance of jury trials to impress upon jurors the solemnity of their duty to do justice.<sup>161</sup> The institution of the jury is deeply imbedded in the culture of common-law nations,<sup>162</sup> and even those who oppose it generally do so on the basis of extensive knowledge. One could argue that for citizens with no knowledge of or experience with juries, the importance of impartiality and fairness might be outweighed by vengeance, class loyalty, or respect for authority. Ultimately, however, this argument is unpersuasive, since it rests on the assumption that some peoples are incapable of governing themselves. It may be difficult to explain the purposes of the jury to those unfamiliar with it, but it is not impossible. A public-relations campaign, preferably begun long before the outset of criminal proceedings, could familiarize society generally with the function and importance of jurors; a focused short course and discussion should provide individual jurors with the tools they need.

Another serious consequence of lack of experience with juries may be a lack of infrastructure to protect juror security. Certainly, any State which has seen genocide committed on its soil has experienced the collapse of the rule of law. Such a State might be unable to protect the identities of jurors who might be influenced or intimidated before leaving home. Even worse, the juror and her family might be subject to retribution by the State or by opposition groups upon reaching any verdict. Under such conditions, no jury trial should be attempted. All impartiality and representation is lost if the jury can effectively be coerced.<sup>163</sup> This may seem to be a damning argument against the use of jury trials for international crimes, but the collapse of the rule of law does not accompany every crime over which the ICC has jurisdiction. Even for the crimes of genocide or slavery, the trial may take place years after the alleged crime, when society and the rule of law have been restored. And, so long as the States in question are willing and able, nations have developed a variety of means to protect jurors, including anonymity, isolation, and police protection

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<sup>161</sup> For example, while both Australia and England allow challenges for cause, they are rare in both countries because there is little information about the jurors available and little voir dire allowed. See *Chesterman, supra* note 64, at 139–41; Lloyd-Bostock & Thomas, *supra* note 64, at 72, 75–76.

<sup>162</sup> See, e.g., Lloyd-Bostock & Thomas, *supra* note 64, at 57; Vidmar, *supra* note 14, at 11.

<sup>163</sup> In Northern Ireland, all sides agreed that jury trials had to be suspended for serious crimes related to the Troubles because the Crown was simply unable to protect jurors from the retribution that certainly followed. See Jackson, *supra* note 95, at 304–09.

when necessary.<sup>164</sup> For extraordinary cases, power could be given to a pretrial chamber and/or the prosecutor to waive the jury when the institutions of the State or States in question are incapable of providing basic security.

### C. Fact-Finding

Fact-finding would be a natural role for a local jury in international criminal cases, as in every jury system, but ultimately it would not be the most valuable role. Compared to judges, a jury may be more deliberative—because required to reach a unanimous decision—but also more inclined to reflect the personal predilections of the decisionmakers.<sup>165</sup> There is a real dearth of empirical research on the issue, but the studies discussed in Part II.B suggest that juries and judges usually concur.<sup>166</sup> Only in truly complex and difficult cases are juries thought to be worse fact-finders than judges. Other than the heightened danger of juror bias in ethnicized conflicts, there is no reason to think a jury would be much worse or much better than professional judges at fact-finding in international criminal cases. The law in such cases is not highly technical. Its difficulty stems from its lack of concreteness. Although lawyers and diplomats spent a good deal of time haggling over the definitions of war crimes, the crimes themselves are not difficult to understand nor should the law be difficult to apply. Modern technology and United Nations translators could overcome language barriers.

One could argue that the outrage accompanying international crises obfuscates all benefits of a fact-finding jury. One solution to that objection would be to make the right to a jury trial waivable. This solution emphasizes an adversarial-style system, and it denies the right of the people to sit in judgment. It would severely circumscribe other functions of a jury: law-finding, benefits to jurors, and legitimization. Ultimately, a jury with a purely fact-finding role (waivable by the defendant, and appealable by the prosecutor) would add little value. While such a jury could be modeled after those in Russia or

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<sup>164</sup> See *id.* (listing means suggested to protect jurors in Ireland). International tribunals have used these techniques to protect witnesses. Compare Patricia M. Wald, *Dealing with Witnesses in War Crime Trials: Lessons from the Yugoslav Tribunal*, 5 YALE HUM. RTS. & DEV. L.J. 217 (2002) (decrying overuse of witness-protection measures in ICTY), with Fatema E. Fallahnejad Burkey, *The Prosecutor v. Aleksovski, 30 May 2001, Judgment on Appeal by Anto Nabilo Against Finding of Contempt: A Critical Analysis of the ICTY Appeals Chamber's Abandonment of Witness Protection Measures*, 82 WASH. U. L.Q. 297, 317 (2004) (arguing that ICTY should adopt more rigorous measures for protection of witnesses, modeled on those used by ICC).

<sup>165</sup> See *supra* Part II.B.1.a.

<sup>166</sup> See *supra* note 95 and accompanying text.

other essentially inquisitorial systems, it seems to add little to the fact-finding process, provides little check on government misconduct (since all jury findings are reviewable), and adds only marginal legitimacy to the system.<sup>167</sup> On the whole, the ICC is probably marginally fairer and more efficient with professional judges as fact-finders. A more robust jury, however, could play additional, extraordinarily important roles.

#### D. Law-Finding

Law-finding and jury nullification would be certain to occur if the jury were given the nonreviewable discretion to acquit.<sup>168</sup> Even official deference to jury findings would likely result in the second kind of jury nullification, where jurors intentionally misconstrue the facts to fit defendants' conduct into a less serious category of offense. The arguments both for and against jury nullification are stronger in an international system, where there is a clamor for greater rule of law but also a total lack of democratic authority.

Certainly, jury defiance of genocide law, for example, would deal a grievous blow to the hopes of using international law to secure peace and order. Genocide law is supposed to be *jus cogens*, a peremptory norm formed by either practice or some natural law, depending on your persuasion.<sup>169</sup> Should a single juror or an entire jury be able to override such a norm, when even a democratic State cannot? While the prohibition on genocide is uncontestable, a jury has every right to challenge the content of law on the thorny issues of personal responsibility and following orders. The definitions of various war crimes also are contested vigorously. For instance, what constitutes targeting of civilians versus collateral damage?<sup>170</sup> Also, it is not inconceivable that the international community could agree on fundamentally unjust laws or norms, which would make jury nullification a desirable possibility.

The democratic argument against jury nullification is usually that a representative lawmaking body, rather than a random collection of citizens, best protects democracy.<sup>171</sup> International law, however, lacks

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<sup>167</sup> Legitimacy is of heightened importance in international criminal trials. See *infra* Part III.F. One could make an argument for a mechanical fact-finding jury based solely on this rationale. However, such appearances could quickly be reversed if jury verdicts—especially acquittals—were entitled to no deference.

<sup>168</sup> See ABRAMSON, *supra* note 66, at 95.

<sup>169</sup> See generally Karen Parker & Lyn Beth Neylon, *Jus Cogens: Compelling the Law of Human Rights*, 12 HASTINGS INT'L & COMP. L. REV. 411 (1989) (discussing *jus cogens* and its application to international and human rights law).

<sup>170</sup> See *supra* note 152 and accompanying text.

<sup>171</sup> See ABRAMSON, *supra* note 66, at 3–4 (summarizing common objections to jury).

any such democratic lawmaking body, and no such body is likely to emerge in the near future. Citizens vest governing authority in their representatives. International law is made through negotiation and the practice of many States, none of which is responsible for other nations and not all of which are responsible even to their own citizenry.<sup>172</sup> The preservation of democracy in international systems depends upon the democratic authority of the States involved and also on having accountable implementation mechanisms.<sup>173</sup> Courts, normally a countermajoritarian force, have authority in democratic States because their power is checked by institutions like the jury and because they are invested in important ways in the tradition of national democracy. A constitution, ordinarily a fundamentally democratic instrument, usually establishes national courts. The judges are steeped in democratic traditions and often are either elected or appointed by elected officials. Civil-law States prefer an apolitical appointment process in order to protect impartiality, but even that is absent from the ICC.<sup>174</sup>

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<sup>172</sup> Treaty obligations among democratic nations have the best claim to democratic legitimacy, of course, since the negotiating parties are all responsible to their own people. The treaties usually must be approved by democratic lawmakers. See David W. Drezner, *On the Balance Between International Law and Democratic Sovereignty*, 2 CHI. J. INT'L L. 321, 324 (2001). It is not a perfect substitute for democratic lawmaking, however. First, for treaty-making purposes, the democratic lawmakers largely delegate their authority to make laws to non-elected officials, removing the process another step from the people. Second, when representing different sovereigns, diplomats would seem not to have any responsibility to citizens of other States. A U.S. Congressman has at least symbolic responsibility to the whole of the United States. Third, even when all of the negotiating parties are democratic, democracies are often run in very different ways under very different philosophies. So citizens of one State who have impliedly or literally accepted one theory of democratic governance are having their laws made, in part, under another State's theory. Finally, the large, multilateral treaties of modern international law are rarely limited to democratic nations. So, even though approved by democratic lawmakers, they are negotiated in conjunction with dictators.

<sup>173</sup> Many scholars have noted the tendency of international law to erode State sovereignty, to the detriment of democratic lawmaking. See, e.g., David B. Rivkin, Jr. & Lee A. Casey, *The Rocky Shoals of International Law*, 62 NAT'L INT'L 35, Winter 2000-01; Paul B. Stephan, *International Governance and American Democracy*, 1 CHI. J. INT'L L. 237 (2000). This harm is by no means limited to the major Western democracies. See Drezner, *supra* note 172, at 329-32.

<sup>174</sup> Cf. John M. Czarnetzky & Ronald J. Rychlak, *An Empire of Law?: Legalism and the International Criminal Court*, 79 NOTRE DAME L. REV. 55, 61 (2003). As the authors point out:

The ICC as an institution is the result of absolute faith in a nonpolitical, legalistic model of justice: where human rights violations have occurred, prosecutions must take place either on the national level or in the ICC. . . . Law, in this view, is inherently and morally superior to the sordid compromises and squabbles of political and social intercourse.

*Id.* (emphasis omitted).

The Rome Statute fails to implement international law in any cognizably democratic fashion. Opponents of a jury trial cannot point to the superior democratic authority of the Statute. The offices it creates are neither accountable to a citizen electorate, as in some American states, nor part of a professional bureaucracy responsible to an idealized State. Many States that participated in the negotiation of the Rome Statute are not democratic in any meaningful sense,<sup>175</sup> and diplomats are not elected officials in any nation. Finally, the ICC election process, while not democratic in any meaningful sense, is nonetheless political, since it depends on election by a political body, the Assembly of States Parties.<sup>176</sup> Diplomats in the Assembly of States Parties will push candidates that serve their national interests, ideologies, or personal political goals. While the ICC officers are not insulated from politics, neither are they checked by any democratic body. However, the development of some lawmaking role for the citizenry—such as jury nullification—is of the utmost importance.

The argument against jury nullification turns on the need for the rule of law. In an unstable, stateless system, where genocide sometimes goes unpunished, jury nullification and lawmaking seem more threatening. Where the definitions of crimes in the Rome Statute are unclear, one might argue, they should be refined by a dispassionate and highly trained legal practitioner, rather than by a popular body that might wipe out the law entirely. Impunity for the most horrific crimes motivated States to create the ICC, and the Court should not allow such impunity to recur. There are, however, a number of ways to reduce this danger. First, voir dire could weed out jurors who think genocide is acceptable behavior, or that the defendant's race is sub-human. Second, the jury could be instructed that their primary role is to determine the facts, but also that a decision to acquit will be treated as final. This sort of instruction would be given before the trial, as the jurors learn their role. It would notify them that they have a responsibility to uphold the law, but also the ability to frustrate it. Third, and less desirably, instead of the completely nonreviewable discretion to acquit, the jury's findings would be entitled to a high degree of deference, and they would be so instructed. If the jury's decision to acquit were rationally supportable, then it would stand, regardless of errors

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<sup>175</sup> The London Daily Telegraph acerbically noted that ICC judges may hail from "such bulwarks of jurisprudential rigour as Cambodia, the Central African Republic, the Democratic Republic of the Congo, Gabon, Niger, Sierra Leone and Tajikistan." *Back-Room Law-Making*, DAILY TELEGRAPH (London), Apr. 12, 2002, at 27.

<sup>176</sup> See *supra* Part III.A.

of law.<sup>177</sup> Likewise, if a judge made no error of law and there were sufficient evidence to rationally support a guilty verdict, then a conviction would stand. I am uncertain that such deference would survive when judges disagree with a finding of the jury. Like juries, judges sometimes manipulate standards when they can rationalize it.<sup>178</sup> However, if taken seriously, this deferential approach would eviscerate the jury's ability to refuse to apply the law, while preserving their ability to softly nullify the law—that is, to construct the facts in such a way that the defendant's actions do not fit the definition of a more serious crime.

Some will argue that current safeguards are sufficient to protect defendants from abuses of power and that the ICC is unlikely to do anything fundamentally unfair with the eyes of the world on it. And, indeed, it would take the collusion of the judges, the prosecutor, and maybe the Assembly of States Parties to pursue a politicized prosecution. But it is far from impossible, and an institution should not be imbued with criminal powers on the assumption that those involved will always hold good intentions and act in good faith. Even good intentions would not be much of a bulwark if, for example, the elected prosecutor believed in the righteous duty to expand the scope and importance of international criminal adjudication.<sup>179</sup> A jury with the power to render a verdict according to conscience in international adjudication would be a powerful democratic force, but it would need the protection of nonreviewable discretion and the ability to issue general verdicts.

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<sup>177</sup> One option is for the Court to allow appeals of issues of law by the prosecution as long as they are specifically aimed at errors by the judge and do not attempt to inquire into the jury's rationale. If prejudicial error were found, it could be sent back for a new trial. This is more in line with an inquisitorial approach, but still protects the jury's discretion. Nonetheless, the expense of jury trials certainly could mount, and such an approach still would infringe upon the jury's discretion.

<sup>178</sup> Some of the early experiences of Spain with a newly instituted jury system tend to confirm this possibility. Cf. Thaman, *supra* note 64, at 346–47 & n.127 (describing reversal of jury acquittal based on insufficient rationale and judges' frustration with jury fact-finding).

<sup>179</sup> Generally, the European approach has been to trust international tribunals to do the right thing. See Brian Mitchell, *One Court for All the World?*, INVESTOR'S BUS. DAILY, July 16, 1998, at A1 ("[Constitutional lawyer Lee] Casey believes Europeans' enthusiasm for the ICC stems from trust in their own national judicial systems and their experience with the Nuremberg tribunal after World War II."). Continental Europeans tend to idealize public life. Michael Novak, *North Atlantic Community, European Community, Part II: What Is Causing the Recent Cleavages?*, NAT'L REV. ONLINE, July 24, 2003 ("Europeans today . . . have begun to idealize large collective entities, such as the United Nations and the European Community."), at <http://www.nationalreview.com/novak/novak072403.asp>. That description is a bit simplistic, but a strong argument can be made for the skeptical, common-law approach here, where no legitimate democratic government provides a check.

### E. Benefits to the Juror

Legitimacy and citizenship would be enhanced by the participation of the community where the crime was committed. The laws are international in character, but the people have some right to apply the laws to condemn or exonerate their own. Such an institution could substantially counterbalance the undemocratic nature of international law, discussed above. To emphasize this aspect of the jury, however, would entail making a jury trial nonwaivable by the defendant, as in Australia.

The other major benefit to the jurors, De Tocqueville's spirit of republicanism, may be fostered at the national level by the use of local jury trials.<sup>180</sup> In many states, it will be the only way in which the citizenry has any voice in the law. By sharing power with the judiciary, jurors would gain experience in self-governance.

### F. The Appearance of Legitimacy

The appearance of legitimacy is particularly important in the international system, perhaps more so than at the national level. Because international law is not made by elected representatives, its legitimacy rests on shaky ground. How legitimacy is best achieved is unclear. The Special Court for Sierra Leone has incorporated national judges.<sup>181</sup> And after Nuremberg, the Allied Powers turned over most German war criminals to the Germans.<sup>182</sup> In Yugoslavia, on the other hand, there is a widespread distrust of the ICTY because it was imposed from the outside.<sup>183</sup> The appearance of imposition is less of a problem for the ICC, which States must affirmatively join.<sup>184</sup> Because the ICC is a permanent, treaty-based tribunal, its rulings

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<sup>180</sup> Fostering citizenship at the international level is probably nonsensical. There is no international citizenry.

<sup>181</sup> See Statute of the Special Court for Sierra Leone art. 12, <http://www.sc-sl.org/scsl-statute.html> (last visited Nov. 8, 2004). The Special Court was established by the government of Sierra Leone and the United Nations in 2002 to prosecute those responsible for war crimes and other crimes against humanity during the civil conflict in that country. PRESS AND PUBLIC AFFAIRS OFFICE, SPECIAL COURT FOR SIERRA LEONE, BASIC FACTS (2004), available at <http://www.sc-sl.org/basicfactsmpamphlet09.pdf>.

<sup>182</sup> Of course, this was coupled with a massive de-Nazification initiative by the occupiers. See David Fraser, "This Is Not Like Any Other Legal Question": A Brief History of Nazi Law Before U.K. and U.S. Courts, 19 CONN. J. INT'L L. 59, 65–67 (2003).

<sup>183</sup> Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT'L L. 7, 16–17 (2001) (noting Serbian disapproval of ICTY); Jelena Pejic, *The Yugoslav Truth and Reconciliation Commission: A Shaky Start*, 25 FORDHAM INT'L LJ. 1, 3–4 (2001) (same); cf. José E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365, 387 (1999) (noting "frosty" relations between ICTR and new Tutsi-dominated Rwandan government).

<sup>184</sup> The United States has objected that U.S. citizens may be subject to prosecution in the ICC even though the United States has not joined the Court, in violation of interna-

should not appear to be *ex post facto* and imposed from without, as the rulings of ad hoc tribunals are sometimes perceived to be.

However, the hybrid structure of the ICC is not consonant with any single nation's legal culture and traditions. A jury would enhance significantly the legitimacy of the ICC in the common-law world, where juries are considered crucial to minimum justice. But a jury also might lend legitimacy to criminal justice outside the traditional common-law world, especially where democracy and the rule of law are lacking. As described above, international law uniquely lacks democratic authority, and direct citizen participation might bolster its credibility.

#### IV IMPLEMENTATION

What would an international criminal jury look like, and what are some of the barriers to such a reform? In brief, a jury with the characteristics described above might look something like this: (1) A panel of twelve citizens is chosen from a randomly selected group of citizens of the relevant nations and empowered to convict or acquit by at least a ten to two vote; (2) in cases of international conflict or intra-national ethnic conflict, where the perpetrator and the victims are from different groups, half of the jury is made up of each group, as in a jury *de medietate linguae*; (3) the jurors have nonreviewable discretion to acquit; and (4) the jury trial is not waivable by the defendant but could be forgone where the Pre-Trial Chamber finds that there is no plausible way to select and protect jurors. As a model program, an ad hoc tribunal (current or future) could be modified to allow for a jury system.

In addition to the problems discussed above, such as juror security and finding unbiased jurors, implementation of a jury system poses a myriad of administrative problems. These include expense, the absence of compulsory jury duty, and the necessary overhaul of the rules of evidence and procedure. First, the added financial expense of juries could be quite large.<sup>185</sup> Someone would have to pay for the selection process, transportation, housing, training, security, and reimbursement of jurors. Second, at present the ICC has no authority and no ability to enforce compulsory jury duty. If juror selection had to be turned over to member States with a stake in the case, it would be difficult to rely on their impartiality. Of course, it

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tional law. This objection is a chimera. When they commit crimes in other countries, American citizens are always subject to the laws of that State.

<sup>185</sup> See Vidmar, *supra* note 14, at 10.

could be managed if uniform rules were adopted and the Court oversaw the process. Finally, vast changes would have to be made to the current evidentiary and procedural rules.<sup>186</sup> The cynical authors of one casebook argue that the single overriding reason for the American law of evidence is distrust of juries.<sup>187</sup> Given the enormous faith placed in juries generally, this is certainly an exaggeration. Ideally, however, the fact-finder is shielded from evidence that is not relevant or was improperly collected.<sup>188</sup> In addition, the time frame of international criminal trials would need to be compressed so that jurors could return home relatively quickly and resume their normal business. The ICC statute provides for a public trial with some presentation of oral evidence,<sup>189</sup> but the rules would have to be reviewed to discover how best to separate decisions of law from decisions of fact and to make sure that evidence presentation to the jury could be condensed to a reasonable period of time. In short, while not insignificant, none of the administrative problems appears insurmountable when approached with a commitment to creative solutions.

### CONCLUSION

Future international tribunals should seriously consider community involvement in the form of lay juries. The democratic world hangs State authority upon the participation of the citizenry, and this participation is singularly absent from international tribunals. It is currently so lacking that if the creation of such involvement is found to be impossible, the entire system of international criminal adjudication should be reconsidered. The inclusion of a jury could significantly improve the ICC by preventing abuses of power, protecting the right of individuals to participate in lawmaking, and shoring up the legitimacy of the Court.

Ultimately, there may be a dearth of political will to pursue the jury solution. Certainly, most of the civil-law world is likely to be hostile to the introduction of a jury, which some perceive as inimical to the ideals of professional and impartial justice. There are a few potential intermediate steps that could be explored in the future. Almost all of the practical problems could be avoided if the treaty were amended

<sup>186</sup> See generally Kristina D. Rutledge, Note, "Spoiling Everything"—But for Whom? *Rules of Evidence and International Criminal Proceedings*, 16 REGENT U. L. REV. 151 (2003) (describing development of international rules of evidence, including in ICC).

<sup>187</sup> CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE UNDER THE RULES 1 (4th ed. 2000).

<sup>188</sup> The total insulation of the fact-finder from prejudicial evidence may be a key advantage of the jury system.

<sup>189</sup> See *supra* note 47 and accompanying text.

to allow jury trials where the State of the accused and/or the State where the crime was committed have a tradition of juries. A similar result could be reached by a separate agreement among nations with a tradition of jury trials.<sup>190</sup>

A second interesting intermediate reform might be the civil-law practice of a mixed bench.<sup>191</sup> It allows laypeople to block a judgment by the State and presumably perform a fact-finding role, while requiring none of the profound changes (like separation of law and fact) that a jury system would demand.<sup>192</sup> The disadvantage of this approach is that the administrative problems might actually be heightened in terms of choosing judges. With only one or two laypeople to choose, the choice of a particular ethnic or political group might appear all the more problematic. As a result, the juror's participatory rights and the legitimacy of the system would be strengthened, while little change in the actual fact-finding and law-finding functions of the court would be necessary. Practically, however, jury nullification and juror fact-finding is highly unlikely in such a system since judges usually lead the laypeople along the path they would go anyway.<sup>193</sup> The burdens of actual responsibility and significant power seem crucial for the jury to serve its most important functions. Despite its limitations, the mixed bench may be a bridge between common- and civil-law systems, offering some of the benefits while attenuating the threat of capricious juries.

Finally, there may be a way to make judges reflect some of these values. Obviously, judges cannot be drawn from the laity or act as a body of citizens interposed between State authority and the accused.

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<sup>190</sup> This remains unlikely, since it creates the appearance of a separate justice for common-law nations. The ICC was meant to bridge the division between common-law and civil-law nations.

<sup>191</sup> Many systems utilize lay assessors in addition to professional judges for serious cases. This tradition is a remnant of the jury systems that once prevailed throughout Europe. French Revolutionaries copied the English jury, and Napoleon later spread it throughout Europe. See Vidmar, *supra* note 127, at 421. Although the jury was gradually abolished in Continental Europe, many countries converted it to this system of lay assessors. See STEPHEN C. THAMAN, COMPARATIVE CRIMINAL PROCEDURE 15 (2002) (noting, however, return to jury trials in Spain and Russia); Vidmar, *supra* note 127, at 428–32. Laypeople participate as judges and, together with professional judges, collegially decide questions of law, fact, and procedure. THAMAN, *supra*, at 15 (explaining development in Germany of use of lay assessors in nineteenth century). These lay judges take an active role in fact-finding and deliberation. See Mirjan Damaška, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PENN. L. REV. 506, 539 (1973). Although lay assessors theoretically have the power to block a decision by the professional judges, they rarely do. See *id.* The judges actively guide them in methods of fact-finding and application of the law. *Id.*

<sup>192</sup> See *supra* note 75 and accompanying text.

<sup>193</sup> See *supra* note 191 and accompanying text.

Two changes, however, seem possible. First, the panel could be given nonreviewable discretion to acquit. Prosecutorial appeals are common in civil-law nations, and are considered crucial to accurate adjudication, but common-law nations prohibit prosecutorial appeal as double jeopardy.<sup>194</sup> This change would create a body of potential nullifiers in the Trial Chamber. None of the benefits of fact-finding and law-finding by a democratic body flow from nonreviewable decisions by judges. Nor does this reform necessarily enhance the appearance of justice: It may prevent the unseemliness of trying a defendant multiple times before finally finding him guilty, but it also makes any acquittal more suspect because there has been no independent evaluation. This reform would, however, tilt the balance of power slightly away from the prosecutor and create a firm temporal limit on prosecution.

More promisingly, the composition of the bench could be altered to yield democratic benefits, such as using judges from the nation of the accused to ensure that the system is not entirely externally imposed and to avoid undermining the national court system.<sup>195</sup> The participation of national judges would lend legitimacy to the prosecution of citizens of that State and bolster the national court system.<sup>196</sup>

Each of the above reforms has unique problems and advantages, barely mentioned here. The point is that there may be some way to incorporate the values of a jury discussed above. Those nations that guarantee jury trials as a constitutional right (either of the accused or of the citizenry generally) should reconsider whether it is truly necessary to sacrifice that guarantee to “put an end to impunity”<sup>197</sup> for international crimes.

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<sup>194</sup> See Christensen, *supra* note 5, at 409–10, 420–21.

<sup>195</sup> See *supra* notes 181–83 and accompanying text.

<sup>196</sup> See Anne-Marie Slaughter, *Not the Court of First Resort*, WASH. POST, Dec. 21, 2003, at B7 (arguing that Iraqi self-government and healing would best be promoted by avoiding paternalistic use of international judges in Iraq). But see Richard Goldstone, *Let Justice Be Done in Baghdad*, L.A. TIMES, Dec. 15, 2003, at B11 (arguing against exclusive Iraqi control of war crimes tribunal). One might argue that this move politicizes the bench. One complaint about the current ICC panel is that judges will have political interests and act as super-diplomats, representatives of their nations’ interests with criminal justice powers. If, however, the idealized neutrality of the bench is significantly compromised by the election procedure already, it makes no sense to prevent direct participation of the nation or nations most directly affected. See *supra* notes 135–36 and accompanying text (discussing democratic legitimacy of judges). Of course, the arguments for ad hoc judges as legitimate arbiters of their own people are meaningless if the government lacks any democratic legitimacy.

<sup>197</sup> Rome Statute, *supra* note 1, at 1002.