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### Activating Victim Constituency in International Criminal Justice

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# Activating a Victim Constituency in International Criminal Justice

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Mark Findlay\*

## Abstract

This article lays out why in the context of global crime, crime control and the legitimacy of global governance, a victim constituency makes sense in terms of the stated aims of international criminal justice and of a wider 'new morality' on which it should be grounded. The incapacity to confront appropriately the consequences to victims of global crime has tended to mean that international criminal justice and the governance that flows from it are unsatisfactorily entwined with sectarian international relations and narrow cultural inclusion. Therefore, in governance terms alone, the conceptualization of global crime victims should be expanded and emancipated from their current more procedurally restricted standing. As a consequence, the citizenship and standing necessary to enjoy international criminal justice would be more fairly realized. This article begins by making the case for why victims should be positioned in a place of priority as the constituency for international criminal justice. It then moves to demonstrate how, through 'communities of justice,' a sharper victim focus could make international criminal justice more accountable. This theme runs through the article and links the case for a transformed criminal trial process to a new age of global governance.

## Introduction

Today, in many domestic criminal jurisdictions, the position and voice of the victim are receiving increased attention and recognition.<sup>1</sup> Slowly, it seems that the prosecution of criminal trials is moving full circle. Historically, in common law jurisdictions in particular, the prosecution of crimes was the responsibility of the victim. With the development of the nation-state and the institutionalization and professionalization of criminal courts, as well as the establishment and monopoly of police investigation, it has become more realistic for state instruments to take on the prosecution role. This trend recognizes the interests of the state and the communities it protects in utilizing crime and punishment as governance tools,<sup>2</sup> and has resulted in the marginalization of the victim voice in a way that would not be tolerated in comparable civil trials.

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<sup>1</sup> Bernd Schünemann, 'The Role of the Victim within the Criminal Justice System: A Three-Tiered Concept,' *Buffalo Criminal Law Review* 3 (1999): 33–49.

<sup>2</sup> Jonathan Simon, *Governing through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (New York: Oxford University Press, 2007).

More recently, first with victim impact statements and then a range of initiatives right up to victim advocacy within the trial, the necessity to recognize, consider and enunciate victim interests in formal trial scenarios have become features of neoconservative justice reforms.<sup>3</sup> Against this, victim advocacy groups have pushed for a repositioning of trial interests away from the conventional protection of the accused towards victim compensation.<sup>4</sup> The imperative for victim inclusion has progressed into the procedures governing institutional international criminal justice.

Those who would like to see the international criminal trial remain a retributive endeavour that reflects the conventional features and characteristics of domestic trials argue that to introduce other expectations of the process will endanger its limited success.<sup>5</sup> Some critics posit that the International Criminal Tribunal for the former Yugoslavia (ICTY) in particular has achieved legitimacy through the effective prosecution of significant offenders important to many victim communities.<sup>6</sup> In this alone, it is argued, lies justification for the establishment of the International Criminal Court (ICC).<sup>7</sup> Besides these legalist assertions, the ICC and its prosecutor have claimed more universalist justifications for the Court, pointing to its potential to assist in state reconstruction and peacemaking. Further, the ICC and the international tribunals that preceded it have within their authorizing legislation recognition of victim interests, even if this remains largely outside the processes of trial decision making.<sup>8</sup>

Besides highlighting an emergent political utility in balancing victim interests against the protection of offenders' rights in national courts, this article argues that the nature of global crime and the purposes of international criminal justice require a more victim-centred transformed trial process.<sup>9</sup> In saying this, I recognize the reservations many have about the domestic trend to enunciate victims' interests and thereby to move away from the consequences of the presumption of innocence towards a more civil jurisdictional consideration of 'balance.' There is good reason

<sup>3</sup> Raquel Aldana-Pindell, 'In Vindication of Justiciable Victims' Rights to Truth and Justice for State-Sponsored Crimes,' *Vanderbilt Journal of Transnational Law* 35 (2002): 1399–1502.

<sup>4</sup> Susan J. Brison, *Aftermath: Violence and the Remaking of Self* (Princeton, NJ: Princeton University Press, 2002).

<sup>5</sup> Eleanor Hannon Judah and Michael Bryant, eds., *Criminal Justice: Retribution vs. Restoration* (New York: Routledge, 2004).

<sup>6</sup> Mark Findlay and Clare McLean, 'Emerging International Criminal Justice,' *Current Issues in Criminal Justice* 18(3) (2007): 457–480.

<sup>7</sup> This is not to suggest that the ICC has no concern for restorative, victim-centred considerations. Such considerations feature in the recent decisions to join victims' interests with the prosecution appeals against disclosure, as well as the release of the accused in the Thomas Lubanga Dyilo trial proceedings. See, *Prosecutor v. Thomas Lubanga Dyilo*, International Criminal Court Appeals Chamber, Case No. ICC-01/04-01/06 0A 13 (6 August 2008).

<sup>8</sup> For a comprehensive summary of the ICC's victim obligations, see, Human Rights First, *The Role of the Victim in ICC Proceedings*, [http://www.humanrightsfirst.org/international\\_justice/icc/VICTIMS.CHART.Final.pdf](http://www.humanrightsfirst.org/international_justice/icc/VICTIMS.CHART.Final.pdf) (accessed 5 April 2009).

<sup>9</sup> See, Mark Findlay and Ralph Henham, *Transforming International Criminal Justice: Retributive and Restorative Justice in the Trial Process* (Cullompton, UK: Willan, 2005); Mark Findlay and Ralph Henham, *Beyond Punishment: Achieving International Criminal Justice?* (Basingstoke, UK: Palgrave Macmillan, 2009).

for law reformers and criminal justice professionals to be suspicious of the victims' lobby when it comes to ensuring a balanced adversarial contest. My argument is that international criminal justice and the global crimes it confronts present a uniquely persuasive position for a victim constituency despite the challenging partiality of victim interests.

The transformed trial, as Ralph Henham and I have envisaged it elsewhere,<sup>10</sup> addresses the current failure of formal international criminal justice at three levels:

- By emphasizing, from the victim perspective, access, inclusivity and integration to key pretrial and trial decision sites;<sup>11</sup> and as a result
- Enhancing the legitimate role of victims in creating and maintaining pathways of influence out of these crucial trial decision sites; added to which
- Restorative as well as retributive processes will be available within the 'rights-protected' procedures of the trial, enabling victims to better achieve their legitimate aspirations in the trial context.

In addition to the necessary procedural and legislative enhancement of the trial to enable structural transformation, the normative foundations of the trial need to be repositioned along the way. Essential for the success of trial transformation is an enlivening of juridical discretion so as to manage the smooth achievement of an improved victim constituency.<sup>12</sup>

All this must be measured against the crucial importance of accountability as an indicator of trial fairness and the protections of the accused that these require.<sup>13</sup> Despite active efforts by international criminal courts and tribunals to balance victim interests better during the pretrial and trial phases, the constrictions of adversarial justice relegate the victim voice to the witness role and compensation considerations to postsentencing.<sup>14</sup>

Along with accountability to a victim constituency lies the pragmatic persuasion that with heightened victim buy-in to international criminal justice will flow greater legitimacy for this process across a wider range of the communities it is said to serve. The legitimacy that the satisfaction of victims' interests offers should not be underestimated, or overcalculated. It has already been recognized in the US with the prosecution of those involved in the 9/11 atrocities and other mass killings.<sup>15</sup> Prospects for broader systemic legitimation clearly influenced the recent reform

<sup>10</sup> Findlay and Henham, 2005, *supra* n 9.

<sup>11</sup> For a detailed modelling of the international criminal trial in terms of sites for decision making and consequent pathways of influence, see, *ibid*.

<sup>12</sup> I am wrestling with the details of trial transformation, particularly in terms of a 'developed trial programme.' Specifically, the analysis focuses on the repositioning of fact and evidence in the determination of responsibility, and on a realignment of trial outcomes away from the limits of penalty as the consequence of adversarial argument. See, Findlay and Henham, forthcoming, *supra* n 9.

<sup>13</sup> *Ibid*.

<sup>14</sup> Mirjan Damaska, 'What Is the Point of International Criminal Justice?' *Chicago-Kent Law Review* 83 (2008): 329–365.

<sup>15</sup> Wayne A. Logan, 'Confronting Evil: Victims' Rights in an Age of Terror,' *Georgetown Law Journal* 96 (2008): 721–776.

of criminal procedure laws in jurisdictions such as Italy, Russia, Japan and China, where victim advocacy is provided for and greater community participation in criminal justice is advanced. It is not a coincidence that the provisions within the ICC Rules of Procedure and Evidence identifying the roles of victims in the proceedings extend much further than the conventional trial limitations surrounding the victim witness.<sup>16</sup> The nature and direction of victim legitimation are examined in this article against a range of challenges that might tend to compromise this legitimating process.

In other work,<sup>17</sup> I have suggested that an incapacity to confront appropriately the victimization consequences of global crime has tended to mean that international criminal justice and the governance that flows from it are unsatisfactorily entwined with sectarian international relations, as well as narrow and politically selective cultural inclusion.<sup>18</sup> Therefore, in governance terms alone, the conceptualization of global crime victims should be expanded and diversified. As a consequence, the citizenship and standing necessary to enjoy international criminal justice will be more fairly realized.

There is no doubt that an ideologically driven campaign to prioritize victim interests in criminal justice runs the risk of distorting some of the central values that criminal justice traditions have developed over centuries.<sup>19</sup> Mirjan Damaska goes so far as to say,

In an ideal world, of course, there would be no reason to balance these two aspirations (accused and victim interests) – they would co-exist in harmony. But in the real world, painful trade-offs between them must often be made.<sup>20</sup>

This article's concluding discussion of 'communities of justice' argues for rationalization above balance. In any criminal justice resolution, several victims or victim communities with different victim stories may be exercising different interests and values. A distillation of legitimate victim interests in such a contested environment will be a challenge for the transformed criminal trial. The identification and harmonization of legitimate victim interests are much more than an uncritical concession to the self-interested expectations, beyond retributive justice and vengeance, victims enunciate.<sup>21</sup> To swing from an accused-centred to a victim-focused trial fairness paradigm endangers trial legitimacy if criticism of the former is simply replaced with a new partiality. Legitimacy

<sup>16</sup> See, for example, Rule 50 on victim witnesses and Rules 89–91 governing the participation of victims in the trial process.

<sup>17</sup> Mark Findlay, *Governing through Globalised Crime: Futures for International Criminal Justice* (Cullompton: Willan, 2008).

<sup>18</sup> Mark Findlay, 'Terrorism and Relative Justice,' *Crime, Law and Social Change* 47(1) (2007): 57–68.

<sup>19</sup> Logan, *supra* n 15; Damaska, *supra* n 14.

<sup>20</sup> Damaska, *supra* n 14 at 333.

<sup>21</sup> Hans-Jörg Albrecht, Jan M. Simon, Hassan Rezaei, Holger-Christoph Rohne and Ernesto Kiza, *Conflict and Conflict Resolution in Middle Eastern Societies: Between Tradition and Modernity* (Freiburg: Max Planck Institute, 2006); Ivo Aertsen, Jana Arsovska, Holger-Christoph Rohne, Marta Valiñas and Kris Vanspauwen, eds., *Restoring Justice after Large-Scale Violent Conflicts* (Cullompton: Willan, 2008).

enhancement comes with richer communitarian governance through international criminal justice that the constituency of humanity, rather than sectarian victim satisfaction, could achieve.<sup>22</sup>

Communities of justice are presented as the crucial context wherein lay and professional players will interact so that a more communitarian form of justice benefits from the application of the rule of law and procedural fairness. As such, communities of justice become a dynamic environment where negotiation is essential and where actionable questions are transferred into the trial decision-making framework, minimizing the burden of partial adversarial argument. It is assumed that if set up with a common aspiration for justice outcomes, these communities will make the victim position more reasonable prior to exposure through trial interrogation.<sup>23</sup>

This article begins by confronting prevailing circumspection about why victims should be prioritized as a constituency for international criminal justice. The argument moves from the demands of legitimacy to the expectation that through communities of justice, a sharper victim focus will require that international criminal justice be more accountable. This is a theme that runs through the article and links the case for a transformed criminal trial process to a new age of global governance.<sup>24</sup> First, however, it is necessary to locate the article's theoretical mission against the perennial struggle between subjective and universalized analysis.

## Sociocultural Theorizing of Victimization

Provision of contextual appreciations of sociolegal phenomena like victimization within different cultures and jurisdictional boundaries is problematic.<sup>25</sup> The difficulties are multiplied when we seek to develop understandings both within and across jurisdictional boundaries, and particularly for the comparative analysis of victim communities.

The research balance between phenomenology and social reality (i.e., what counts as an epistemologically valid explanation) lies in the extent to which agreement exists on what constitutes the 'objectivity' of victimization. As I suggest below, with the conditionality of victim legitimacy even the status of victim communities can be politically and culturally contingent.<sup>26</sup> Although the reality of victimization is epistemologically conjectural, we can nevertheless postulate (depending on our theoretical persuasion) some *a priori* principles by which to measure and evaluate whether such a phenomenon 'objectively' exists. The 'politics' of victim legitimacy, I argue below, is constantly engaged in claiming such objectivity. These principles connect to

- The nature of the harm inflicted;

<sup>22</sup> Findlay, *supra* n 17.

<sup>23</sup> Findlay and Henham, *forthcoming*, *supra* n 9.

<sup>24</sup> See, Findlay, *supra* n 17.

<sup>25</sup> See, Albrecht et al., *supra* n 21; Aertsen et al., *supra* n 21.

<sup>26</sup> *Ibid.*

- The 'noncombatant' role; and
- The standing of victim communities against measures of political and cultural authority.

Also, if victims or victim communities are deemed resistant to these measures, the consequences of victimization can be markedly different. The subjectivity of the victim phenomenon is determined largely by measures of 'innocence' and hence concerned with issues such as

- The perceived legitimacy of the causes and consequences of 'war';
- What it subjectively 'feels' like to be a victim, rather than simply having been ascribed that status; and
- How these intimate influences have shaped the individual attitudes of those claiming victimization.

Thus, the social reality of victimization is a conflation of subjective and objective measures. Victimization, particularly in its communitarian sense, is a representation of both what 'victims' claim and what they have ascribed to their status. Communitarian victimization especially depends for its legitimacy and credibility on the consequences that flow from the community's status and behaviour.

Any social theory that seeks to address the nature and significance of victimization must necessarily address its legal, sociohistorical, economic and political dimensions. The challenge for comparative analysis (and one largely not met in many postconflict empirical studies) involves appreciating the multilayered nature of the relationships between the values and actions that produce victimization within particular cultures, as well as being able to make epistemologically acceptable generalizations about them. This article suggests a complex framework of indicators around which such comparative contextual analysis might be mounted.

Certain 'war victim' experience studies that offer vital insights into individual perception go beyond conventional empirical victim analysis in the sense that they seek to hypothesize about observed and quantifiable 'facts,' such as sentencing patterns.<sup>27</sup> In so doing, the 'victim experience and aspiration' approach applies quantitative techniques to the analysis of what is essentially an account of the subjective perception of 'facts,' describing what it is like to be a victim in a particular postconflict society and how this impacts on the perception of what constitutes justice for war crimes. The 'objectivity' of these accounts can only be evaluated, in such a subjective methodology, to the extent that we are able to understand their meaning within particular contexts. These contexts may offer micro- and macro-cultural 'objectivities' outside the comprehension of victim communities but available for more detached comparative analysis. The comparative potential of the analysis to follow is more universally generalized through the employment of community structures and functions of victimization (collective contexts of experience) to ground the subjective appreciation and ascription of victimization.

<sup>27</sup> George P. Fletcher, *With Justice for Some: Protecting Victims' Rights in Criminal Trials* (Reading, MA: Addison-Wesley, 1996).

The repercussions of this tension between subjective methodologies and objective speculation are considerable because, both theoretically and methodologically, a clear distinction can be drawn between exploring the aspirational and empirical dimensions of social experience. The objectivity of any social phenomenon mirrors its subjectivity (and vice versa) – the relationship is reciprocal. We can attempt to ‘explain’ how definitions of objectivity are produced through the analysis of subjective experience, which is a recursive and constantly changing process. Hence, this approach tries to fix the meaning or contextualize social life by deconstructing the subjectivity of individual experience and making generalizations about the extent to which such experiences and understandings are collectively held. Where the collective experience is given objective form through ‘community,’ it follows that the comparative enterprise (community to community, and the aspiration to justice option) is greatly enhanced. Self-evidently, such methodologies are culturally contextual in suggesting ways in which the objectivity of process is constructed subjectively.

War victimization, therefore, should be conceived as a social construct that involves the interplay between the causes and effects of war and the perceived appropriateness of particular forms of legal and institutional redress. The analysis of postconflict victimization as a comparative endeavour should benefit from community location so that the individualized and collective representation of victimization, and its selectivity, can be critiqued and materialized in justice outcomes.

### **Why a Victim Focus?**

The first answer to this question is simply that international criminal justice has no choice but to move towards a victim constituency if its legitimacy and functional relevance are to be confirmed beyond the authority of legislative instruments and sponsor agencies. It is a functional and operational shift now required by legitimate victim interests and aspirations for pluralist justice outcomes. In its first trial, the ICC confronted and – in a limited fashion, through access and representation decisions in favour of victims – recognized this imperative.

The research carried out in victim communities affected by genocide and crimes against humanity clearly establishes that victims are not satisfied solely by the retributive justice offered through current international criminal tribunals.<sup>28</sup> This is not a blanket denial that retributive justice is on the list of victim community expectations.<sup>29</sup> Nor can it be said from the victim community perspectives surveyed that retribution should be marginalized in any process of trial transformation. Along with most victim communities studied thus far, Henham and I endorse the importance of retributive justice in terms of current political resonance for criminal trials, and against the dissatisfaction of victims of mass harm with alternative truth

<sup>28</sup> See, for instance, Albrecht et al., *supra* n 21; Aertsen et al., *supra* n 21.

<sup>29</sup> This concept includes collective victimization, victims’ communities, the victimization of communities and communitarian harm.



and reconciliation options alone.<sup>30</sup> Even the ICC's capacity for restitution and compensation through such mechanisms as the Victims Fund may not address broad restorative concerns.<sup>31</sup> If the international criminal trial does not have the capacity to offer more than retributive justice through international penalty, the potential for victims to justify and legitimate formal international criminal justice may be squandered.

It has become essential for the legitimacy of international criminal justice that a victim constituency be centrally recognized. The unavoidable justification for this rests in the nature of the international criminal jurisdiction. The types of crimes that international criminal tribunals and courts confront are all inextricably linked to victim communities. War crimes occur within jurisdictional and communitarian limits. The communities at risk and the individuals, communities and cultures that suffer harm can be clearly identified. The acts that comprise war crimes rely on the scope of victimization for their definition. The same could be said of genocide, although the notion of harm in genocide extends beyond communities to cultures and races. In fact, in the case of ethnic cleansing, the purpose of military intervention and violent confrontation may be to victimize and destroy opposing cultural or racial elements. Finally, when dealing with crimes against humanity, it is the global community that is at risk. This community, however defined, is at least partially a community of potential victims and one for which international criminal justice is constructed.

### **Humanity as the Constituency for International Criminal Justice**

A new moral foundation for international criminal justice with 'humanity' at its centre<sup>32</sup> distinguishes the victim focus for international criminal justice from current trends to inject a higher victim profile into domestic criminal justice processes.<sup>33</sup> It is different for the following reasons:

- Global crimes are crimes against humanity, against communities and against culturalism;
- International criminal justice agencies have declared an interest in peacemaking and conflict resolution for the benefit of communities and cultures under attack;
- The harms against which international criminal justice is directed (war, genocide and ethnic cleansing) are collectivized in their impact; and
- The extent of liability for global crimes is also collectivized beyond considerations of joint criminal enterprise and superior orders, and humanity is a democratic and inclusive determinant of the global community.

<sup>30</sup> Findlay and Henham, 2005, *supra* n 9.

<sup>31</sup> Charles Barton, *Restorative Justice: The Empowerment Model* (Sydney: Hawkins Press, 2003).

<sup>32</sup> Findlay and Henham, forthcoming, *supra* n 9.

<sup>33</sup> This is not to deny such a focus domestically but merely to highlight its dominance in the global criminal jurisdiction.

To accept humanity as the natural constituency for international criminal justice does not require a rejection of ‘the rule of law,’ ‘constitutional legality’ or ‘the global state’ as important terms of reference for the exercise of that justice. The UN and its Security Council, for instance, play a crucial role in the interventions and priorities of the ICC. In addition, important nongovernmental organizations will continue to exercise influence in the maintenance of global order. This is as it should be. The legal professionals in the transformed trial process will play a crucial role in dividing the rights and protections that the adversarial process can advance.<sup>34</sup> With all this in mind, natural and appropriate constraints on the inclusion of a victim voice in the trial process may be found, but this does not diminish the importance of humanity as a constituency for international criminal justice.

### **Collectivization of the Victim Dimension**

I have argued elsewhere that international crime victimization is a collective phenomenon.<sup>35</sup> The term ‘victim community’ recurs throughout this article to emphasize the manner in which this collectivization occurs. Victim communities can be seen as a challenging concept to distil, begging the following questions: How can victimization be removed from individual harm? How are communities (in their diversity) to be conceived so that some convincing notion of victimization can emerge? If it does, what are legitimate interests in a community context? How are these interests to be revealed, and how is a community to be given access to and voice within criminal justice determinations? What particular impact should the voices of victim communities be accorded against the conventional protections for the accused in due process?

The victim dimension is collectivized because of the nature of global victimization and, in the legislative sense, through the way the three global crimes that form the jurisdiction of the ICC are currently conceived.<sup>36</sup> The collectivization of victims in a global sense from this legislative and jurisdictional foundation invites the discussion below of collective liability.

### **The International Criminal Trial’s Failure on Access, Inclusivity and Integration**

As a result of the failure of formal international criminal justice fully to incorporate a victim constituency,<sup>37</sup> many victim aspirations, such as truth telling,

<sup>34</sup> Findlay and Henham, 2005, *supra* n 9.

<sup>35</sup> See, Findlay, *supra* n 17.

<sup>36</sup> Crimes of aggression are to be incorporated along with war crimes, crimes against humanity and genocide in 2009 as appropriate for prosecution before the ICC. Consistent with this article’s argument as relates to the collectivization of victims for existing crime types, crimes of aggression more often than not are directed against victim communities.

<sup>37</sup> This is not an empirical statement, as studies regarding victim inclusion are not yet available. The assertion rests on the legislative foundations of the courts and tribunals, as well as of several studies, particularly on victim attitudes to postverdict outreach into victim communities by the ICTY and the International Criminal Tribunal for Rwanda. See, for instance, Victor Peskin, ‘Courting Rwanda: The Promises and Pitfalls of the ICTR Outreach Programme,’ *Journal of International*

restoration, reconciliation and compensation, have been moved into the alternative justice paradigm. It is not surprising, therefore, that the mandate for conflict resolution is more acceptable and less controversial within this alternative framework. Truth commissions have been constructed where postconflict states and peacekeeping agencies deem that retributive justice and its institutions cannot legitimately achieve the interests of victims within a context of transition.<sup>38</sup> As international criminal justice develops and gains more significant purchase in global governance, it is clear that justice for the purpose of conflict resolution cannot be relegated to a second tier of truth telling.<sup>39</sup>

An important justification for transforming the international criminal trial is to enable victims otherwise relegated to alternative justice contexts to benefit from the procedural protections offered within the trial, contested as they may be in an adversarial environment.<sup>40</sup> Although these protections are sometimes problematic in practice, the rights of victims are often more ignored or mediated in local justice situations. The transformed international criminal trial is premised on commitments to expanded victim access, deeper and more genuine opportunities for inclusion and a more natural and productive integration of victim aspirations through a greater variety of resolution opportunities.<sup>41</sup>

### Need for Conflict Resolution in International Criminal Justice

This discussion of the enhanced governance potential of international criminal justice concedes the importance of peacekeeping and conflict resolution for the legitimacy of the process.<sup>42</sup> In much of the debate about the contemporary direction of global governance, the importance of state reconstruction is emphasized.<sup>43</sup> It is assumed that after military interventions in transitional states, community-to-community conflict resolution serves an essential peacemaking function. Yet, whether through the mechanism of a truth commission or the retributive outcomes of criminal tribunals and special courts, lasting peace will only emerge when communities of victims are satisfied that governance and justice

*Criminal Justice* 3(4) (2005): 950–961; Human Rights Watch, *Still Waiting: Bringing Justice for War Crimes, Crimes against Humanity, and Genocide in Bosnia and Herzegovina's Cantonal and District Courts* (July 2008). The assertion is also based on the relative underfunding of processes that serve victim interests at the ICC. See, Jonathan O'Donohue, 'The 2005 Budget of the International Criminal Court: Contingency, Insufficient Funding in Key Areas and the Recurring Question of the Independence of the Prosecutor,' *Leiden Journal of International Law* 18 (2005): 591–603.

<sup>38</sup> Mark Freeman, *Truth Commissions and Procedural Frameworks* (Cambridge: Cambridge University Press, 2006).

<sup>39</sup> Findlay and Henham, forthcoming, supra n 9.

<sup>40</sup> I do not intend here to overstate trial rights protections. If these rights are retained in their conventional form, the focus on the accused's rights in Article 6 the European Convention on Human Rights offers little comfort to victim participants. A feature of trial transformation as I see it is the actualization of victim participant protections that do not undermine the accused.

<sup>41</sup> Findlay and Henham, 2005, supra n 9.

<sup>42</sup> John Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford: Oxford University Press, 2002).

<sup>43</sup> Findlay, supra n 17; Markus Lederer and Philipp Mullers, eds., *Criticising Global Governance* (New York: Palgrave Macmillan, 2005).

interventions on their behalf have meaning and impact. Peacemaking is little more than political posturing when communities not at war but victimized through war are excluded from constructive justice outcomes. Those institutions and paradigms of justice most successful in meeting the widest range of victim interests obviously have greater legitimacy amongst communities that might challenge peace.

### **Legitimacy of Victim Interests**

The legitimacy of justice and governance that emerges from victim satisfaction are a crucial underpinning of an international criminal justice that conciliates a liberal democratic governance model. Even with their limited engagement with victim interests and aspirations, the ICC and international criminal tribunals have been legislated at least to provide victims with information about the substance and impact of their determinations. This will never of itself be enough to represent democratic engagement for an emergent victim constituency. Victim communities have identified a desire to see the perpetrators of global crime brought to justice.<sup>44</sup> In many situations, however, this is a symbolic first stage in addressing more restorative and community-centred considerations. The ICC has confronted this pressure as a feature of the emergent tension between the prosecutor's office and the Trial Chamber in the Thomas Lubanga Dyilo trial. The interests of the victim in this case are free from prosecutorial imperatives.

The capacity of victims to demand, and the satisfaction of their legitimate interests to then legitimate criminal justice service delivery are more than an ideological attainment. With international criminal justice institutions identifying conflict resolution and peacemaking as central goals, the enjoyment of ongoing peace and good order should first be measured against the victim communities that have suffered from the global crimes in question. Where peace is won through further alienation and exclusion or consequent victimization, legitimacy is undermined.

An obvious problem here is to identify legitimate victim interests in situations where several victim communities contest the nature of their victimization, its origins and what should be done in restoration.<sup>45</sup> Contested victim interests require procedural opportunities for resolution if the satisfaction of these interests is to lend legitimacy to international criminal justice.

### **Victims' Capacity to Create Global Governance Accountability**

In my discussion elsewhere of the two levels of accountability – internal and external – offered to international criminal justice through the transformed trial, I have identified the important context of 'communities of justice.'<sup>46</sup> Communities of justice in each particular pretrial incarnation provide 'boundaries of permission'<sup>47</sup>

<sup>44</sup> Albrecht et al., *supra* n 21.

<sup>45</sup> Findlay and Henham, *forthcoming*, *supra* n 9.

<sup>46</sup> Findlay, *supra* n 17.

<sup>47</sup> Mark Findlay, 'The Ambiguity of Accountability: Deaths in Custody and Regulation of Police Power,' *Current Issues in Criminal Justice* 6(2) (1994): 234–251.

to determine the nature of justice applied and justified for the conflicts and challenges these communities are facing. The processes of justice employed, the decision making they achieve and the outcomes and resolutions they elicit will be the measures of accountability against genuine communitarian justice aspirations.

The location of justice accountability within communities takes it away from its present, and I would argue unhealthy, reliance on the sponsorship of sectarian political hegemony. This is not to say that international criminal justice accountability will not have its political dimension. Rather, a more productive place for the political aspect of accountability is grounded in the authority that communitarian justice interests and processes provide.

## The Nature of the Global Victim

Once the need for greater attention to a victim constituency in international criminal justice has been argued, the next issue is to identify and describe in more detail the nature of the global victim. Collectivization aside, the global victim has some unique features in terms of inclusion and exclusion that mean that victim status is not simply designated by proximity to violent harm. Even so, the harm arising from violent exchanges that is borne by victims remains a critical determinant of victimization in domestic criminal justice settings. Globally, the relativity and sectoral designation of violence that a the interest of international criminal justice mean that harm to victims and communities of victims may not be enough to ascribe legitimate victim status to them.<sup>48</sup>

## Problems Caused by Victor's Justice

'Victor's justice' suggests the discrimination and exclusion initiating international criminal justice through a process of criminalization that in the current phase of globalization is inextricably linked to sectarian political hegemony.<sup>49</sup> In terms of victimization, victor's justice is responsible for the designation of those victims worthy of protection, imbued with the rights of citizenship and therefore standing before formal justice institutions. The flip side of this is the denial of legitimate victim status to those individuals and communities that resist the cultural, economic and political predominance of the hegemony.

Essential for distinguishing those victims worthy of justice outcomes from those who are not is the attribution of morality or immorality to violence applied by and against particular groups. Morality in this sense relies in part on awarding the status of innocents to some victims and perpetrators or, at the very least, the status of justified collaborators. Concepts of risk, powerlessness, guilt, injury and blame are empowered where they are applied on behalf of the innocent victim to

<sup>48</sup> Findlay, *supra* n 17.

<sup>49</sup> *Ibid.*

those represented as unjustified perpetrators. For example, terrorist communities<sup>50</sup> become victims in similar contexts to those who suffer terrorist violence, but from the perspective of victor's justice, little regard is paid to their victimization as a supposed necessary consequence of justice against terror.

Therefore, the subjective distinction of worthy victimization depends on the authority of those imposing the label and the 'significant others' on whom the label rests. The process of 'meaning attribution' is not all one-way traffic, however. For any meaning to stick, it must resonate for the wider audience at which it is directed. The valorized victim may retain the status accorded by our politicized process of meaning, amongst those significant others (family, friends, civic leaders, etc.) who accept the authority of the labelling agency and its 'take' on the terror enterprise. Crucial to this process are the victims themselves. Those who might challenge or even modify the nature of this meaning and its authority are quickly sidelined and their valorization is denied.

The morality of the justice response (or the terrorist act, for that matter) requires either community respect or superimposed violence (force) to condition its standing and ensure compliance. If the claim for standing relies on force rather than respect, the resistance of the recipient communities is an important consideration in fashioning the response and expectations of its effectiveness. If standing is to have an essential influence on the prosecution, beyond a particular version of truth or justice, the arena within which it is claimed must be mutually respected. Particularly at this level, the morality of victor's justice is contested by terrorist violence.

### **The Challenge of Jurisdiction and Standing Posed by Selective Citizenship**

Standing, even in the legal, nonmetaphysical sense, has largely eluded analysis in the literature on international criminal justice and global governance. A reason for this is that if standing is to have a definitive influence on the prosecution of a particular version of truth or justice, the context within which it is claimed must be mutually respected. The selective application of international criminal justice currently runs against such mutuality of interest.<sup>51</sup> Particularly at the level of the morality of victor's justice, it is constantly contested through the violence of resistant communities.

The ambiguity of violence as both a challenge to and a confirmation of hegemonic domination is widely apparent in the process of redefining statehood and citizenship on the 'global periphery.'<sup>52</sup> Here, in transitional and separatist states,

<sup>50</sup> These are not to be understood as communities of terrorists – far from it. Rather, they are communities for which the terrorist claims representative significance and which may share common ideologies but not necessarily common commitments to violence.

<sup>51</sup> Findlay, *supra* n 18.

<sup>52</sup> Citizenship here is not merely referring to some as yet amorphous claim to inclusion in the 'global community.' More particularly, it represents claims to legitimacy and standing within the sectarian protection of hegemonic global governance. See, Findlay, *supra* n 17.

violence is transacted from the status of terrorist coercion through to legitimate armed struggle, along with the transformation to legitimacy and global recognition. In the context of the 'war on terror,' crime victimization and legitimate claims to global citizenship are conflated. The fissures of exclusion and inclusion are drawn against criminality and the victimization of global communities.

Citizenship is protected through globalization where it accords with the constructs of the global community and its market economies, liberal democracies, democratic styles of government and allegiance to the modernization project.<sup>53</sup> The nature and ramifications of global citizenship are clearer in the context of international criminal justice than they may be in other regulatory frameworks because of the triggering effect of citizenship.

Humanity is represented and protected by prosecutions before international criminal tribunals. The global community, through the enabling legislation of the ICC and international tribunals, carries actionable responsibility for a limited range of harms caused to communities within it. In this regard, it is not simply individuals or nation-states that are the subject of tribunal interest; in fact, under the terms of the ICC Statute, individual liability is the focus of the justice delivered.<sup>54</sup>

The challenge when conceptualizing and actualizing global citizenship is to avoid the political partiality demonstrated in global governance as it presently operates. From the regulatory perspective of the dominant political alliance, domestic citizens are cherished if they fall within the political allegiance and jurisdictional boundaries of the alliance and its supporter states. Outside these boundaries, the protection of the nation-state and citizenship are conditional on risk and security evaluations from the perspective of the dominant alliance and on broader geopolitical significance. These considerations also invest the designation of legitimate victim.

### **Victims in Both Supportive and Resistant Communities**

Resistance to the partial recognition of citizenship is sometimes violent within communities where individual rights are subservient to communitarian concerns of social harmony.<sup>55</sup> Western governance models, which promote individual autonomy over community responsibility, have not received universal acceptance through globalization, and this has fomented violent resistance in some contexts. Margaret Levi argues that citizens are more likely to comply with and give active consent to imposed democratic governance when its institutions and processes are perceived as fair in decision making and implementation.<sup>56</sup> The cultural sensitivity

<sup>53</sup> Mark Findlay, *The Globalisation of Crime: Understanding Transitional Relationships in Context* (Cambridge: Cambridge University Press, 1999); Zygmunt Bauman, *Globalisation: The Human Consequences* (Cambridge: Polity Press, 1988).

<sup>54</sup> For a critique of this position against the need to collectivize liability, see, Alison Danner and Jenny Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law,' *California Law Review* 93 (2005): 75–169.

<sup>55</sup> Findlay, *supra* n 18; Braithwaite, *supra* n 42.

<sup>56</sup> Margaret Levi, *Consent, Dissent, and Patriotism* (Cambridge: Cambridge University Press, 1997).

and origination of these processes are also crucial to its acceptance.<sup>57</sup> Inclusivity and community collaboration affect acceptance of imposed governance models. The same could be said about the response to international criminal justice as an introduced governance model in which community justice is not primarily individualized.

When citizenship is more dependent on the jurisdiction of the secular state than on membership of a religious culture or a cohesive community, issues such as territoriality, sovereignty and political authority are determined to be central risk and security considerations by the dominant alliance. Communities that value religious culture and communitarian customary practices are overrepresented amongst those victimized by violence internationally, but through their resistance to the dominant political alliance, they have been denied legitimate victim status.

### **Collectivity and Distance: Who Can Claim Victimization?**

Issues of standing for ‘victims’ seeking international criminal justice highlight a clear tension between the ‘local’ and the ‘global’ contexts of justice service delivery. The criminal justice literature is replete with caveats concerning the uncritical expansion of victim participation and influence in domestic trial deliberations.<sup>58</sup> Internationally, however, the ICC and tribunals have advanced victim interests through a range of pretrial and trial inclusions. This is a logical consequence of the special position of victim communities in the construction of global criminality. Further, the collective and communitarian contexts of global criminal victimization defuse much of the domestic debate about distance, harm and legitimacy.

The experience in domestic jurisdictions of trying to identify an appropriate victim voice in homicide trials has raised the specific question of victimization and the actionable distance from the harm caused by the substantive crime (original victim encounter). Courts have faced some difficulty in situations where the immediate victim is the deceased in determining to what extent family and friends intimately connected to but removed from the victimization can be considered victims for the purposes of an impact statement. The conundrum of victim status and distance from harm is likely to be moderated within global crimes like genocide, where the victim may be perceived as a community, a culture or a race as much as individuals who have suffered directly from the crime.

In the situation of mass murder trials, Wayne Logan explores the many difficulties the use of victim statements presents, including:

- Demarking permissible boundaries in terms of victimization and impact. These are issues for capital (murder) trials in general, but they may be exacerbated in the context of mass killings and mass victimization.
- Questions of proximity to the actual victimization for survivors.

<sup>57</sup> Findlay, *supra* n 53.

<sup>58</sup> See, for example, Fletcher, *supra* n 27; Edna Erez and Linda Rogers, ‘Victim Impact Statements and Sentencing Outcomes and Processes: The Perspectives of Legal Professionals,’ *British Journal of Criminology* 39(2) (1999): 216–239.



- The forms of harm to be recognized by the court.
- Guarding against popular emotionalism, which may affect the personal experiences of victim survivors.
- A range of tactical problems in giving equal recognition or proportional weight to different victim voices, depending on proximity, and how these are to be challenged.<sup>59</sup>

For instance, the instrumentality of victim impact statements arising from terrorist mass killings is controversial. Should the victim voice, individual or collective, influence sentencing directly? If so, what weight should be accorded relative to other sentencing principles, such as general community protection? Further, in the context of widely feared terrorist attacks, how can the interests of the accused fairly be separated from victim impact, as well as community vengeance or mob hysteria? In terms of extending the reach of legitimate status, what are the dangers for international criminal justice in preferring victims' interests and thereby compromising conventional protections for the accused?

The problems associated with this trend have been rehearsed in detail in the case of domestic jurisdiction of victim impact statements in homicide.<sup>60</sup> Therein, no victim voice remains, beyond the voices of secondary parties closely connected to the deceased. This issue of connection to harm is exacerbated when more than one voice comprises a connected victim community. Moving up to a global context, communitarian victim contexts presuppose more flexible and case-by-case consideration of harm 'networking.' After all, this is the essence of genocide.

In the international context, the normative framework around harm and victim location may not be as consolidated as it can be in the domestic setting. According to Logan,

While the views of natures and cultures can coalesce in matters of broad importance . . . they often diverge on questions relating to more specific normative notions of substantive and procedural fairness . . . Finally is the basic question whether government should be appointed to deploy victims to meet their didactic ends?<sup>61</sup>

## Victim Communities

Crucial to my argument in favour of repositioning the constituency of international criminal justice towards legitimate victims' interests is the recognition of communitarian victimization. Communitarian incorporation assumes a level of participatory democracy not yet seen in global governance. Communitarian governance will give legitimacy to both the substantive and the institutional authority of global governance so far not present beyond normative claims about themes like rights and justice.<sup>62</sup>

<sup>59</sup> Logan, *supra* n 15.

<sup>60</sup> Erez and Rogers, *supra* n 58.

<sup>61</sup> Logan, *supra* n 15 at 741.

<sup>62</sup> Braithwaite, *supra* n 42.

I have strategically employed the notion of ‘victim communities’ not only to emphasize the collective composition of global victimization but also to identify the structures of relationships that make sense of global crime victimization and that would be essential in the measure of appropriate restorative and reconciliatory responses.<sup>63</sup> The article now further develops the concept of communitarian victimization in discussing communities of justice. Essential to this discussion is the recognition that victim communities themselves may be in contest over the nature and legitimacy of victimization. This will be one of the principal challenges for legal professionals in the transformed international criminal trial process.

On to the requirement of identifying victim communities in action, the communitarian context of victimization engages:

- The communities of victims, which share their harm;
- Wider communities or groups of victims that suffer harm;
- Crime directed at community cohesion or cultural integrity; and
- Violence motivated by the destruction of what makes communities or cultures (language, art, religion, family structure, etc.).

### **The Nature of Global Crime and the Centrality of ‘Mass Violence’**

Crimes against humanity, genocide and war crimes all have about them and within them collective composition. Global crime, therefore, assumes the importance of communities that comprise the ‘humanity’ that international criminal justice should prosecute and protect in a normative and a practical sense.

As with victim valorization, ‘humanity’ has been limited as a consequence of the segregation of legitimate violence. Oppositional cultures and communities, if resisting in a violent fashion the governance of the dominant political alliance worldwide, become the subject of criminal prosecution rather than being appreciated in any context of victimization. Segregated cultures, therefore, are disengaged from the protections of international criminal justice through association with perpetrators rather than victims. Consequently, the communitarian notion of global victimization is selective, exclusive and discriminatory. Victimization is not accorded as a result of violent harm alone. Violence is negotiated in terms of its legitimacy rather than its consequences.<sup>64</sup>

Aggressively resistant victim communities against whom violence is directed also resort to the monopolist claims over legitimate violence exhibited in compromised global governance.<sup>65</sup> For instance, suicide bombers give meaning to their sacrifice (and that of their innocent victims) in terms of the discriminatory violence of oppressive cultures against which they are at war. These oppressive cultures may

<sup>63</sup> Findlay, *supra* n 17.

<sup>64</sup> Findlay, *supra* n 18.

<sup>65</sup> This balancing of aggressive justice responses with violent victim reaction is not essentially causal or universal. Violent justice can be directed against otherwise peaceful resistant communities, and it is not the principal cause of terrorist resistance. However, in certain prominent examples of violent justice and resistance, the relationship merits examination as much as the social and cultural factors acting against violent resistance.

not be within the suicide bombers' middle-class, detached personal experience but they are no less 'real' as a motivation for violent resistance. The monopoly on violence exists in terms of contested legitimacy and not merely the nature of its occurrence. Even victimization cannot alone determine the legitimacy or otherwise of violence.

Violence may be a force for transition, but rarely can it sustain legitimate governance, domestic or global. Whether employed by resistance movements or the arms of the state against which these movements are directed, violent revolution may stimulate transition, but it will not ground the governability of cultures in conflict, as the Palestinian Authority recently demonstrated. Even so, violence is all too often an essential precursor to more established styles of global governance. Walter Benjamin sees legitimacy, or violently asserted legitimacy, prevailing over contested political realities as the key to the 'legal ends' of violence. In this respect, violent responses from states in transition (such as Sri Lanka, in conflict with the Tamil Tigers) demonstrate a violent-response governance model against violent revolution that the state criminalizes. Militarist violence claims its legality through the authority of the state but does not have legality as its principal end.<sup>66</sup>

Benjamin calls the first function of violence the 'law-making function' and the second the 'law-preserving function.' Violence in the context of legality and justice responses for the sake of longstanding legitimacy would replace militarism,<sup>67</sup> as the US problematically claims it will in the restoration of Iraq to democratic governance. When governance itself is challenged as a result of a sectarian and arguably unjust or illegal application to some victim communities and not others, the limitation of violence as a regulatory capacity becomes clear.<sup>68</sup>

### **The Nature of Global Violence: Conflict against States or Distinguishing Communities?**

Violence becomes a tool for social exclusion against communities and cultures determined to live beyond and outside the realm of legitimate victimization. When these communities and cultures become 'collateral damage' through military intervention or violent justice responses, the violence directed against them is deemed suitable for prosecution in international criminal courts, as demonstrated by the experience of the ICTY.

In the setting of global governance, I discussed in detail the nature and consequences of violent regulatory responses in the form of military intervention or formal and sometimes distorted justice incursions.<sup>69</sup> There can be little doubt that the perceived danger of international terror has given the US and its global

<sup>66</sup> Walter Benjamin, 'Critique of Violence,' in *Reflections: Essays, Aphorisms, Autobiographical Writings*, ed. Peter Demetz (New York: Schocken Books, 1986), as noted in Marcus Bullock and Michael W. Jennings, eds., *Walter Benjamin: Selected Writings, Volume 1, 1913–1926* (Cambridge, MA: Harvard University Press, 1996).

<sup>67</sup> Ibid.

<sup>68</sup> Hanah Arendt, *On Violence* (London: Allen Lane, 1969).

<sup>69</sup> Findlay, *supra* n 18.

political alliance the opportunity to expand justifications for military intervention and to augment traditional justice forms in order to segregate, contain and punish terrorist suspects.<sup>70</sup> A recurrent concern in international criminal justice, which distinguishes its scope from domestic criminal justice traditions, is conflict resolution in transitional state violence. In fact, this objective could be refined to more universal domestic applications of the criminal sanction to maintain social order. The ‘global community,’ which enjoys social order within the restored state and against cultural resistance, comprises only those victims ‘worthy’ of justice protection. With the other ‘victims and their communities,’ global governance is often at war.

### War-Based Governance

Traditional criminal justice protections and even international human rights conventions can be argued away by identifying the principal threats to global security and world order in terms of war and war making. Like victim valorization, the war discourse promotes a clear if questionable division between citizens who deserve the protections of international criminal justice and the enemies who do not. On this basis, international criminal justice is coopted into the war analogy, and even conventional justice protections are selectively employed through conditional citizenship. As for parajustice, discrimination and its consequences for further selective victimization are starker.

The war discourse and its consequences for the purposes of social control as governance are not new. Jonathan Simon rightly draws our attention to the war on drugs, and even to the war on cancer, as policies designed to galvanize and sharpen control on regulatory potential.<sup>71</sup> What makes this new phase of the war on terror interesting in terms of both governance and victimization is the manner in which it has justified military intervention and distortion of conventional criminal justice when applied to terrorists. War discourse is no novelty as a language of international crime control. Whether it is a war on drugs, a war on vice or a war on child abuse, the conflictual discourse resounds through the political representation of law enforcement as military engagement. What distinguishes the war on terror discourse from, say, one that relates to the war on drugs is its justification of actual and extensive military interventions. This state of war is more universalized.

The preference in global governance terms for ‘law over war’ in controlling international crimes such as terrorism may gain greater relevance as international humanitarian law plays a more important role in international criminal justice.<sup>72</sup> Modern laws of war evolved in the 19th century from reciprocal alliance pacts that were designed to ensure minimal restraint amongst civilized people. Any strict contractual approach to mutuality in restraint has been superseded in the current

<sup>70</sup> For a discussion of the consequences of the war on terror discourse, see, Gerard P. Fogarty, ‘Is Guantanamo Bay Undermining the Global War on Terror?’ *Parameters* 35(3) (2005): 54–72.

<sup>71</sup> Simon, *supra* n 2.

<sup>72</sup> Elizabeth Chadwick, ‘It’s War, Jim, but Not as We Know It: A “Reality Check” for International Laws of War?’ *Crime, Law and Social Change* 39(3) (2003): 233–262.

situation of global governance by a more rigid and delineated commitment to global security and order at whatever cost. The cost has emerged as violence to the rights of the offender and victims in the name of risk alleviation and other security concerns.

The violence focus of governance responses to global terror can be seen as harming the rights of offenders and communities as much as their physical integrity. Christopher Michaelson argues that criminal law has been 'bastardised' in the name of control and security.<sup>73</sup> The perversion of human rights in the process is evidence that both law and justice have been subverted. The question is whether the terrorist threat can be viewed legally as a sufficient public emergency that national security legislation is justified in abrogating the common obligations imposed by international human rights conventions.

### **Cultural Victimization**

Terrorist communities worldwide are clearly delineated in terms of their ideologies and their political commitments. For instance, fundamentalist Islamist predispositions now are seen as a crucial stimulant to terrorist activities. Almost as in the time of the Crusades, Islamic culture has become the enemy of liberal democracy and western freedoms, leading to the wholesale alienation of Muslim communities in the West, in particular.

Amongst other cultures facing simplistic terrorist designations, political separatists may be given legitimate victim status along with credibility in geopolitically valued states. 'Terrorist' communities are denied the political legitimacy of rational resistance, which means that violence against these communities is legitimated and the resultant harm is neutralized. Take for example the worldwide condemnation of the Tamil Tigers and their long-standing violent resistance to the Sri Lankan state authorities. In the case of the East Timorese opposition to Indonesian annexation, meanwhile, the world slowly came to view this resistance as a legitimate struggle for self-determination and cultural identity.<sup>74</sup> Some might say it is an interesting coincidence that Indonesia is the largest of the world's Islamic nation-states, while Sri Lanka is seen as a bulwark against the socialist governance of Tamil Nadu.

The social exclusion of whole cultures beyond claims of legitimate global citizenship and resultant actionable victimization provide fertile ground for violent resistance to global governance. The devaluation of the critical components of any culture, along with violent justice responses to terrorist resistance, undermines the capacity of global governance to develop a pluralist and inclusive regulatory framework. Violence breeds violence when cultural integrity, as well as community safety, is at stake.

<sup>73</sup> Christopher Michaelson, 'International Human Rights on Trial: The United Kingdom's and Australia's Response to 9/11,' *Sydney Law Review* 25(3) (2003).

<sup>74</sup> Suzannah Linton, 'New Approaches to International Justice in Cambodia and East Timor,' *International Review of the Red Cross* 845 (2002): 93–119.

## Hegemonic Violence and Sectarian Exclusion

The dominant global political alliance, which has assumed a crusading role in the war on terror, has consciously sponsored and promoted the emergence of violent control strategies, as well as their delineation.<sup>75</sup> Coalescing this alliance is a hegemony of ideals, preferred governance models, singular economic relations and cultural supremacy. Yet, this hegemony is fragile when both confirmed and challenged through terror and violent resistance. The formation and reformation of hegemonic orders in the context of wars of any type offer disproportionate and dangerous precedents to violence in challenging or confirming order. Hegemony over the war on terror is no different.

A characteristic of political hegemonies that struggle to determine and impose a singular cultural and economic order over a wide and expanding terrain is that violence becomes dominant in control strategies. Violence uniformly produces victimization. Where violence and victimization become instrumental in determining the limits of political hegemony and the nature and illegitimacy of resistance to it, social exclusion in a community and in a cultural sense is a feature of that order.<sup>76</sup>

Constructive political configurations are less possible or sustainable where oppositional forces are determined through violent risks and countered with violence rather than diplomacy. The security of a hegemonic order becomes the overriding aspiration where order is contested and violence is the language of dominion. At base, global hegemony is presently a political construct. As Jörg Friedrichs observes, in order to provide the glue for global capitalism and an ordered global community, global governance is sometimes construed as beyond and somehow above politics.<sup>77</sup> That said, violence and victimization, which confirm and confine the world order, have recently exacerbated violent resistance through sectarian exclusion of communities and cultures from that order.<sup>78</sup>

## Communities of Justice: Making a Victim Focus Work

Communities of justice are, in essence, a meeting of principal stakeholders in international criminal justice; a context wherein legitimate interests can be sorted out and features in dispute narrowed down with the assistance and oversight of legal professionals and the protections of a trial justice tradition.<sup>79</sup> Returning to my initial discussion of identifying and rationalizing victim interests as the dominant

<sup>75</sup> Hans-Jörg Albrecht and Martin Kilchling, *Victims of Terrorism Policies and Legislation in Europe: An Overview of Victim Related Assistance and Support* (Freiburg, Germany: Max Planck Institute, 2005).

<sup>76</sup> Finn Tschudi, 'Dealing with Violent Conflict and Mass Victimisation: A Human Dignity Approach,' in Aertsen et al., supra n 21.

<sup>77</sup> Jörg Friedrichs, 'Global Governance and the Hegemonic Project of Transatlantic Civil Society,' in Lederer and Muller, supra n 43.

<sup>78</sup> Jonathan Kay, 'Redefining the Terrorist,' *National Interest* 75 (2004): 87–93.

<sup>79</sup> The concept is explored in the context of democratic global governance in Findlay, supra n 17.

commitment of international criminal justice, I suggest that communities of justice will comprise:

- Contesting victim interests and their ‘voices’;
- Perpetrators and accused persons against whom victimization responsibility is charged; and
- Juridical professionals required to manage and mediate justice resolutions and decision pathways to specific trial outcomes, governed by the rule of law and procedural fairness.

Because of limited access to the trial process, pretrial communities of justice will function in an important didactic role for other communitarian justice opportunities in the less formal or alternative justice sector of international criminal justice.

Communities of justice are more than just a place for negotiating particular or mutual interests. They are essentially communitarian in nature, intent, discourse and diversity. As true communities, they coalesce with an eventual common purpose: the achievement of humanitarian justice. It is anticipated that if the conditions for communitarian justice are ensured,<sup>80</sup> trust and mutual respect being essential to them, then a shared notion of humanity may override the tensions of self-interest in the trial proper. This outcome will eventuate within communities of justice provided that the rewards available through trial access, inclusivity and integration are observed and actual.<sup>81</sup>

It would be naïve not to identify and confront the very different starting points for stakeholders on the road to a possible justice communion within the context of the international criminal trial. Therefore, the mechanisms we have proposed for the achievement of that identification and its mediation will be crucial before a trial for establishing a possible and appropriate common framework through which communities of justice will evolve and engage with particularized issues in dispute for adversarial resolution in the trial.

As with the trial model, as a series of crucial decision sites where ‘pathways of influence’ are constructed by crucial stakeholders (victims included),<sup>82</sup> communities of justice will centre on decision sites essential for the identification and achievement of justice outcomes. Pretrial and trial contexts will enable the mediation of disputes that otherwise would complicate and confound the decisions that emerge progressively in this model. These decision sites also will be influential in the type of communitarian justice resulting from the various regulatory mechanisms resorted to by any community of justice to solve its justice requirements.

<sup>80</sup> These conditions are developed in detail in Findlay and Henham, forthcoming, *supra* n 9. Put simply, communities of justice in a trial attachment will be determined through pretrial conferencing in a mediation format. It will be similar in process to the way agreed facts are settled prior to trial. The prosecutor (and, where necessary, victim advocates) will mediate conflicting interests so that commonality can be passed on to the trial proper and the key issues in dispute can progress to adversary resolution within the trial.

<sup>81</sup> *Ibid.*

<sup>82</sup> Findlay and Henham, 2005, *supra* n 9.

Outside the trial, for instance, the crucial process of victim compensation in the ICC framework would be significantly affected and facilitated by the mediation of victims' interests through communities of justice resolutions (pretrial and trial). This process assumes that in a community of justice, a singular regulatory model is in appropriate and that a variety of regulatory alternatives should be on offer for negotiation and resort, even in the trial itself.<sup>83</sup>

A detailed contextual interrogation of how any particular community of justice reaches consensus also requires getting to know the parties and relationships from which pathways of influence to crucial decisions in the trial may evolve. In order that such an interrogation be valuable and predictive, the obligations of trial professionals to facilitate communities of justice need to be clearly designated and uniformly required.<sup>84</sup>

### **Communities of Justice and Accountability**

In addition to providing the framework for more conciliatory justice resolutions respectful of legitimate victims' interests, communities of justice will act essentially as a background for testing the accountability of international criminal justice. How does a community of justice promote international justice as an accountability pillar in global governance?<sup>85</sup>

- As with all communities, it provides 'boundaries of permission'<sup>86</sup> within which discretion can be exercised and decisions have their acceptable reach.
- These boundaries are qualified by the same normative framework that confirms the justice for which the community strives.
- For this justice to be confirmed and to continue, it must have legitimacy within the community.
- This legitimacy is crucially dependant on an atmosphere of peace and order that global governance is charged with ensuring.
- The capacity of global governance to achieve peace and good order and to maintain their benefits relies on the widest support of the cultures and interests that contest in any community of justice.
- Therefore, good governance is only achieved when the instrumentalities and processes of governance are responsible to the legitimate interests within those communities.

### **Communities of Justice and Legitimation: The Future of International Criminal Justice?**

Concluding the analysis in *Governing through Globalised Crime* is the recognition that communitarian justice has powerful potential to legitimate international

<sup>83</sup> Findlay and Henham, forthcoming, supra n 9.

<sup>84</sup> Ibid.

<sup>85</sup> For a more detailed answer than space here allows, see, Findlay, supra n 17.

<sup>86</sup> Elaborated on in Findlay, supra n 47.



criminal justice and the governance model within which it is significantly placed.<sup>87</sup> For such legitimacy to be more than superficial, communities in dispute need at least to share a common regard for the reconciliatory capacity of international criminal justice, its institutions and its agencies.

The achievement of a resounding and resilient legitimacy that is community focused takes us back to a consideration of the normative framework for a transformed international criminal justice and the manner in which it is to be actualized.<sup>88</sup> Access to justice is central to this achievement. It needs to be much more inclusive than is possible for victims' interests in contemporary domestic criminal justice models. Inclusivity means more than appearance, and it functions much better as actual involvement.<sup>89</sup> To confirm the reality of access, along with inclusivity comes the need for integration at all stages of the pretrial and trial decision-making process. If this is achieved, victim interests should be recognizable in each important pathway of influence at any pretrial and trial decision site within the transformed trial process.

Communities of justice will not be achieved simply by a loose recognition of a new normative framework around access, inclusivity and integration. The reality of communitarian justice for international criminal justice within trials will rely on if and how justice professionals, prosecutors and judges, in particular, engage with and promote the victim voice, as well as confront and confound the challenges that enabling a victim voice constantly presents.<sup>90</sup>

<sup>87</sup> For a detailed discussion of this governance model, see, *ibid.*

<sup>88</sup> See, Findlay and Henham, 2005, *supra* n 9.

<sup>89</sup> For a discussion of the limits of that involvement in the courts and tribunals as currently constituted, see, Holger-Christoph Rohne, *The Victims and Witnesses Section at the ICTY: An Interview with Wendy Lobwein* (Freiburg, Germany: Max Planck Institute, 2003).

<sup>90</sup> Tyrone Kirchengast, *The Victim in Criminal Law and Justice* (Basingstoke: Palgrave Macmillan, 2006).