THE DEMOCRATIZING EFFECTS OF TRANSNATIONAL ACTORS' ACCESS TO INTERNATIONAL COURTS

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Abstract: How should we evaluate international courts in terms of their effect on democratic deficits in international law-making? This article takes an initial step toward understanding how ICs improve or weaken the presence of democratic values in international law-making, focusing on one aspect of international courts – access for transnational actors (TNAs). This article argues that TNA access to international courts provides institutional mechanisms for participation and transparency. As widely accepted democratic values, the participation and transparency advanced by TNA access has democratizing effects for international law-making.

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Introduction

International law has developed to be a prominent component of global governance.[1] Some observers of this development argue that international law-making does not reflect the values of collective self-governance and suffers from democratic deficits.[2] Such arguments often rest on the assumption that international law-making is dominated by states, with limited input from those affected by the rules states adopt. Yet, international courts and tribunals (ICs) have grown in number and are widely recognized as important architects of international law. Against this backdrop, we can see that a significant gap in debates about the democratic deficits in international law-making arises from the lack of attention to international courts. How should we evaluate the performance of international courts in terms of their effect on the democratic credentials of international law-making?

This article takes an initial step toward understanding if and how ICs improve or weaken the presence of democratic values in international law-making. In particular, the article scrutinizes *one* feature of the institutional design of ICs and asks what potential role it plays in democratizing international law-making. The design feature of interest in this article is access for transnational actors (TNAs). Following recent literature, I conceive of TNAs as "the broad range of private actors that organize and operate across state borders, including

nongovernmental organizations (NGOs), advocacy networks, social movements, party associations, philanthropic foundations, and transnational corporations," among others.[3] As an initial probe into the democratizing effects of international courts for international law-making, a focus on access is chosen for two reasons. First, existing literature highlights the relevance of TNA access to the democratic quality of global governance.[4] Second, access is a feature of ICs that, as will be shown, applies to most international courts. This focus enables a discussion of the democratizing benefits to ICs in general, whereas other aspects of international courts require a case-by-case approach.

By examining one institutional design feature of international courts, the article is a plausibility probe into whether the design of ICs may shape how ICs are able to render the making of international law more democratic. Even though judicial practices and outputs are relevant to this question, for the purposes of this article, I set them aside. My intention is not to exclude their relevance, but to hopefully begin a conversation by starting with institutional design.

I argue that TNA access to ICs provides an institutional mechanism that can enhance participation and transparency in international law-making. The greater the opportunities are for TNAs to access international courts, the more potential it has to make international law-making more inclusive and transparent. This argument combines normative and empirical analysis. Empirically, the article maps TNA access to ICs since 1945, documenting its expansion. The argument relies on a method of first identifying participation and transparency as values commonly featured by theories of democracy and then assesses if and how these values might be advanced by TNA access. Overall, the article offers a normative contribution by highlighting how access to international courts has the potential to render international law-making more democratic, while also making an empirical contribution by mapping access to 24 international courts.

I present this argument in four parts. First, the article explains why we need to include ICs when considering the democratic quality of international law-making, arguing that international courts play a key role in international law-making. The second part maps TNA access, illustrating that indeed access is a common feature of ICs today. The third part of the article identifies participation and transparency as democratic values commonly featured in theories of democracy. It considers how TNA access can potentially improve the presence of these values in ICs and their role in law-making. This part argues that access is most relevant for its ability to act as an institutional mechanism for participation and transparency in

international law-making. Fourth, the article concludes with a discussion of the implications of the argument for assessment of democratic deficits in international law-making.

International Courts and Law-making

It is widely accepted today that international courts are no longer inconsequential institutions.[5] They play important roles in global governance,[6] including law-making. While there is contention as to whether ICs should make law, "theoretical assertions that deny law-making power to international judicial bodies ignore the reality that…international courts…do play a major law-making role."[7] In what ways do ICs contribute to international law-making? There is certain inevitability to judge made law.[8] As with any law, or system of rules, international law comprises abstract rules; it provides general prescriptions that cannot anticipate all possible circumstances to which they will apply. When asked to settle a dispute, ICs interpret the general rules and apply them to concrete cases. When doing so, they contribute to international law-making through two modes – clarifying the meaning and scope of rules, and developing the law. First, ICs make law when they clarify the meaning and scope of rules as part of interpreting the rules and applying them. In other words, they fill gaps and resolve ambiguities in ways that stabilize normative expectations and give law more predictability.

The second mode through which ICs make law is through progressive development of the law. Unlike the process of clarifying legal rules, ICs can significantly change a rule in a way that fundamentally alters its interpretation and application. Progressive development occurs when a decision advances the law's ability to address the changing conditions of international interactions. For example, the International Criminal Tribunal for Rwanda changed international criminal law by recognizing rape as an instrument of genocide.[9]

Developing the law occurs through three aspects of adjudication. First, ICs can at times be called upon to interpret the scope of legal rules. In this capacity, an IC can significantly extend the scope of a rule. For example, the International Court of Justice (ICJ) and the International Criminal Tribunal for the former Yugoslavia have asserted that laws of war apply to internal conflicts.[10] Or, the European Court of Justice (ECJ) has extended the scope of European Union law to include human rights. Second, ICs order rules. A central question frequently brought before courts pertains to which rules are superior. For example, do national laws trump international law? Similarly, ordering occurs when an IC determines whether a law is *jus cogens* or a customary law. By determining a law is *jus cogens*, such as torture, the court

defines and develops the law such that the prohibition of torture is a supreme law. In other words, ICs define and develop the hierarchy of rules. Making these assessments, ICs change the ordering of principles in a way that significantly develops the law. Third, ICs determine how rules balance against one another in order to reconcile two conflicting rules. Balancing occurs both within a single legal regime and across legal regimes. An instance of the former is the European Court of Human Rights' (ECtHR) pronouncements on how to balance the rights of one individual against those of another. In the latter case, ICs can adjudicate over a conflict between international trade law and international environmental law, for example, such as in the *US-Shrimp* dispute before the World Trade Organization's (WTO) Appellate Body.[11] Overall, ICs may significantly modify how rules are balanced, contributing to the development of the law.

Judicial decisions have law-making effects, even though they are typically not binding on anyone other than the parties to a dispute. Judgments develop precedential value through legal argumentation, or by being treated as if they were precedent. While varying in how elaborate their legal argumentation is and how extensively they draw upon previous decisions, most ICs refer to previous judicial decisions.[12] ICs use previous legal developments and perspectives of the law to develop a legal argument. Previous judicial rulings enhance the persuasiveness of an argument because they provide analogies, help to illustrate distinctions and patterns in meaning, and endorse certain perspectives or interpretations. ICs refer to their own previous decisions as well as the decisions of other ICs.[13] Thus, through legal argumentation, judgments of ICs have precedential effects, contributing to judicial law-making.

TNA Access to International Courts

Following previous research on TNA access, I conceive of TNA access as a dimension of the institutional design of international courts, which consists of the mechanisms whereby TNAs may take part in the judicial processes.[14] Access to international institutions in general has been show to offer some promises for democratizing global governance.[15] Similarly, access for transnational actors to ICs might render international law-making more democratic. This section identifies four types of access to international courts, defined as permanent international judicial bodies that meet the following criteria: (1) decide the question(s) brought before them on the basis of international law, (2) follow pre-determined rules of procedure, (3) issue legally

binding outcomes, (4) are composed of independent members, and (5) require at least one party to a dispute is a state or an international organization.[16]

There are four types of TNA access to international courts: direct access, indirect access, third party access, and public observer access. *Direct access* is governed by rules that grant TNAs privileges to directly file a petition to a court to have a complaint heard. Direct access enables individuals and groups, other than states or intergovernmental organs, the opportunity to litigate through an IC. Direct access is an important feature of more recently established ICs.[17] Examples of ICs that grant direct access include the ECtHR and the Andean Tribunal of Justice. However, not all ICs feature direct access, including some recently established courts, such as the Permanent Review Tribunal of Mercosur. Direct access allows TNAs to file petitions, but it does not guarantee that their case will be heard on the merits. Rather, petitions are first assessed for admissibility.

The second type of access is *indirect access*. Indirect access is governed by rules that grant TNAs privileges to become a litigating party indirectly after another public authority brings their dispute to a court. One procedure that leads to indirect access is a referral by a national court. This is commonly found in regional trade courts and is exemplified by the ECJ's preliminary reference procedure. Another indirect pathway is through an international commission, in combination with the acceptance of the court's jurisdiction by the relevant member state. Such a procedure exists in the Inter-American Court of Human Rights (IACtHR) and the African Court of Human and Peoples' Rights (ACtHPR). Also, there is the possibility that individual states recognize the right of individuals to directly petition a court. I treat these as indirect access because they require state acceptance separate from ratification of the contentious jurisdiction of the court. This applies to the ECtHR prior to 1998 and the ACtHPR.

Third, access to ICs transpires via rules that allow TNAs to participate in proceedings as a *third party*.[18] Third parties can either be intervenors or amicus curiae. While the privileges of an intervenor are different from amicus, they are similar in that they offer a non-litigant the opportunity to voice their interests and present information to the court.[19] Many ICs provide third party access, including the IACtHR, the ECJ, and the International Criminal Court.

The fourth type of access is *public observer access*, which is regulated by provisions that detail whether IC's oral proceedings are held in public. Public hearings allow TNAs to observe the oral proceedings of ICs. While seemingly insignificant, some ICs maintain closed proceedings, preventing all non-litigants from observing proceedings. Many ICs grant public observer access, but close proceedings to observers under limited exceptions. For example,

Article 46 of the ICJ Statute requires hearings are public "…unless the Court shall decide otherwise, or unless the parties demand that the public be not admitted."[20]

These types of access are intended to be "ideal types" for analytical purposes. In practice, however, access arrangements vary, as additional rules determine the details of access for each court. Nevertheless, the ideal types are informed by access that currently exists in ICs. Also, these types of access include only those that are officially recognized by court treaties or rules of procedure. Informal access, such as lobbying efforts, is excluded from my discussion because they are not dimensions of institutional design. However, informal access may have consequences for democratic deficits in international law-making.

How accessible are international courts? Which types of access do ICs feature? To answer these questions, I map TNA access to ICs over time based on an original dataset on the design of 24 international courts. The ICs included in this dataset comprise the full universe of permanent ICs that were operational at any point between 1945 until the end of 2014 (see appendix for a list).[21] Excluded are quasi-judicial bodies (such as the UN human rights committees), tribunals with ad hoc appointments (such as investor-state arbitration tribunals), hybrid criminal courts (such as the Special Court for Sierra Leone), or ICs that were "nipped in the bud."[22] This selection of ICs matches other prominent comparative research on international courts.[23] TNA access is coded based on the rules provided in treaties and protocols establishing international courts, their rules of procedures as well as some case law that established new access measures (which applied only in a few instances). The data reflects changes in access during the life time of a court.

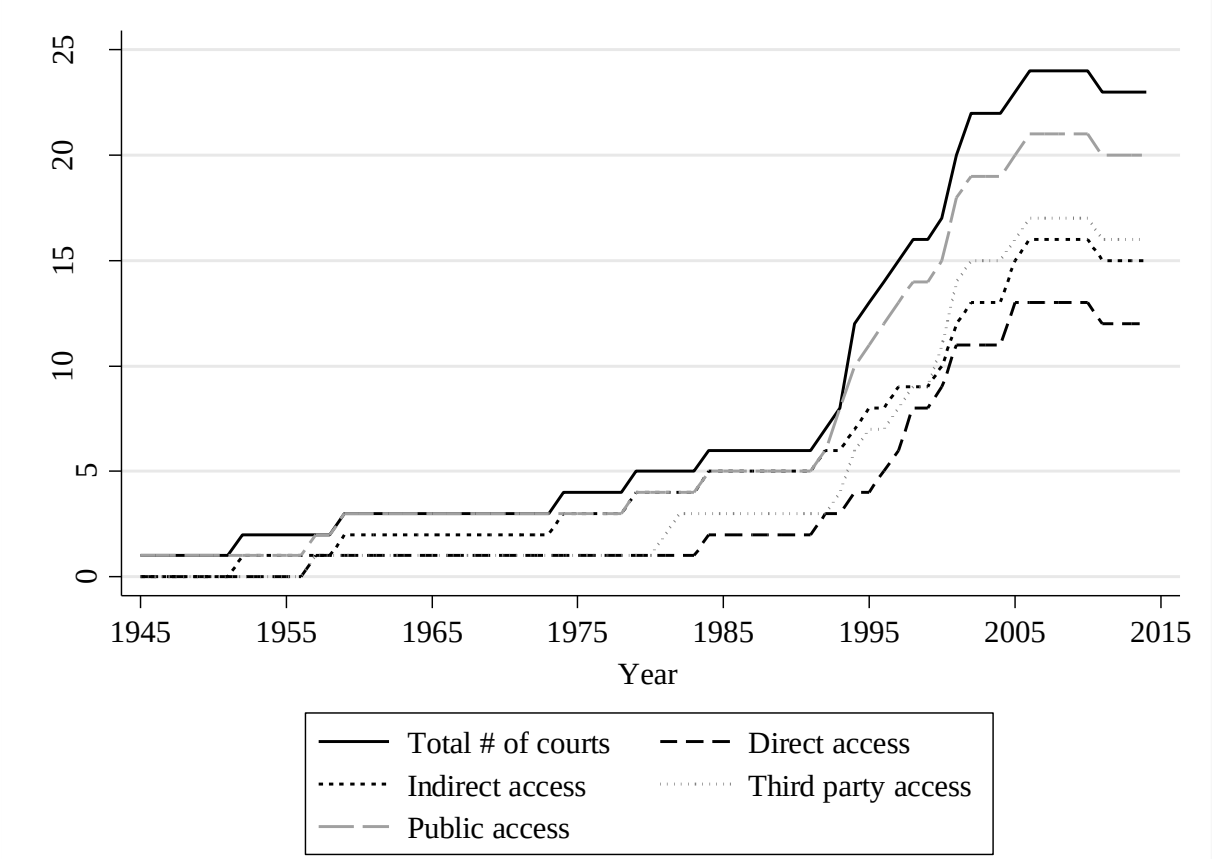

Figure 1 Development of Access from 1945 to 2014

Figure 1 illustrates the development of access from 1945 to 2014. The figure shows access grows as the number of ICs increase.[24] This suggests that the increase in access is largely due to the creation of new ICs and that newly founded ICs have access at their origin. Only six ICs experienced changes in access after establishment (see appendix). As shown, the most common form of access is public observer access. In 2014, 20 ICs operate with the general rule that oral proceedings are public. Exceptions to this include the WTO Appellate Body, the Benelux Court of Justice and the Mercosur Permanent Tribunal.[25] The least common form of access is direct access. In 2014, fifteen ICs provided direct access. Direct access is usually provided by regional trade courts, but the ECtHR also features this form of access. Also, these patterns are consistent over time. Direct access has been consistently the least common form of access, while public observer access has been the most common.

Table 1 illustrates the overall accessibility of ICs by cross-sections of time. In 2010 the majority of courts featured either three or four types of TNA access. Also in 2010, it was most common for ICs to feature all four types of access, while no ICs were completely closed. This is in contrast to 1995, when access was less common. More than one-third of all ICs in 1995

had either no access or only one type, and only two ICs featured all types of access. So, the proportion of ICs that offer no access or only one type of access has declined over the past twenty years, and the proportion with three or more types has increased. As mentioned, access rules have changed in a few ICs after their establishment. For example, third party access was introduced in the WTO AB in 2000 and the ECOWAS CJ was adapted in 2005 to include direct and indirect access.

Table 1. Accessibility of ICs, by year

	Number of ICs		
Accessibility	1995	2000	2010
No access	1 (7.7%)	0	0
1 type of access	3 (28.1)	4 (23.5)	5 (20.8)
2 types of access	2 (15.4)	3 (17.7)	4 (16.7)
3 types of access	5 (38.5)	5 (29.4)	6 (25.0)
All types of access	2 (15.4)	5 (29.4)	9 (37.5)
N =	13	17	24

Access to International Courts: Democratizing International Law-Making

The data reveal TNA access has become commonplace feature of ICs. How can we evaluate the democratizing benefits of access to ICs? I follow a method adopted by recent research that merges normative theory with empirical research,[26] which first identifies values that are common to various theories and conceptions of democracy, and then assesses if and how these values are preserved in the empirical context. It should be noted that some theorists reject this approach, arguing that adding democratic values is not sufficient for democracy.[27] I however do not claim that by enhancing the presence of certain values in international law-making it becomes democratic, but only that the presence of these values have potential to render

international law-making more democratic. Rather than highlighting a single model of democratic governance in this analysis, my argument builds on identifying values that are widely acknowledged as crucial to democratic governance and then asks if and how TNA access to ICs might better secure these values in international law-making.

Participation and transparency are widely recognized as necessary (but not sufficient) values for democratic governance. Three core models of democracy - participatory, representative, and deliberative democracy – highlight participation and transparency among the key criteria of democratic governance, albeit to varying degrees. Moreover, these two values can be identified in theories of democracy for the nation-state as well as for global governance.

Participation is viewed as an essential democratic value by different strands of democratic theory.[28] Most perspectives on democracy in global governance have suggested that participation and participatory mechanisms are crucial to global democratization.[29] Despite notable differences, proponents of global deliberative democracy, global stakeholder democracy and global cosmopolitanism all recognize participation is essential to alleviating democratic deficits in global governance. Macdonald, presenting global stakeholder democracy, argues that "individuals should be entitled to participate in any decision-making that impacts in problematic ways upon their autonomous capacities."[30] Held, who presents ideas related to global cosmopolitanism, also emphasizes participation, arguing democratic order hinges on whether "citizens were able to enjoy a bundle of rights which allowed them to command democratic participation…" [31] Likewise, adherents of global deliberative democracy see participation as central to democratic authority. [32] In these various strands, participatory mechanisms are essential to making decision-making more inclusive of and responsive to affected people, even though it cannot be equated to electoral participation.

Transparency is also generally viewed as an essential democratic value, and one that has potential to democratize global governance.[33] Transparency is considered a crucial value for global democratization for several reasons. First, transparency is a cornerstone of participation. It plays an informational role that enables participation. Information asymmetries exist between the governing elites and the public. Simply put, the lack of information held by the public creates a *de facto* barrier to meaningful participation in global governance. Transparency mediates information asymmetries, transferring information available to elites to the public. With a more balanced distribution of information, the public is more readily equipped to participate. Second, transparency is a democratic value because of the ways in which it generates a public sphere of contestation. Transparency encourages public debate, and

opportunities for civil society to participate at the international level can act as a "transmission belt," bringing international decision-making to the wider public.[34]

Third, transparency enables those affected by transnational and national authority to scrutinize the exercise of that authority. In other words, it is a necessary (albeit insufficient) condition for accountability.[35] Transparency for states alone is not adequate to meet the demands of accountability in global governance. If transparency is to provide for accountability, it must be directed to those who hold ICs to account and contest the terms of accountability.[36] While states can be accountability holders, they are not the only ones. Civil society can also hold authority to account. For this reason, transparency must be adequate enough to provide civil society with the information that would be necessary to exercise public scrutiny. As Buchanan and Keohane argue, "broad transparency" is needed, such that "information produced initially to enable institutionally designated accountability holders to assess officials' performance may be appropriated by agents *external* to the institutions, such as nongovernmental organizations (NGOs) and other transnational civil society, and used to support more fundamental criticism …"[37] Thus transparency for external actors is essential to broad accountability, where the standards of accountability, the accountability holders and their interests, can be contested. For these reasons, institutional mechanisms of transparency are widely considered to be crucial to democratizing global governance, even though transparency may come with some costs.[38]

Before proceeding, a few caveats must be mentioned. First, the argument does not assume that participation and transparency are sufficient remedies for democratic deficits. There may be other common values against which one could use to evaluate ICs in the democratizing of international law-making. For example, one might consider accountability or human rights. However the link between these values and TNA access to ICs is less clear, and arguably better associated with other design features of ICs (such as jurisdiction) or even judicial outputs. For this reason, I set aside these other values. Second, as will be explained further, additional factors condition the extent to which TNA access to ICs are mechanisms of participation and transparency. Third, TNA access to ICs *alone* cannot *fully* democratize international law-making. Rather, I take the view that ICs are part of a broader set of institutions and actors involved in law-making. In this sense, I generally subscribe to a "system approach."[39] My argument, thus, only deals with one aspect of the overall system. Nevertheless, all else equal, TNA access to ICs has the potential to make international law-making more democratic *than in its absence*. Having identified important confines to my argument, I now turn to if and how TNA access to ICs might render international law-making more democratic.

Participation and TNA Access to ICs

TNA access to ICs can provide an institutional mechanism for participation in international law-making. Access rules entitle TNAs, or those affected by international law, to participate in international judicial processes that shape the content of international law. While a full range of factors (such as epistemic and monetary resources) may determine whether TNAs actually participate, TNA access is the institutional pre-condition to participation. In other words, access provides the possibility of participation is law-making by ICs, and the absence of access prevents it.

The entitlements provided by TNA access mechanisms should be viewed as more than mere token privileges to participate. Rather, access to ICs can provide democratizing benefits because it enables those affected to influence law-making. TNA access to ICs can foster participation that has an impact on judicial law-making in two ways. First, access to ICs enables TNA actors to influence an IC's policy agenda, or the issues that are adjudicated. Specifically, *direct* and *indirect* access empowers TNAs, by acting as litigants, to influence what cases an IC hears because courts, unlike other political institutions, cannot pick the policy issues they consider. Rather, courts depend on cases to be brought to them, and their agendas are constructed primarily by what cases they receive. Thus, when TNAs are entitled to either directly or indirectly petition a court, they play a large role in determining what law and policy issues are on the court's docket.

Indeed, petitions brought to ICs by individuals and societal groups have transformed the agendas of ICs in several instances. For example, TNA access was instrumental in leading the East African Court of Justice (EACJ) to address unexpected policy issues. Despite a lack of explicit authority to do so, the EACJ addressed issues of human rights and environmental protection because of petitions brought to the Court by TNAs.[40] Similarly, TNA access to the ECtHR contributed largely to questions of freedom of assembly and association.[41]

Indirect access through referral procedures also enables TNAs to participate in ways that shape ICs' agendas. For example, it is through the petition process at the Inter-American Human Rights system that territorial rights of indigenous peoples were placed on the agenda, even though they were previously not articulated in the Inter-American Human Rights Convention (Inter-American Commission on Human Rights 2010). Referrals to the ECJ lead the Court to adjudicate over women's rights, and consequentially making gender equality a policy domain of the EU and the Court.[42]

These examples illustrate how the direct and indirect access provisions can translate into opportunities for TNAs to play a crucial role in determining what issues lay on the policy agenda of an IC. Access for TNAs contributes to an IC's agenda in ways that states could not, or would not. Non-state litigants have incentives to bring claims against non-compliant states, whereas states have disincentives to do so. Concerns for retaliation and reputation can prevent states from filing claims against other states. Citizens, however, have incentives to do so, especially when social change is blocked through other pathways.[43] Thus, direct and indirect access to ICs enables citizens to influence what issues are decided by ICs.

Second, access to ICs enables TNAs to participate in ways that ensure deliberation and decision-making is informed by a range of societal views and interests. In other words, TNA access can improve the "discursive quality"[44] of judicial deliberation and law-making. Direct, indirect, and third party access, in particular, are avenues through which TNAs' perspectives enter into international judicial law-making. While these forms of access technically grant TNA actors opportunity to present both factual information and legal arguments, as opposed to raw opinion, they nevertheless can be a means by which a court obtains information about the perspectives of those affected or interested in any given dispute. These forms of access introduce societal perspectives or discourses that would otherwise not enter into judicial law-making. States do not have an obligation to provide a fair representation of societal perspectives, or even some notion of the public interest, in their argumentation before an IC, nor do they have interests to do so. Additionally, courts are not representative institutions because of the requirements of independence and impartiality.[45] So they are not designed to incorporate diverse perspectives and interests through the individuals who sit on the bench. Thus, TNA access is crucial to broadening the scope of perspectives and interests that enter into international judicial deliberation.

Direct and indirect access ensures that at least one societal perspective – that of the non-state litigant – is taken into account when deliberating and deciding a dispute. More important, however, is whether a broader set of perspectives or discourses may be included in the process. For this reason, third-party access can play an especially vital role. For example, Williams and Woolaver find that "*Amicus curiae* can be very useful in ensuring that the perspective of these groups [victims and groups within society] is heard" during international criminal court proceedings.[46] Without such opportunities to participate, the discourses present in judicial deliberation are only guaranteed to be that of the complainant and the respondent.

Some may argue that access to ICs does not ensure *equal* participation or that the access provided to international courts does not guarantee that those who participate have strong

democratic credentials. Opponents of access claim that those who participate will tend to represent special interests, not public interests. For example, Trachtman and Moremen argue that TNAs who participate in the WTO Dispute Settlement Mechanism are biased stakeholders and not representative voices.[47] Recent evidence, however, shows there is more diversity of interests represented than Trachtman and Moremen suggest.[48] Also, Williams and Woolaver respond to similar criticisms when assessing amicus curiae before international criminal tribunals, and argue that most often the biases of amici are obvious and judges make independent assessments as to the value of their contribution. They find that "the risk of courts becoming battlegrounds for interest groups has not been realized before international criminal courts to date."[49] I would similarly argue that the forms of access that are provided by ICs are not unrestrained. Judges have the discretion to determine inadmissible claims, to not grant leave for amicus submissions, and to ultimately reject information that appears to be biased or irrelevant. In addition, the solution to capture of ICs by special interests does not lie with the exclusion of societal participants, but rather their inclusion more broadly. In line with Madison's well-known argument in the Federalist Paper #10, interests are best balanced against one another and merit more inclusion, rather than less.

Participation that is generated by TNA access is not without imperfections. This form of participation is not equivalent to electoral participation or participation associated with direct democracy. Those who can participate, either for formal reasons such as meeting the criteria of having standing in legal proceedings, or informal requirements such as financial resources, are limited. The participation that is provided may more closely resemble unelected or informal representation.[50] Yet, even if we view TNA access to ICs as only providing representation, by actors who makes "representative claims," there may still be good reason to view it as on balance more democratic by allowing for inclusion or representation of more views than in its absence.

Despite shortcomings, access to international courts offers those affected more voice in the making of international law, and thereby may push international law-makers to be more responsive to those governed, than in its absence. TNA access to ICs serves as an institutional mechanism of participation, albeit an imperfect one. It provides those affected with greater capacity to shape the policy agenda of ICs. Also, access allows TNAs to influence the discursive quality of judicial deliberation and law-making by enabling more perspectives and interests to enter into the judicial process. The various forms of access provide the potential for participation, and thus might reduce democratic deficits – albeit to different degrees. Access

has the greatest potential to democratize international law-making when its several forms are offered at the same time.

Transparency and TNA Access to ICs

TNA access to ICs provides a transparency mechanism in international law-making. As the empirical data reveal, most ICs provide public observer access, meaning that they operate with the general rule that oral proceedings will occur in open court, with the exception that they can be closed on account of accentuating circumstances. Public observer access, at a minimum, ensures that oral proceedings of a court are open to interested TNAs. This type of access can enable greater participation of the public, either directly or indirectly. For example, an organization that observes the hearings may find that the issues at hand relate to their interests, and may then seek to participate through more participatory channels to air their views. Through public proceedings, civil society gains valuable information concerning the issues and interests at stake in a legal dispute, as well as a sense of the legal problems and arguments surrounding a conflict. Similarly, access to proceedings may simply lead individuals to discuss the issue at hand in public fora. The ability for one or two individuals or groups to observe proceedings can have an impact on how seemingly remote and insular legal processes connect to wider public audiences, and become the focus of political discourse.

This is not to imply that judges should make their own internal deliberations public, and that all aspects of the written proceedings must be publicly accessible. It is possible to ensure greater transparency, while still valuing the obligations and rights that are furnished by confidentiality.[51] Some transparency after the fact may be able to harness some of the benefits of transparency when we speak of courts.[52]

Access increases transparency to a greater extent when we consider other forms of access, including direct, indirect, and third party access. Direct access as well as some forms of third party access supplies additional transparency. Access as a litigant comes with full privileges to written and oral proceedings. Similarly, indirect access requires transparency for effective and fair judicial process. Likewise, some forms of third party access would also entail having written proceedings being made readily available. These forms of access translate into transparency for those directly involved, and can contribute to broader transparency when involved TNAs transmit information to the wider public. For example, the World Wildlife Fund (WWF) has acted as an amicus before the WTO dispute panels before. As a consequence the WWF published information on the dispute to its members and on the Internet. Through this

process, the issue then is transferred to the public sphere. As Bogdandy and Venzke argue, amicus "might be able to trigger processes of scandalisation that contribute to discussions and mobilize the general public."[53] While access may enable transparency and a subsequent heightening of public discourse around international courts, there may be a subsequent feedback effect where the IC is sensitized to the public discourse on the topic. As Eckersley explains, amicus submissions contribute to a public sphere around the WTO, "sensitizing the trade regime to the wider concerns of transnational civil society and thereby narrow the external accountability gap."[54]

The transparency that access offers is far from perfect. Indeed, the judicial deliberation does not transpire in an open forum, creating limits to what access can do for transparency. Nevertheless, access enhances the possibility of transparency in a way that is better than in its absence. Indeed, the temporal patterns illustrate that in some international courts, hearings are closed to the public. Moreover, TNA access is not the only means of ensuring transparency to international law-making by ICs. For example, rules may require that ICs make their judgments public.

To review, access to international courts may secure democratizing benefits to international law-making by fostering greater transparency. Specifically, transparency has the potential to boost participation, accountability, and a public sphere around international adjudication and law-making. The various forms of access offer promise for transparency. The greatest promise for more transparency, like participation, would arise from a combination of different types of access. ICs that are designed to grant especially third-party access and public observer access would seem to hold the greatest transparency mechanisms and thus democratizing benefits.

Conclusion

This article aims to bring international courts into the conversation on the democratic quality of international law-making. It argues that ICs are law-making institutions and should be given greater consideration when speaking of international law-making. I propose that international courts in their law-making role have significance for assessments of democratic deficits. Specifically, TNA access, a common institutional feature of international courts, has the potential to render international law-making more democratic than in its absence. Mapping access to international courts, this article shows that TNA access to ICs has expanded since

1945. The expansion of TNA access has provided additional institutional mechanisms for participation and transparency – two widely recognized democratic values – in international law-making. This argument resonates with extant literature that links TNA access to global governance with global democratization.

The democratizing effects generated by TNA access to ICs, however, are conditioned by various factors. I have explained how the various types of access have different impacts on participation and transparency and that the more access TNAs have to ICs the greater the potential impact. Two other considerations are likely to condition the potential democratizing effects of TNA access to ICs. First, there is significant variation among ICs in terms of their jurisdiction as well as their influence over international law. Second, not all TNAs are the same, NGOs, thinks-tanks, and individuals, for example, may differ in their material and epistemic resources, and thus they are unlikely to use access to similar degrees or even in similar ways. All of these factors condition the extent to which TNA access has democratizing effects on law-making through ICs. Nevertheless, on the whole TNA access to ICs has the potential to make international law-making more democratic *than in its absence* – albeit to varying degrees depending on the types of access featured, the nature of an IC's jurisdiction and who has access. Taking the perspective that, on the one hand, ICs are part of a broader system of law-making and, on the other hand, global democratization is a process that has only begun,[55] TNA access to ICs moves us forward in this process.

This article has implications for three debates. First, when considering the democratic quality of international law-making ICs are relevant. International courts are *de facto* part of the making of international law, despite whether one believes they should be and despite the hesitance of states to admit that they have such a role. For this reason, ICs as lawmakers merit normative consideration. While I have focused on the democratizing effects of access for international law-making, other design features of international courts may either dampen or intensify democratic deficits.[56] Second, this article suggests that international law-making today takes on dynamics that differ from our traditional assumptions. When considering democratic deficits in international law-making, these new dynamics are relevant yet unexplored. For example, treaty making today involves a wide-range of transnational actors.[57] If, how, and when the broader dynamics of international law-making effects global democratization begs consideration. This article suggests we look at how features of law-making processes dampen or intensify democratic deficits. Third, literature on the democratic deficits in global governance has largely neglected international courts. They however deserve more attention in the debates concerning democracy in international law-making and global

governance. The ways in which ICs can dampen and exacerbate democratic deficits are potentially plentiful but little understood. This article is a start to a hopefully broader discussion on ICs in global democratization.

Appendix

International Court	Year in Operation	Changes in access
African Court of Human and Peoples' Rights (ACtHPR)	2006	None
Andean Tribunal of Justice (ATJ)	1984	Yes (third party access added in 2001)
Benelux Court of Justice (BCJ)	1974	None
Central American Court of Justice (CACJ)	1992	None
Caribbean Court of Justice (CCJ)	2005	None
Central African Economic and Monetary Community Court of Justice (CEMAC CJ)	2000	None
Court of Justice of the European Union (CJEU)	1952	Yes (direct, third party, and public access added in 1957)
Common Market for Eastern and Southern Africa Court of Justice (COMESA CJ)	1998	None
East African Court of Justice (EACJ)	2001	None
Economic Court of the Commonwealth of Independent States (ECCIS)	1993	None
Economic Community of West African States Court of Justice (ECOWAS CJ)	2002	Yes (direct and indirect party access added in 2005
European Court of Human Rights (ECtHR)	1959	Yes (third party access added in 1981, direct access added in 1998, indirect access removed in 1998)
European Free Trade Agreement Court of Justice (EFTA CJ)	1994	None
Inter-American Court of Human Rights (IACtHR)	1979	Yes (third party access added in 1982)
International Criminal Court (ICC)	2002	None
International Court of Justice (ICJ)	1947	None
International Criminal Tribunal of Rwanda (ICTR)	1994	None
International Criminal Tribunal of the former Yugoslavia (ICTY)	1993	None
International Tribunal for the Law of the Sea (ITLOS)	1996	None
Mercosur Permanent Review Tribunal (Mercosur PRT)	2002	None
Organization for the Harmonization of Business Law in Africa Common Court of Justice and Arbitration (OHADA CCJA)	1996	None
Tribunal of the Southern African Development Community (SADCT)	2005-2010	None
Western African Economic and Monetary Union Court of Justice (WAEMU CJ)	1995	None
World Trade Organization Appellate Body (WTO AB)	1994	Yes (third party access added in 1998)

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[18] In some instances, third party refers to access by a state or intergovernmental organ. I do not include these in the analysis.
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[20] Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 3 Bevans 1179; 59 Stat 1055; TS No 993.
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