

Between “Autistic” Courts and Mob Justice: Theorizing the Call for More “Democratic” International Criminal Justice

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I. Introduction

In the last few years, the literature on international criminal courts has shifted from legal enthusiasm over the exciting new frontiers in legal and institutional development to a more critical debate in which anthropologists, sociologists, political scientists, and many interdisciplinary scholars also participate. There are three interrelated lines of critique, pursued to different degrees by different authors. The first is a general questioning of whether the exclusive focus on punitive “trial” justice is in fact helpful for the victims of war crimes and crimes against humanity and the wider societies that have suffered from such atrocities. The second points out that in ongoing conflicts, the pursuit of such justice may get in the way of the pursuit of peace through negotiations. The third concerns the “remoteness” of these courts from the lived realities of the populations affected by the crimes they prosecute.

On the first two points, the arguments on both sides are well rehearsed. Indeed, in relation to the first point it could be argued that a consensus is emerging in the scholarly literature, although certainly not yet in policy practice, that international criminal courts ought to be part of a wider package of transitional justice instruments at the various policy levels.

The third critique, however, has not received much attention. In this line of analysis, the point is usually made that the victims and populations have not been consulted and have not had a choice as to whether international criminal courts are their preferred form of justice.¹ Critics and even advocates of international courts demand a procedurally different implementation of justice. International criminal courts are asked to be more communicative, more deliberative, indeed, more *democratic* in the sense given to this term in the literature on participatory or deliberative democracy.

This article will not attempt to contribute to the already lively discussions on whether and when Western-style “trial justice” is more or less appropriate than other forms, or how to resolve tensions between the interests of justice and the interests of peace. Instead, it will consider the claim underlying the third line of critique: for criminal proceedings to be legitimate in an absolute normative sense, they need to be *legitimated* through deliberative consultation generating consent.

First, it will briefly discuss the formal legal basis of each of the courts and how this relates to the concept of democratic legitimacy. This will be followed by a more detailed examination of the kinds of “democracy demands” that are being made of international criminal courts, and how they have been responding. Then it will assess these developments through the lens of classical and recent theories in legal sociology and legal anthropology: in what ways does this body of literature conceptualize the relationship between “normal” criminal proceedings and the democratic legitimacy of legal institutions? Furthermore, can these conceptualizations be transferred to the rather exceptional situation of international tribunals for very grave crimes?

In the remainder of this article, the term “international criminal courts” will denote international criminal justice institutions in the abstract. I will use “the courts and tribunals” to refer to actually existing institutions and their practices. These include such entities as the Extraordinary Chambers in the Courts of Cambodia (ECCC); the International Criminal Court (ICC); the International Criminal Tribunal for Rwanda (ICTR); the International Criminal Tribunal for the former Yugoslavia (ICTY); and the Special Court for Sierra Leone (SCSL). I will use “crimes against humanity” as shorthand for war crimes, crimes against humanity, and genocide—the typical remit of these institutions.

II. Formal Legal Basis

The courts and tribunals that have come into existence since the 1990s were established in different ways. This section will briefly discuss these differences and relate them to the question of democratic legitimacy. The point here is not to discuss the legality of these courts and tribunals under international law. Instead, it will be argued that the differences that may be crucial to legal scholars in terms of legality, and have excited much debate between them, are of only limited relevance to the question of democratic legitimacy.

The Yugoslavia tribunal, the first post-Nuremberg court of its kind, was established through a Resolution of the United Nations Security Council (UNSC). The UNSC stands out in the post-World War II international architecture as a crucial exception to the principle of state consent, required for the maintenance of international peace and security. Its conception of threats to the peace was famously stretched, and its capacity for action unleashed, after the end of the Cold War. This is clearly expressed in its Resolution 827. The ongoing breaches of humanitarian law in the former Yugoslavia are declared to be a threat to the peace, a tribunal is established, and the Council peremptorily “decides that all States shall cooperate fully with the International Tribunal.”² Regardless of its legality, it would be very difficult to construct any sort of argument that this process of establishing an international tribunal contained any element of democratic consent from a global—or local—*demos*.

The situation of the Rwanda tribunal is slightly different. Although also based on a Security Council Resolution, its establishment followed an official request from the government of Rwanda. However, this was the RPF government, formed by the Tutsi army that vanquished the *genocidaires* in the summer of 1994, rather than a democratically elected government. Moreover, it soon withdrew its support for the tribunal.

The ICC’s position is similar to that of the ICTY in relation to its Darfur case. It was also mandated by the Security Council without consent from the state in question, Sudan. Its other current cases all concern states that have ratified the ICC Statute, and three of the governments actually referred situations to the ICC, a procedure not foreseen by the Statute. However, these instances of state consent do not reflect *democratic* consent unproblematically. Uganda is a one-party state, and the democratic credentials of the Central African Republic and the Democratic Republic of Congo are weak at best. Although multi-party elections are held, they are flawed by violence, the exclusion of opposition candidates, and fraud. Civil liberties are routinely violated. In Kenya, it is the violence associated with the elections themselves that forms the substance of the ICC’s

case. This is hardly surprising: we should not expect to find a robust democracy and respect for civil rights coinciding with situations that have come to the attention of international criminal courts.

The ECCC is the result of protracted negotiations between the United Nations and the Cambodian government. Again, although we have state consent here, it can hardly be equated with democratic consent, firstly because the Hun Sen government is highly undemocratic, and secondly because it accepted the Court reluctantly, under pressure.³ The SCSL is perhaps the international tribunal that comes closest to having been established through democratic consent. It was established by an agreement between the United Nations and the government of Sierra Leone through the explicit request of President Ahmad Tejan Kabbah, one month after he had won a landslide victory in the first post-civil war elections. Even in this situation, however, it remains arguable whether the people themselves have given consent to the extraordinary hybrid body that has come to pass judgment on the main actors in the conflict. If we accept Jürgen Habermas' dictum that "democratic procedure for the production of law...forms the only postmetaphysical source of legitimacy," then the courts and tribunals are all in trouble.⁴

Having established the shaky democratic ground the courts and tribunals rest on, the next section will look more closely at what kind of concrete "democracy critiques" they have been exposed to, and how they have responded to date.

III. The Critiques and Demands

A first set of critiques focuses on the neglect of international criminal courts to adequately explain themselves. Diane Orentlicher, for instance, argues that the Yugoslavia tribunal "has never placed adequate store in the importance of communicating effectively with the communities most affected by its work... Remarkably, the ICTY did not even translate its judgments into the languages spoken in the former Yugoslavia until 1999, and did not issue its first press release in Serbian until 2000."⁵

In relation to the ICC's Uganda case, Adam Branch complains of "what many Acholi [the most war-affected of the peoples inhabiting Northern Uganda] whom I have interviewed perceive to be the ICC's lack of transparency and its aloof and secretive demeanor" and its "nontransparent decision-making process."⁶ Jose Alvarez has asserted that the ICTR's judgments have had far less local media (especially radio) coverage than national trials related to the genocide, leaving Rwandans without a "sense of ownership."⁷

From these and other statements, it appears that the authors consider it to be self-evident that international criminal courts have a responsibility to explain themselves to affected communities. Without arguing to the contrary, it must be noted that such a responsibility is not necessarily taken for granted in the pursuit of "normal" domestic criminal justice. But the demands of the critics go well beyond better information provision by the Courts.

Writing about the Yugoslavia and Rwanda tribunals, Victor Peskin makes a distinction between the transparency model of outreach, along the lines described above, and a (preferable) "more comprehensive and multifaceted" engagement model, that would involve "extensive and frequent...interaction and dialogue" between tribunal staff and the

population.⁸ In a similar vein, Payam Akhavan has insisted that international criminal courts engage in “participation and public dialogue” as especially important to facilitating ownership and hence contributing to post-conflict peace building and collective healing.⁹

In relation to the Rwanda tribunal, Peskin suggests that such engagement “may also help Tribunal officials better understand how the court and the outreach programme are perceived domestically” in Rwanda and break down their “self-imposed isolation from Rwandan society.”¹⁰ Similarly, Orentlicher has argued that “[t]he failure of key ICTY staff and officials to educate themselves adequately about the Balkans has often been evident and deleterious.”¹¹ Instead, she suggests, they ought to be “keeping constantly in mind the impact of proceedings on core audiences as trial and public information strategies are developed.”¹² Branch, too, argues that the ICC in its Uganda case “failed to undertake either the independent political analysis or the consultation with the Acholi that might have alerted it to the potential negative consequences of its investigation.”¹³

But what are the courts and tribunals meant to do once they have made this analysis? Should they be making different decisions in order to prevent a negative impact? Or is the suggestion just that they explain themselves better, as above? Peskin uncritically asserts that dialogue can take place “without undermining the Tribunal’s autonomy.”¹⁴ Orentlicher remains cautious, arguing only that, “there is an inherent tension between a court’s awareness of its local audience on the one hand and its institutional imperative to focus on doing justice in the specific case before it.”¹⁵ Branch is less shy about what is normatively required for international criminal courts like the ICC to be legitimate in situations like Northern Uganda: “even if the Acholi were eventually to call for international prosecution, such prosecution would only be legitimate if it were in response to this prior deliberative process and not by fiat of the Ugandan government and the ICC prosecutor.”¹⁶ Once in action, the “ICC would...need to work at the behest of and in coordination with democratic forces.” At the same time, he recognizes this “is difficult since it would require that the ICC make judgments as to the democratic credentials of those calling for intervention.”¹⁷

Other critics have made the same argument in much more general terms. Helena Cobban, in a cogent argument against international criminal courts in *Foreign Policy*, argues that, “those who want to help the survivors of atrocities should first ask broad sections of society in an open-ended way how they define their own needs and how they define justice.”¹⁸ Mark Drumbl, who does not reject international criminal courts quite so categorically, also argues that, “ICTY and ICTR are not directly accountable to populations in the former Yugoslavia and Rwanda,”¹⁹ and that the Sierra Leone tribunal “does little to incorporate local manifestations of popular will.”²⁰ He uses the phrase “popular disenfranchisement”²¹ to describe the position of local populations in relation to all the courts and tribunals.

IV. The Responses

The critiques and demands made on the courts and tribunals in their communicative aspect have not left them untouched. They have all developed “outreach strategies,” for which there is typically no parallel in domestic criminal justice systems. The main focus of these strategies is on the provision of information and explanation to a variety of audiences, primarily in the localities with which the court investigations and prosecutions

are dealing. The first of these tribunals, the ICTY, took six years to develop such a strategy or even to translate its judgments into local languages. Having recognized how this neglect contributed to negative perceptions, it now defines its mandate as making the Tribunal's "trials and judgements accessible and understandable in the region of the former Yugoslavia" and "actively explain[ing] its work to the communities it serves in the region."²²

Similarly, the ICC's "Strategic Plan for Outreach," developed in response to criticism of its lack of outreach,²³ explains that for the Court to fulfill its mandate, "it is imperative that its role and judicial activities are understood, particularly in those communities affected by the commission of crimes under the Court's jurisdiction. The Court must therefore put in place mechanisms to ensure that affected communities can understand and follow the Court."²⁴

All the courts and tribunals operationalize this commitment in similar activities: in the production of leaflets and booklets in various languages; the transmission of (parts of) trial proceedings; the organization of seminars and town hall meetings to which court staff travel to give presentations; the appearance of court staff in local media (especially radio programs); and the arrangements to allow victims, civil society actors, journalists, local officials, and legal professionals to visit the courts and tribunals. A more specific instance of this commitment to transparency is exemplified by the ICTY's website explanation of the benefits of accepting guilty pleas and publication of these pleas.

The outreach documents, as well as some statements and writings by civil society actors who favor the courts and tribunals, tend to assume, if not an automatic, at least a strong connection between the provision of good information and support for international criminal courts. The ICC's Strategic Plan, for instance, posits that, "[t]his communication should serve first of all to increase the confidence of these communities in the international criminal justice system, since they will be better informed about the Court and its role." The Sierra Leone court's briefing paper, which marked the first attempt at developing an outreach strategy before operations began, remarks more cautiously but in the same vein that the strategy outlined "stands the best chance of ensuring the Special Court's transparency and credibility, and promoting the notion of it being an inclusive institution, serving the needs of the people of Sierra Leone for effective accountability for the conflict in their country."²⁵ The outreach team of the Yugoslavia tribunal, despite continued high levels of hostility to it in the region, actually claims on its website that this effect has already been achieved: "Access to accurate information has served to dispel myths and prejudices about the Court."

Given the scope of the enterprise and the limited resources, it comes as no surprise that neither the Yugoslavia tribunal nor the Sierra Leone court has been able to achieve anything approaching comprehensive levels of explanation and information provision.²⁶ This article, however, is particularly interested in the nature of the engagement, rather than its scope. While the emphasis remains on one-way communication, as seen previously, the courts and tribunals have begun to go beyond this one-way model.

Affected communities and special groups are not exclusively constructed as recipients of messages. It is also recognized that they must be "given a voice." Naturally, they already have a voice, and it is often a critical one. Discussion about court cases in the media and in informal conversations is nothing unusual from the perspective of "normal" criminal justice. But a *voice* as recognized by the institution is different in nature.

The ICC has perhaps the most formalized (but also restrictive) voice for victims in the form of the Victims' Counsel in the Court. The Yugoslavia tribunal has a section on its website titled "Voice of the Victims," which displays the testimonies of a number of victim witnesses to the tribunal. It does not explain, however, why this section exists or what purpose it is supposed to serve. In the early days of its outreach program, the Sierra Leone court formulated the aim not only of ensuring that the purpose of the Special Court is understood across Sierra Leone, but also to grant to all sections of civil society in the country the opportunity to have their voice heard and their expectations of the Court identified.²⁷ In 2005, a conference of Sierra Leonean civil society groups did indeed take up this invitation and developed "a set of performance evaluation criteria" by which civil society will assess the impact of the Special Court both during and after its lifetime.²⁸

The recognition of a voice does not in itself imply that the courts and tribunals respond to voices from affected communities or particular groups. But it turns out that they have done just that, at least at the rhetorical level. The Sierra Leone court, in one of its annual reports, specifies the purpose of outreach as to "foster two-way communication between Sierra Leoneans and the Special Court."²⁹ The ICC website similarly defines outreach as "a process of establishing sustainable, two-way communication between the Court and communities affected by the situations that are subject to investigations or proceedings." Its strategic plan lists as one of its objectives, "to respond to the concerns and expectations expressed in general by affected communities and by particular groups within these communities." This objective found perhaps its first expression in prosecutor Moreno-Ocampo's decision to meet with Acholi traditional, religious, and political leaders to explain the controversial decision to investigate the situation in Northern Uganda: "He explained that he had invited the Acholi leaders to hear their views, as he had a responsibility to take into account the interests of victims and the interests of justice."³⁰

According to the ICC's strategic plan, this two-way communication will "enable the Court to better understand the concerns and expectations of the communities so that it could respond more effectively and clarify, where necessary, any misconceptions." Perhaps based on its Ugandan experience, traditional leaders (more than victims) are singled out as partners in a two-way dialogue. The communication is intended to foster:

...discussions of the articulation between international criminal justice and local and traditional justice modes of resolving conflicts, and should provide ample opportunity for these groups to express their questions and concerns. Such an approach will assist the Court in gaining knowledge from local understanding and experience.³¹

In more general terms, the ICTY website explains how dialogue will "also enable interlocutors from the former Yugoslavia to relay their perceptions of the Tribunal's work to ICTY representatives, improving their understanding of the impact of the ICTY's trials and judgements."

But what will they do with this improved understanding? And what if the concerns from communities are not based on lack of information, but express a clear desire for a change in (for instance, prosecutorial) policy? It remains nebulous in all these accounts to what extent and in what ways these Courts are prepared to respond to such demands. If

Court officials do not seriously consider shifting policies in response to community demands, they will continue to face criticisms like the ones outlined above. Yet if they do, they may be in breach of other values classically associated with fair trials.

The dilemma is neatly illustrated by two statements from officials of the Yugoslavia tribunals. In 2005 in an outreach meeting in Bosnia, then ICTY Registrar David Tolbert said, “I’ve always viewed the Tribunal as really your Tribunal. It’s not our Tribunal.”³² But ICTY President Fausto Pocar explained to a researcher in an interview that, “when judging a particular defendant the Tribunal’s imperative is to apply and be guided by ‘neutral principles of justice. We shouldn’t have a second agenda’ such as considering how or whether this judgment ‘may help or not help reconciliation.’”³³ The same contradiction is summed up by the five general principles of the ICC’s outreach strategy: neutrality; independence, engagement, flexibility, and partnership.³⁴

It would appear, then, that the courts and tribunals accept that they do suffer from a deficit relating to democratic legitimacy. But the rhetoric of the ICTY Registrar quoted above notwithstanding, no Court officials appear to have gone as far as suggesting that their decision-making must have a *direct* democratic basis, as argued by Branch, Cobban, and Drumbl.

V. Theorizing the Contradiction

The purpose of the rest of this essay is to seek guidance from legal sociological and anthropological conceptions of the role of criminal courts in society to determine how international criminal courts should resolve the obvious contradictions between the requirements of neutrality and independence, on the one hand, and the need for engagement, flexibility, and partnership, on the other. Because of the obviously social—rather than purely moral—nature of the dilemma under investigation, this literature is expected to offer a more fruitful point of departure than the natural law tradition that is the half-explicit moral foundation of the courts and tribunals.

The emphasis is on the legal sociology of modern Western states, as international criminal courts are decidedly products of Late Modern Western thought, but cut loose from statist moorings. Yet legal anthropology is also needed, as the courts and tribunals respond to situations that cannot be readily understood in terms of pre-modern, modern, or post-modern, but which are (with perhaps a partial exception for the former Yugoslavia) certainly not Western.

There are, of course, limitations to this approach. First of all, legal sociologists, when writing theoretically rather than empirically, have a tendency to write about law in an abstract sense. This piece, however, is less concerned with the general acceptance and legitimacy of law as rules than with law as institutions, *in casu* criminal courts. Moreover, the emerging literature on courts and tribunals is exercised by the behavior and decision-making of prosecutors at least as much as by judges. The classics of legal sociology either speak to legal professionals in general or to judges in particular, and are almost wholly silent about the particular role of criminal prosecutors. Finally, it is simply not possible to begin to do justice to the volumes of more than a century of work in the areas of legal sociology and legal anthropology in the space of an article. I issue an apology and disclaimer in advance: the essay may be summarizing intricate systems of

thought to the point of caricature in order to quickly jump to their potential application to twenty-first century international criminal courts.

VI. Marxism to Governmentality: Domination with a Loophole

There is a large and varied tradition in legal sociology that runs all the way from instrumental Marxism to the more subtle “governmentality” approaches of Foucault and others. For Marx, law within the capitalist mode of production is a straightforward instrument to keep the working classes in their place. In more subtle representations, such as structural Marxism (Pashukanis 1978), repressive formalism (Edelman 1979), and Foucaultian analysis (Pratt 1998), the legal order can be relatively autonomous from particular capitalist forces. In governmentality approaches there is not necessarily even a capitalist driver behind the pervasive control mechanisms of the power/knowledge complex. Yet the emphasis on formal equality still obscures inequality and produces consent.³⁵ By and large, the dilemma posed in this article is a non-question for these schools of thought. Courts of law, and by extension also international criminal courts, are not in any way conceptualized as having democratic legitimacy. Their independence from state interests and impartiality in decision-making are elaborate fictions. Instead, they act to legitimize an unjust, unequal order. This is their function and they cannot be otherwise.

Yet there is a loophole in this line of thought that opens up the possibility of a different functioning of courts in general, and international criminal courts in particular, in the *dialectics of struggle*. In this conceptualization, some marginalized or underprivileged individuals benefit from the Rights discourse, while at the same time contributing to the legitimation of a still structurally unjust order. In the nightmare version of this line of thought, any critical engagement with an international criminal court merely stabilizes the unjust order by allowing it to improve its cosmetic appearance.³⁶ In a less deterministic interpretation of this neo-Gramscian avenue, such critical engagement might actually destabilize and adjust the social order. Thus, Marxist historian E. P. Thompson has suggested that in Western capitalist contexts, “the legitimacy of the rule of law provides a significant political weapon for the ‘have-nots’...since it necessarily provides them with the protection of known or knowable rules, limits arbitrary discretion, and forces many valuable legal concession from the powerful.”³⁷

In this reading, the “democratic engagement” of international criminal courts would be instrumental rather than foundational, with the object being social change rather than democratic legitimation. The point here is access for the marginalized, rather than majority consent. There is something to be said for this point of departure in the deeply unequal and undemocratic contexts in which international criminal courts typically operate, and in which, moreover, it is obvious that they can only make minor inroads into the substantive injustice of the situation. More specifically, the emphasis of the courts and tribunals on victims gives space for such a reading. Even if it is true that courts and tribunals instrumentalize and “craft” victims to fit their own concepts of justice,³⁸ the victims may equally use courts and tribunals for their own projects of restoring their self-esteem and their position in society.³⁹

A. Penal Law 1.0: Community Expiation by the Collective Conscience

1. Durkheim

In Emil Durkheim's influential conception, law is an expression of the norms of a "collective conscience," aimed at fostering organic solidarity. This famous collective conscience is "the totality of beliefs and sentiments common to average citizens of the same society."⁴⁰ Durkheim argued that in ancient societies the administration of penal law had a religious character. Penal law, administered through "a definite organ as intermediary" (96) symbolizes solidarity, but also strengthens it: "the institution of this power serves to maintain the common conscience itself"(104). However, Durkheim has very little to say about the "definite organ" itself or how it remains continually in touch with the collective conscience. This is less surprising when one reads his often decontextualized collective conscience as it was intended: the *ideal type* of law *before* society's transition to a modern Western capitalist state, which is characterized by division of labor and contract law. He saw penal law as particularly expressive of primitive, more solidaristic societies, and regressive in modern Western ones.

It is this reading of Durkheim that is the point of departure for Nonet and Selznick, who see law as developing in three phases, with "repressive law" as its first phase.⁴¹ Unlike Durkheim, and rather importantly for this essay, they do problematize the role of the "definite organ," which they see as implementation of the coercive needs of those in power as much as the expression of collective consciousness (see also Von Gierke). In Nonet and Selznick, this phase is characterized both by a close integration of law, morality, and politics (which they like) and by rampant official discretion (which they do not).⁴²

Max Weber's account is somewhat different. While he echoes Durkheim on traditional penal law as related to "magic" and prophesying, he believes that in the majority of cases, there is little distinction between "crimes" and private disputes. In either case, the injured party seeks redress or revenge, although sometimes through the medium of elders, priests, or a full community assembly. This is still a form of mediated self-help. Only in the case of injury against the whole community, such as blasphemy or treachery, would there be some form of collective punishment. For Weber, this form of justice (putatively attributed to the Muslim "Khadi courts") was "substantive irrational," or concerned with substantive justice, but arbitrary due to its connection with temporal authorities.⁴³

2. Anthropological Accounts

Early anthropological accounts nuance Durkheim's idealtypical division between primitive societies characterized by penal law and modern societies in which civil law is much more developed. Yet they resonate with Durkheim's account of early criminal law as both an expression and a necessary solidifier of social cohesion, as well as being interdependent with—but not originating in—the supernatural.⁴⁴ Bronislaw Malinowski, moreover, confirmed Weber's "substantive irrational" verdict both in terms of the unpredictability of the consequences of crime and the inclination of administrators of justice (in the form of sorcerers) to side with "those in power—chiefs, men of rank and wealth."⁴⁵ Adamson Hoebel sided with Durkheim in asserting that even "private

prosecution” depends on societal sanction. He defined Durkheim’s “definite organ” as “an individual or group possessing the socially recognized privilege” to apply physical force, elaborating the forms this can take among “primitive peoples,” ranging from private to public and from democratic (in the Athenian sense of involving all free men) to hereditary. Yet he insisted that there is a general tendency to follow the group’s conviction of what is right.⁴⁶ The same point is also stressed by Ehrlich, who can be read as an early anthropologist of his own society. He famously pointed out that formal laws make up only a tiny fraction of the social rules even in Western societies, and that the real sanction of law most felt and applied is exclusion from social life rather than a court verdict.⁴⁷ In other words, the anthropological classics tended to confirm Durkheim’s argument that in “primitive” societies, there was a close association between criminal law and collectively held values, expressed by whoever happened to be the administrators of justice.

3. Whose Collective Conscience?

Despite the intended historicization of Durkheim’s claim, and some evidence that in Western societies values are in reality only shared at the elite level,⁴⁸ penal law as an expression of common values is still the default position of most mainstream legal sociologists and those legal practitioners who think beyond natural law. According to Roger Cotterrell, for instance, in modern Western societies, “law ultimately reflects and depends on the society’s shared values,” even though tensions may arise due to the slow adjustment of legal norms to social change.⁴⁹

At the level of international criminal courts, two additional problems arise with the “collective conscience.” The first is that it is even harder to imagine such a normative consensus existing in a society where crimes against humanity have recently been or are still being committed than in a relatively stable society.

The second is that, even if we accept that there still is a society that may or may not have such a consensus, international criminal courts, even hybrid ones, are not in it or of it. In order to transpose Durkheim’s indirect democratic legitimation through collective conscience to the global level, we have to believe in a collective conscience of mankind. But such a conscience, invoked in the Universal Declaration of Human Rights, remains an article of faith that cannot be tested or disproved. Durkheim himself is contradictory on this point. On the one hand, he posits that each nation has its own distinctive morality,⁵⁰ but on the other hand, he argues that, “there is in all healthy consciences a very lively sense of respect for human dignity,”⁵¹ which perhaps leaves the possibility open that some societies have unhealthy collective consciences. The concept of minimum norms of a collective conscience of mankind may be considerably easier to justify in relation to crimes against humanity than in relation to the wider human rights agenda,⁵² but the leap to trial proceedings and incarceration does not automatically follow. Even if one accepts the problematic idea that Durkheim’s characterization of penal law in primitive societies could have applications in the contemporary global context, it does not answer the question about how the definite organ, in the form of international criminal courts and their functionaries, is in touch with either global or more specific local common consciences.

One way out of this problem is to take Durkheim's hint that courts do not just reflect a common conscience, but also help to shape it. They become the agent of and substitute for values. According to Cotterrell, courts have "the specific task of coordinating and structuring diverse moral milieux into an overall social unity."⁵³ Through a "carefully managed drama of presentation and examination of evidence, formal procedures, and role playing," they enable a "successful denunciation of a transgressor against social norms."⁵⁴ This would at least theoretically suggest that when there is no firmly established social order, which may often be the case during or after crimes against humanity have taken place, courts could contribute to shaping one. Clearly, however, the existing courts and tribunals have not been unambiguously successful in doing so. In this reading, the task for international criminal courts would be daunting but clear: they would need to get better at using discourses and symbols that resonate with affected societies, which they may then help unify.

B. Penal Law 2.0: Autonomy and Formal Rationality

In his extensive analysis of law in economy and society, Max Weber actually has very little to say about criminal law. His emphasis is much more on contractual law and dispute resolution as the basis for rational exchange. Nonetheless, he gives an unambiguous answer to the question posed by this essay. Indeed, it could be argued that the influence of his mode of thinking on generations of legal professionals, providing an orientation away from the primitive-solidaristic one, has caused the question to arise in the first place. He believed democratic administration to be impossible in all but the smallest groups. In any more complex societal form, either a new class of professionals (*honoratiros*) or a single-headed hierarchy will re-emerge.⁵⁵

Three idealtypes of domination find expression in three forms of legitimation: (1) rational, through bureaucracy; (2) traditional, through patriarchy; and (3) charismatic, through concrete individuals. Modern Western law is, in this account, almost exclusively associated with rational-bureaucratic domination. (Interestingly, Cotterrell places the projection of images of impartiality and objectivity by the legal profession in the charismatic rather than the rational category. Such charismatic projection would indeed appear to play a role in the behavior of certain prosecutors of courts and tribunals.⁵⁶)

In modern Western society, rational domination through the formal law of fixed abstract concepts has emerged as suited to the purpose of the rationality of capitalist society. The content of the rules does not matter; order and predictability are prioritized over any substantive sense of justice. In his definition, law is externally guaranteed by coercion, applied by a staff of people to bring about compliance. The administration of justice is self-justifying, a technical imperative, not a moral search. This view echoes Hegel's characterization of state-administered justice: "(t)hose who administer justice are persons, but their will is the universal will of the law and they intend to import into the punishment nothing except what is implied in the nature of the thing."⁵⁷ While Weber's analysis appears mostly descriptive and sometimes critical, the final paragraph of his *Law in Economy and Society* leaves little doubt of how he would respond to the demands for democratic deliberation at issue in this article: "The rational course of justice and administration is interfered with not only by every form of 'popular justice,' which is little concerned with rational norms and reasons, but also by every type of intensive

influence of the course of administration by ‘public opinion,’ that is, in a mass democracy, that communal activity which is born of irrational feelings and which is normally instigated or guided by party leaders or the press.”⁵⁸

The influence of this view of any outside interference as pernicious to legal deliberation is well-expressed by a U.S. lawyer quoted in Becker: “The moment a decision is controlled or affected by the opinion of others or by any form of external influence or pressure, that moment the judge ceases to exist. One who pronounces a decision arrived at even in part by other minds is not a judge.”⁵⁹ More recently, Aaron Fichtelberg has expressed himself in similar terms with specific reference to international criminal courts: “(t)here are too many technical factors which are only available to the diligent legal or forensic expert—too many facts to weigh and balance in determining the guilt or innocence of the accused...for democracy to be a concern in criminal trials.”⁶⁰

Nonet and Selznick explain the rationale for this profound emphasis on autonomy and technical expertise as a reaction to “the arbitrary decision-making of an earlier era...the stress is on barriers and dividers—to wall off the particularistic influences of kinship or personal influence, to insulate administration from politics, to sustain the integrity of officialdom.”⁶¹

While more attacked than honored in social theory, formal rationality continues to exert an important influence over legal practice. Niklas Luhmann’s theory of autopoiesis has gone a long way to explaining this: he discusses law as a self-referential system that “adopts always its own normative criteria which in themselves owe nothing to its environment.”⁶² Although it can take note of socio-political events, it can only evaluate them in its own terms: legal/illegal, right/wrong. Luhmann sees this ever-developing self-referentiality as the law’s response to complexity.

Autopoiesis offers some intuitive explanatory value for the behavior of courts and tribunals. Certainly the ICTY, the ICTR, and the ICC acted in an extraordinarily autopoietic manner in their early years. But the puzzle of this examination is not so much the initial behavior, but rather the challenges to it, and how far international criminal courts can go in responding to these challenges. The pessimism of autopoiesis does not explain the steps taken by courts and tribunals (operating in hyper-complex circumstances) thus far. It offers no guide as to how far the engagement can or should go.

Weber’s choice of predictability over substantive justice, and his categorical rejection of any form of societal influence on legal professionals, may be hard to swallow for the democratic twenty-first century reader. But his precepts can certainly be considered applicable, if not universally acceptable, to the circumstances faced by international criminal courts. These circumstances are characterized by essential—and very violent—contestation of every form of domination. The crisis of legitimacy is both a cause and a consequence of crimes against humanity. Far from rational legal domination, at least some of these situations (the eastern Democratic Republic of the Congo springs to mind) are characterized by complete lawlessness. Moreover, as Fichtelberg has pointed out in a powerful plea for prioritizing procedural fairness over the democratic legitimation of international criminal justice, massive human rights abuses may be democratic in the minimal sense of enjoying majority support.⁶³ In these circumstances, emphasis on procedure and predictability, even only within the very limited domain covered by international criminal courts, may be as much a contribution to the restoration of these societies as any attempt to do substantive justice. In this reading, international criminal

courts should stick to what they do best: interpreting right and wrong, and crime and punishment, consistently and predictably on their own terms.

C. Penal Law 3.0: Responsive Law

1. *Deliberative Democracy and Criminal Courts*

While Luhmann critically developed Weber's autonomous formal rationality in its pure form, other mainstream theorists have long put it into perspective. For Talcott Parsons, autonomy was "a finely balanced and inevitably precarious condition" that needed to be counterbalanced with recognition of the interdependence of law and society. Bredemeier refined this idea of interdependence with the theory of a series of exchanges between polity, citizenry, and the legal profession, in which the courts give citizens conceptions of justice as an element of their socialization, while citizens give courts "acceptance and use" (i.e., legitimacy).⁶⁴

Nonet and Selznick have gone a step further, describing autonomous legal procedure as a phase that is, or ought to be, passing (in Western democracies, an important qualification!). In the face of demands for more than procedural justice, courts "should help define the public interest and be committed to the achievement of substantive justice."⁶⁵ They should be results oriented and dare to depart from the classic image of justice blind to consequences.⁶⁶ Their idealized responsive institution "*perceives social pressures as sources of knowledge and opportunities for self-correction.*"⁶⁷

Jürgen Habermas appears, at a higher level of abstraction, to follow a similar categorization of law and its relation to politics and morality as Nonet and Selznick's three-phase model. After discussing at length Weber's account of the move from traditional to formal-rational justice, Habermas critiques Luhmann's analysis of the self-perpetuation of autonomy.⁶⁸ On the contrary, "the adaptations that an increasingly complex society demands of a legal system forces the transition to a cognitive style, that is, to decision making which is context sensitive, flexible, and prepared to learn" (255). He makes a distinction, very pertinent to the preoccupation of this essay, between acting on universal interests, which is the law-maker's job, and the "context-sensitive application of norms" by judiciaries, in which the moral imperative is to "take into consideration all relevant aspects of a given situation" (277). The "normative validity claim" of a legal judgment can be "vindicated only through argumentation" (279) that goes beyond legal casuistry.

This communicative need becomes greater the more the legal institution intrudes into the "lifeworld." In a different text, Habermas implies, although more or less in parentheses, that criminal justice falls very much into this category: "regulation of those criminal offences close to morality (e.g., murder, abortion, rape, etc.)...need substantive justification, because they belong to the legitimate orders of the lifeworld itself and, together with the informal norms of conduct, form the background of communicative action."⁶⁹ One may conjecture that this would *a fortiori* be true of crimes against humanity. On the other hand, it must be noted that in his magnum opus *Between Facts and Norms*, Habermas insists on strict adherence to the separation of powers, situates his famous discursive democratic model primarily at the level of law-making, and assigns to the judiciary the task of guaranteeing certainty of law as well as "rational acceptability."⁷⁰

Moving beyond his original adherence to critical legal theory, Roberto Unger goes considerably further. After condemning what he considers to be a “profoundly anti-democratic” fascination with the choices faced by judges, he argues that, “the jurist, no longer the imaginary judge, must become the assistant to the citizens. The citizen rather than the judge must turn into the primary interlocutor of legal analysis.”⁷¹ More concretely, the courts should do this through the “context-oriented practice of analogical reasoning” and a “commitment to seek guidance in the mentalities and vocabularies of the real political world.” They should be “guided by ideals of concern for litigants as real people” and the “goal of advancing the power of a free people to govern themselves” (115). While it is worth recognizing that Unger, like Nonet and Selznick and Habermas, is writing in and of the context of an advanced and stable democracy, his final word on the ideal structural conditions required to fulfill these aspirations are eerily familiar to those who know the emerging literature on courts and tribunals. The judiciary as it is, he writes, can only provide a kind of stop-gap justice “so long as we fail to establish a distinct branch of government...with more democratic accountability and greater investigative, technical, financial, and administrative resources than the traditional judiciary now enjoys” (118).

Pablo De Greiff has applied the deliberative vision to criminal law in particular. What he offers is not so much a democratic theory of punishment as a democratic theory of trials, which can be seen as an expression of deliberative reason-giving that could, in principle, persuade the victims, the public, and even the offender of the version of affairs proposed by the judges, and if applicable, the justness of the punishment in light of the offense.⁷²

2. *Legal Pluralism*

The theorists discussed so far, whether addressing ancient, modern Western, or “primitive” non-Western models of law, nearly all conceive of societies as coherent, bounded social realities, matching the boundaries of the polity. Nowadays, of course, social science is concerned with overturning what is considered an outdated, statist paradigm. Legal pluralism, an orientation in legal anthropology, has long cast doubt on this “emphasis on sovereignty and centralization”⁷³ in relation to the law in post-colonial societies. While Leopold Pospisil’s “patterned mosaic of sub-groups,” each with their own legal system,⁷⁴ could still be read as an adaptation of Durkheim’s bounded societies, legal pluralism shatters the illusion that legal systems have natural boundaries, either within or across societies.⁷⁵ It recognizes that different and often competing legal systems exist side by side, which may *de facto* give people an option of legal forum “shopping,” even if the systems themselves do not recognize each other. First applied to the co-existence of traditional and colonial law, the study of legal pluralism is now equally concerned with the direct intrusion of international law, and even more concretely, international institutions, into interpersonal relations.⁷⁶ In these terms, the existence of international criminal law, which arrogates to itself the right to put on trial local sovereigns, can be considered an extreme manifestation of legal pluralism (notwithstanding the attempts of state officials and legal experts to keep chaos at bay with the mantra of complementarity).

In itself, legal pluralism as a field of study does not provide concrete recommendations for the communicative behavior of international criminal courts. It does, however, make visible certain dynamics that are important for them to consider. It demonstrates not just that there are multiple legal systems in operation, and that these may conflict with each other, but also that each of these systems is dynamic and subject to interpretation and reinvention. It is beginning to show that these processes typically take shape in circumstances of highly unequal power relations and all sorts of vested interests.⁷⁷ Finally, it begins to chart how and when legal pluralism can be empowering or disempowering to its subjects/agents.⁷⁸ Prosecutors and judges in international criminal courts might be able to strengthen the empowering dynamics by orienting themselves not just to the socio-political and cultural environment, but also to the wider legal environment they operate in, without reifying what appear to be the tenets of local tradition.

3. Some Concrete Proposals

By and large, the few contributions connecting deliberative democratic theory to judicial practice have concerned themselves only with domestic courts. Legal pluralism makes important contributions to our understanding of complex, globalized social realities, but tends to shy away from recommendations, especially universalistic ones.

James Bohman, in the first tradition, has made an argument vesting the legitimacy of international criminal courts in membership rights to a universal political community. On this basis, he insists that such courts must be democratically accountable along deliberative lines: “the requirement of freedom from subordination and mutual dependence must be applied to the very institutions that promote the conditions of freedom. This is simply a matter of the sort of reflexivity and political egalitarianism that is instituted in democracy.”⁷⁹ Like the other theorists, however, he offers little practical guidance on how this “simple matter” is to be given shape in the daily practices of the courts. One hint he throws out is the possibility of a jury system (577).

Gaston, Lingle, and Deess have elaborated just such a scheme. They present flexible use of a jury as a powerful antidote to the ICC’s legitimacy deficits, for instance when “the perception of victor’s justice is particularly acute or where the Court’s intervention is hotly contested by populist critics.”⁸⁰ They give a thought-provoking hypothetical example of how this might work in the context of a case adjudicated in the aftermath of ethnic conflict. A jury could be made up half of local members, who represent a mix of relevant ethnic communities, and half of international members. It would decide, by a majority of both halves, not on guilt or innocence but on the sentence (85). As a result, “(t)he final decision on sentencing would be the product not only of rigorous deliberation but also compromise across key social rifts”(86).

Other practices and proposals, made in domestic contexts, might also be applied internationally. Philip Pettit has suggested, in the U.S. context, that general guidelines on sentencing could be set by penal policy boards, which would “include experts in relevant areas of law and criminology, but also community representatives: say representatives of associations like victims’ groups, prisoner rights movements, different ethnic or religious blocks, and so on.”⁸¹ Pettit presents such a board in response to what he sees as an “overdemocratized” U.S. system, where an “outrage dynamic” engenders ever-heavier

sentences, but it might also serve in response to the democratic deficit of criminal justice at the international level.

In a project to describe and further forms of engagement between different legal systems in such a way that they empower indigenous communities, Melissa Williams discusses “experiments in ethical hybridity,” “recognized by both communities as (relatively) just.”⁸² In dealing with criminal cases concerning members of Canada’s First Nations, panels of elders and sentencing circles of stake-holders can be called upon by state-sanctioned judges, who have discretion as to whether to follow their recommendations (473). While many concerned minor-level offenders, some of these schemes dealt with more serious offences, such as incest or child abuse.

Such schemes leave many questions unanswered, and many criticisms may be raised against them. In most contexts, they are unfamiliar institutions, untested in terms of legitimacy effects. Should the people serving on penalty boards, juries, or sentencing circles be ordinary people or members of local elites? Would they be willing to take up such tasks? Might this not put them at risk or under pressure? Even more problematic is the issue of devising procedures for the appointment or election of representatives of such citizen bodies. It can never be unproblematically assumed that community leaders, civil society figures, or victims’ representatives actually represent the views and preferences of wider groups in society, and this is even less the case in the aftermath of crimes against humanity. With every voice that is given official status, other voices might be excluded.

Finally, the schemes discussed all limit democratic influence to the issue of sentencing. Many of the heated controversies surrounding international criminal courts concern not sentencing, but whether the prosecution of particular people—and not others—is in the interest of justice at all. Nonetheless, these designs do begin to translate the need to respond to the democratic deficit of international criminal courts (for those who believe there is such a need) into concrete plans for consideration and adaptation.

VII. Conclusion: But is it Enough?

The legitimacy deficit of international criminal courts is over-determined. The justificatory basis for the administration of criminal justice is weak in stable, prosperous, liberal democracies. The stronger reality of legal pluralism in post-colonial states further weakens it. The idea of values held in common, of which criminal justice could be an expression, is further compromised in societies where mass violence has recently occurred. Finally, even if there were still such a common cultural legacy, international prosecutors and judges could not be expected to know or understand it.

Hence, the analytical purchase of the theories presented above is limited. Nonetheless, they offer a few points of departure for theorizing the relationship between courts and affected populations, and the call for democratic legitimacy. First of all, it is important to note that there is no parallel in either classical or critical legal sociology, or legal anthropology, for the notion that *direct* democratic legitimation, expressed by Branch in deliberative and by Drumbl in franchise terms, is required for the legitimacy of international criminal courts.

Marxist and post-structuralist orientations offer a healthy skepticism about whether international criminal courts can ever be anything other than institutions that supply legitimacy to (global) domination, as opposed to institutions that require and ought to

seek a social basis for legitimacy. Beyond this, and only if they are read not entirely in the spirit in which they were intended, they pinpoint a route through which international criminal courts might (occasionally) destabilize power relations and legitimate the claims of those most marginalized in their own contexts.

Arguably, we may have seen something of this nature in trials dealing with sexual crimes and, more problematically, child soldiers. If there is any prescriptive value in this observation, it would counsel courts to cultivate this function instead of fulfilling it despite themselves, and to seek out and bestow legitimacy on particularly marginalized groups in the form of redress. This would require a great deal of sensitivity on the part of court staff in assessing the balance between potential emancipatory effects and the potential risks that destabilizing the status quo might pose to its would-be beneficiaries.

The Weberian emphasis on autonomy and generality would counsel international criminal courts to stick to their guns and provide post-conflict societies with an unflappable integrity and predictability, which is likely to have been in short supply in the recent past. It may well be the case in practical situations, of course, that this advice would run directly counter to the instrumental aspiration to strengthen marginalized groups, as formulated above. Whether such a formal-rational orientation could, or should, strengthen its potential effect by “explaining itself” depends on how absolute is the insistence on autonomy. In its more extreme, autopoietic form, the legal system is unable to function in any other than self-referential terms. Consequently, outreach would be a waste of time and resources. Yet the increasing emphasis of the existing courts and tribunals on outreach would suggest that they are not content to be purely self-referential.

A return to ideas of a collective conscience, while running dangerously close to unreflexive reliance on natural law, could have advantages if constructed as a problem within the remit of international criminal courts, rather than a predetermined basis for legitimacy. This would entail, first, a recognition that formal rationality is not enough and criminal justice must resonate in terms of moral meaning. Second, it would recognize legal pluralism as a reality and an advantage in terms of the social mission of international criminal courts. But thirdly, it would also recognize that any sense of collective conscience would likely be in disarray after crimes against humanity have been committed, and that the legal pluralism to be found in these circumstances would have a different, more traumatized character than in other socio-political contexts.

Finally, theories of responsive law and communicative theory offer points of departure for international criminal courts to open themselves up. This would entail a recognition that socio-political analysis, dialogue with affected groups and individuals, and application of the logic of consequences are not dangerous distractions from the sacred duty of dispensing justice, but an essential part of the dirty job of trying to do justice. They may open the door to institutional (re)designs that systematically offer carefully circumscribed citizen deliberation in certain stages of adjudication.

None of these suggestions amount to a handy blueprint, or even a practical guide, for the conduct of international criminal courts. This is hardly surprising. A legal sociology of responses to crimes against humanity is, if it exists at all, in its infancy. But the courts and tribunals currently in operation need more work of this kind if they are to survive the challenges against them.

Notes

1. Branch 2007, p. 190.
2. United Nations Security Council 1993, Resolution 827.
3. Unac and Liang 2006.
4. Habermas 1996, p. 448.
5. Orentlicher 2008, p. 22.
6. Branch 2007, pp. 188, 191.
7. Alvarez 1999, pp. 366–367.
8. Peskin 2005, p. 954.
9. Akhavan 2003, p. 716.
10. Peskin 2005, p. 955.
11. Orentlicher 2008, p. 22.
12. Ibid., p. 78.
13. Branch 2007, p. 186.
14. Peskin 2005, p. 955.
15. Orentlicher 2008, p. 88.
16. Branch 2007, p. 194.
17. Ibid., p. 195.
18. Cobban 2006, p. 25.
19. Drumbl 2007, p. 133.
20. Ibid., p. 134.
21. Ibid., p. 135.
22. ICTY website.

23. Glasius 2009b.
24. International Criminal Court Assembly of States Parties (ICC ASP) 2006, p. 3.
25. “Briefing Paper on an Outreach and Public Education Program for the Special Court,” Office of the Attorney General and Ministry of Justice, Special Court Task Force, 2002.
26. Orentlicher 2008, p. 67; Kerr and Lincoln 2008.
27. “Annual Report 2002–2003,” Special Court of Sierra Leone, 2003.
28. “Annual Report 2005–2006,” Special Court of Sierra Leone, 2006.
29. Ibid.
30. Allen 2005, p. 178.
31. ICC ASP, 2006.
32. “Bridging the Gap between the ICTY and Communities in Bosnia and Herzegovina,” Conference Proceedings, Brcko, 8 May 2004. Available online at http://icty.org/x/file/Outreach/Bridging_the_Gap/brcko_en.pdf.
33. Orentlicher 2008, p. 88.
34. ICC ASP.
35. Milovanovic 2003, pp. 21–22.
36. Ibid., pp. 101–102.
37. Thompson 1975, pp. 258–269.
38. Clarke 2009, pp. 105–109.
39. Glasius 2009a.
40. Durkheim 1893/1964, p. 79.
41. Nonet and Selznick 1978, pp. 29–52.
42. Ibid., p. 51.
43. Weber 1926/1954, pp. 49–56.
44. Malinowski 1926/1970; Hoebel 1954.

45. Malinowski 1926/1970, pp. 78–84, 86, 95–99.
46. Hoebel 1954, pp. 22–28, 278–279.
47. Ehrlich 1936/1975.
48. Cotterrell 1992, pp. 103–105.
49. *Ibid.*, p. 84.
50. Durkheim 1893/1964, pp. 396–397,
51. *Ibid.*, p. 400.
52. See, for instance, Walzer 1994 and Bohman 2002,
53. Cotterrell 1992, p. 96.
54. *Ibid.*, pp. 222–225.
55. Weber 1926/1954, p. 334.
56. Cotterrell 1992, p. 229.
57. Hegel 1821/1991, §102.
58. Weber 1926/1954, p. 356.
59. Becker 1970, p. 143.
60. Fichtelberg 2006.
61. Nonet and Selznick 1978, p. 65.
62. Luhmann 1986, pp. 113–114; see also Teubner 1989.
63. Fichtelberg 2006.
64. See Cotterrell 1992, pp. 85–90.
65. Nonet and Selznick 1978, p. 74.
66. *Ibid.*, p. 84.
67. *Ibid.*, p. 77, italics in original.

68. Habermas 1986a.
69. Habermas 1986b, p. 212.
70. Habermas 1996, pp. 170–173.
71. Unger 1996, pp. 107–113.
72. De Greiff 2002, p. 392.
73. Smith 1974, p. 116.
74. Pospisil 1971, p. 125.
75. Moore 1978; Griffith 1986.
76. Benda-Beckmann 1999.
77. Sousa Santos and Rodriguez-Garavito 2005; Oomen 2010.
78. Merry 2006; Oomen 2010.
79. Bohman 2002, p. 586.
80. Gaston, Lingle and Deess 2009, p. 71.
81. Pettit 2002, p. 442.
82. Williams 2002, p. 463.

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