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Glasius, M.

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## Do International Criminal Courts Require Democratic Legitimacy?

### *Abstract*

International criminal courts have in recent years been criticized for being ‘undemocratic’ in their dealings with populations affected by the crimes they are concerned with. They are beginning to formulate responses to these criticisms. This article will first outline the nature of these critiques and the courts’ responses. Then it will take inspiration from classical and recent theories in legal sociology and legal anthropology to assess whether there is a theoretical basis for the demand for democracy. It concludes that there is no viable argument that would support requiring a direct democratic basis for international criminal courts, but there are clear points of departure for insisting that they should pursue wider social aims, for identifying these aims, and for identifying principles that can guide the conduct of relationships with affected populations.

### **1. Introduction**

In the last few years, the literature on international criminal courts<sup>1</sup> has shifted from legal enthusiasm over the exciting new frontiers in legal and institutional development to a more critical debate in which anthropologists, sociologists and political scientists (and many interdisciplinary scholars) also participate. There are three interrelated lines of critique, pursued to a different degree by different authors. The first is a general questioning 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 crimes.<sup>2</sup> 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<sup>3</sup>. The third concerns the lack of consultation of the populations affected by the crimes they prosecute.

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<sup>1</sup> In the remainder of this article, I will refer to ‘international criminal courts’ as denoting international criminal justice institutions in the abstract. I will use ‘the courts and tribunals’ to refer to actually existing institutions: 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), the Special Court for Sierra Leone (SCSL), and the Special Tribunal for Lebanon (STL). I will use ‘crimes against humanity’ as shorthand for war crimes, crimes against humanity and genocide, the typical remit of these institutions.

<sup>2</sup> See for instance M. Findlay and R. Henham, *Beyond Punishment: Achieving International Criminal Justice* (2009); Parmentier and Weitekamp (2011). ‘Dealing with War Crimes in Bosnia: Retributive and Restorative Options in the Eyes of the Population’, in A. Crawford *International and Comparative Criminal Justice and Urban Governance* (2011); K. M. Clarke, *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa* (2009); M. Drumbl, *Atrocity, Punishment, and International Law* (2007); Cobban, ‘Think Again: International Courts’, *Foreign Policy* (2006) 153, at 22-28.

<sup>3</sup> See for instance Apuuli, ‘The ICC Arrest Warrants for the Lord’s Resistance Army Leaders and Peace Prospects for Northern Uganda’, 4 *Journal of International Criminal Law* (2006), 1, 179-187; Flint and de Waal ‘Case Closed: A Prosecutor

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 different policy levels.

The third point of critique however has not received much attention. In this line of critique, the point is made that victims of crimes and wider affected populations have not been consulted and have not had a choice as to whether international criminal courts are their preferred form of justice. In its weaker form, it insists that in order to gain legitimacy, international criminal courts need to be more communicative and attentive to social needs than they have been to date. The stronger form of this line of argument insists that they cannot be legitimate unless they are *democratically accountable*.

This article will consider the claim underlying the third line of critique, that for criminal proceedings to be legitimate in an absolute normative sense, they need to be *legitimated* through some form of societal consent. The next part of the article will take stock of the nature of the criticisms raised against specific courts, and the way they are responding. It will begin by outlining the three forms the 'democratic critique' of international criminal courts takes: a criticism of the lack of information provision by international criminal courts, a more thorough-going demand for 'two way engagement', and the most radical demand, that international criminal courts should only be founded by prior democratic consent. This will be followed by a section discussing the formal legal basis of each of the existing international criminal courts, and the extent to which the form of establishment of each particular court can be considered as democratic. The third section of this part of the article will discuss the manner in which existing courts and tribunals have been responding to 'democracy critiques'.

The third part of the article 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 criminal proceedings and democratic legitimacy of legal institutions? And can these conceptualizations be transferred to the particular case of international tribunals adjudicating very grave crimes?

This part consists of an introduction and four sections. The first section, discussing the conception of criminal justice as an expression of a society's collective conscience, consists of four subsections: on criminal justice in 'primitive societies' as discussed by Durkheim, Weber and Nonet and Selznick; on early anthropological literature dealing with the same subject; on the question whether and how the collective conscience concept can apply to international criminal courts; and on the contribution the recent 'legal pluralism' literature can make in answering this question. The second section deals with Weber's influential conception of justice as necessarily autonomous and formal-rational in nature, and its implications for international criminal courts. The third section deals with a conception of justice developed in Habermas' political theory on the one hand, and Nonet and Selznick's concept of 'responsive law' on the other hand, and applies these parallel and very similar

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Without Borders', 171 *World Affairs* (2009) 4, 23 – 38; Snyder and Vinjamuri, 'Trials and Errors: Principle and Pragmatism in Strategies of International Justice', 28 *International Security* 3, 5-44.

theorizations to international criminal courts. The fourth section discusses the (limited) potential contribution of a very different school of thought, running from Marxism to Foucaultian conceptions of the role of legal procedure, to the research questions.

The fourth part of the article, the conclusion, building on the previous part, will deduce that there is no sound theoretical basis for the demand that international criminal courts should be democratically accountable to populations affected by crimes in order to be legitimate. However, the classical and critical literature does point towards three (modest) contributions that international criminal courts can make to traumatized societies: to help restore a sense of normative order, to help rehabilitate those marginalized in society by crimes against humanity, and to help generate some legal security through procedurally correct and predictable dispensation of justice. Moreover, these theories offer points of departure for conceptualizing the ways in which international criminal courts could develop communicative and cognitive relations with the relevant societies in order to further these aims.

## **2. Is there a deficit?**

### **2.1 The critiques and demands**

The chorus of critiques that are leveled at the courts and tribunals with respect to their engagement with local populations can be grouped into three types of argument, ranging from a minor demand for more transparency to a radical demand for international criminal justice only by prior democratic consent.

The first set of critiques focuses on information-provision. 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’.<sup>4</sup> In relation to the ICC’s Uganda case, Adam Branch complains of ‘what many Acholi 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’.<sup>5</sup> 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’.<sup>6</sup> It would appear that the critics in question take 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 here that such a responsibility is not necessarily taken for granted in the pursuit of ‘normal’ domestic criminal justice.

A second line of critique goes beyond one-way information-provision, insisting on two-way dialogue. Writing about the Yugoslavia and Rwanda tribunals, Victor Peskin makes a distinction between the transparency model of outreach, along

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<sup>4</sup> D. F. Orentlicher, *Shrinking the Space for Denial: The Impact of the ICTY in Serbia* (2008) at 22.

<sup>5</sup> Branch, ‘Uganda’s Civil War and the Politics of ICC Intervention’, 21 *Ethics and International Affairs* (2007) 2, at 188 and 191.

<sup>6</sup> Alvarez, ‘Lessons from the Akayesu Judgment’, 5 *ILSA Journal of International and Comparative Law* (1999) at 366-7.

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 population.<sup>7</sup> 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.<sup>8</sup> Peskin suggests in relation to the Rwanda tribunal 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’.<sup>9</sup> 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’.<sup>10</sup> 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’.<sup>11</sup> 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’.<sup>12</sup> There are clear differences however in how far the proposers of two-way dialogue are willing to take this argument. Peskin unproblematically asserts that dialogue can take place ‘without undermining the Tribunal’s autonomy’.<sup>13</sup> Orentlicher is more cautious, arguing 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’.<sup>14</sup> She does not pronounce on whether, having done the analysis, courts should adapt their decisions in line with the preferences of affected populations. Branch, as will be seen below, clearly prioritises societal demands.

The third line of demand claims not just that international criminal courts should adjust their decision-making in the light of local preferences, but that their very existence ought to be based on prior democratic consent. Referring again to Northern Uganda, Branch argues that ‘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

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<sup>7</sup> Peskin, ‘Courting Rwanda: The Promises and Pitfalls of the ICTR Outreach Programme’, 3 *Journal of International Criminal Justice* (2005) 4, at 954.

<sup>8</sup> Akhavan ‘Review: The International Criminal Court in Context: Mediating the Global and Local in the Age of Accountability’, 97 *American Journal of International Law* (2003) 3, at 716.

<sup>9</sup> Peskin, *supra* note 7, at 955.

<sup>10</sup> Orentlicher, *supra* note 4, at 22.

<sup>11</sup> *Ibid*, at 78.

<sup>12</sup> Branch, *supra* note 5, at 186.

<sup>13</sup> Peskin, *supra* note 7, at 955.

<sup>14</sup> Orentlicher, *supra* note 4, at 88.

and the ICC prosecutor'.<sup>15</sup> 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'.<sup>16</sup> 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.'<sup>17</sup> 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'<sup>18</sup>, and that the Sierra Leone tribunal 'does little to incorporate local manifestations of popular will'.<sup>19</sup> He uses the phrase 'popular disenfranchisement'<sup>20</sup> to describe the position of local populations in relation to all the courts and tribunals.

## **2.2 Establishment of the courts and tribunals: democratic consent?**

The critiques above raise two questions, which will be answered in this section and the next. First, whether the courts and tribunals have come into existence in a democratic manner, and second, whether they function in a democratic manner.

The radical line of critique sketched above, insisting that international criminal courts require some kind of procedure of prior democratic consent, can be considered as indebted to the primary thinker of our age about the relation between law, democratic procedure and political legitimacy, Jürgen Habermas, who has claimed that "democratic procedure for the production of law evidently forms the only postmetaphysical source of legitimacy."<sup>21</sup> While Habermas will be revisited in the next part of this article, it is appropriate at this point to consider to what extent the legal basis for the existing courts and tribunals does indeed meet this standard of law produced through democratic procedure.

The Yugoslavia Tribunal, the first post-Nuremberg court of its kind, was established through a Resolution of the United Nations Security Council.<sup>22</sup> The Security Council stands out in the post-World War II international architecture as a fundamental exception to the principle of state consent, required for the maintenance of international peace and security. Its conception of threats to the peace was

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<sup>15</sup> Branch, *supra* note 5, at 194.

<sup>16</sup> *Ibid*, at 195.

<sup>17</sup> Cobban, *supra* note 2, at 25.

<sup>18</sup> Drumbl, *supra* note 2, at 133.

<sup>19</sup> *Ibid* at 134.

<sup>20</sup> *Ibid* at 135.

<sup>21</sup> J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (1996) at 448.

<sup>22</sup> SC Res. 827, 25 May 1993.

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'. Regardless of its legality, it would be very difficult indeed 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 as, although also based on a Security Council Resolution<sup>23</sup>, 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 Special Tribunal for Lebanon (STL) was also established by the Security Council at the request of the Lebanese prime minister (and son of the main victim whose murder triggered the tribunal's establishment, Rafiq Hariri). However, it was established under the Security Council's Chapter VII mandate, in opposition to the wishes of the Lebanese president, the speaker of the parliament, and a number of parliamentarians.<sup>24</sup>

The International Criminal Court's jurisdiction is treaty-based, and hence comes closer to the Habermasian requirement of being based on democratic procedure.<sup>25</sup> Four of the International Criminal Court's six current situations concern states that have ratified the ICC Statute, and three of the governments actually referred these situations to the ICC, a procedure not foreseen by the Statute. However, even these instances of state consent do not unproblematically reflect *democratic* consent. 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, exclusion of opposition candidates and fraud, and civil liberties are routinely violated. In Kenya, it is indeed the violence associated with the elections itself which 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.<sup>26</sup> The ICC's position in its other two situations, Darfur and Libya, is similar to that of the ICTY: it was referred by the Security

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<sup>23</sup> SC Res 955, 8 November 1994.

<sup>24</sup> Tzanakopoulos, 'Special Tribunal for Lebanon: The First Orders by the Pre-Trial Judge', 13 *American Society of International Law Insight* (2009) 11.

<sup>25</sup> US officials such as John Bolton have argued that the ICC's territorial jurisdiction principle constitutes a democratic deficit: Bolton 'The Risks And Weaknesses Of The International Criminal Court From America's Perspective' 64 *Law and Contemporary Problems* (2001), 167-179. However, a focus on democratic consent *from affected populations* would actually favour the territorial basis for jurisdiction over the nationality of the suspect. The distinction is not relevant to the ICC's current cases, in all of which jurisdiction can be based both on territoriality and nationality.

<sup>26</sup> Author, 2011 elaborates on this point.

Council without consent from the states in question (although a new government in Tripoli may endorse the arrest warrants retrospectively).

The Extraordinary Chambers in the Courts of Cambodia is the result of protracted negotiations between the United Nations and the Cambodian government.<sup>27</sup> But 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. The Special Court for Sierra Leone is perhaps the international tribunal that comes closest to having been established through democratic consent: it was established through an agreement between the United Nations and the government of Sierra Leone, on the explicit request of President Ahmad Tejan Kabbah, after he had won a landslide victory in the first post-civil war elections.<sup>28</sup> 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.

Having established the shaky democratic ground on which the establishment of the courts and tribunals rest, the next section will look more closely at the ways in which the courts and tribunals have responded to the other two demands, for transparency and two-way engagement.

### **2.3 Practices of the courts and tribunals: from information-provision to two-way engagement?**

The chorus of critiques and demands have not left the courts and tribunals 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 court investigations and prosecutions are dealing with. The first of these tribunals, the ICTY, took six years to develop such a strategy or even translate its judgments into local languages. Having recognized how this neglect contributed to negative perceptions, it now defines its outreach mandate as making the Tribunals ‘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’.<sup>29</sup> Similarly, the ICC’s Strategic Plan for Outreach, developed in response to criticism of its lack of outreach<sup>30</sup>, 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

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<sup>27</sup> Unac and Liang, ‘Delivering Justice for the Crimes of Democratic Kampuchea’, in J. Ciorciari, ed. *The Khmer Rouge Tribunal* (2006), 133-154.

<sup>28</sup> Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 16 January 2002.

<sup>29</sup> ‘Outreach’, ICTY website, <http://www.icty.org/sections/Outreach>, last accessed 20 September 2011.

<sup>30</sup> Author, 2009.



put in place mechanisms to ensure that affected communities can understand and follow the Court'.<sup>31</sup> All the courts and tribunals operationalise 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 programmes, and schemes to allow victims, civil society actors, journalists, local officials and legal professionals to visit the courts and tribunals. The outreach documents, as well as some statements and writings by civil society actors who favour the courts and tribunals, tend to assume if not an automatic, at least a strong connection between good information provision 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.'<sup>32</sup> The Sierra Leone court's briefing paper, which marked the first attempt at developing an outreach strategy before investigations had begun, 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.'<sup>33</sup> The outreach team of the Yugoslavia Tribunal, despite continued high levels of hostility to it in the region, actually claims that this effect has already been achieved: 'Access to accurate information has served to dispel myths and prejudices about the Court'.<sup>34</sup>

While the emphasis remains on one-way communication, the courts and tribunals have begun to some extent to embrace the notion of two-way communication. 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 what is intended here, a Voice as recognized by the institution, is different in nature. The ICC and STL have perhaps the most formalized (but also restrictive) Voice for victims in the form of the Victims' Counsel making independent representations in court. The Yugoslavia tribunal has a section on its website titled 'Voice of the Victims',<sup>35</sup> which displays the testimonies of

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<sup>31</sup> International Criminal Court Assembly of States Parties, *Strategic Plan for Outreach of the International Criminal Court*, 29 September 2006, at 3.

<sup>32</sup> *Ibid.* at 3.

<sup>33</sup> Office of the Attorney General and Ministry of Justice, Special Court Task Force, *Briefing Paper on An Outreach and Public Education Program for the Special Court*, 7-18 January 2002.

<sup>34</sup> 'Outreach', ICTY website, *supra* note 29.

<sup>35</sup> 'Voice of the Victims', ICTY website, <http://www.icty.org/sections/Outreach/VoiceoftheVictims>, last accessed 20 September 2011.

a number of victim witnesses to the tribunal – but does not explain why there is this section or what purpose it is supposed to serve. The Sierra Leone court formulated in the early days of its outreach programme 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.<sup>36</sup> The recognition of Voice does not in itself imply that the courts and tribunals also respond to voices from affected communities and particular groups. But it turns out that they have, at least at the rhetorical level, recognized the need to do so. The Sierra Leone Court in one of its annual reports literally specifies the purpose of outreach as to ‘foster two-way communication between Sierra Leoneans and the Special Court’.<sup>37</sup> 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.’<sup>38</sup> 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.’<sup>39</sup> This objective found perhaps its first expression in prosecutor Moreno-Ocampo’s decision in 2005 to meet 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.’<sup>40</sup> 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.’<sup>41</sup> Perhaps based on its Ugandan experience, traditional leaders (more than for instance victims) are singled out as partners in two-way dialogue: ‘Training sessions should provide ... 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’.<sup>42</sup> In more general

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<sup>36</sup> Special Court of Sierra Leone. *First Annual Report of the President of the Special Court for Sierra Leone for the Period 2 December 2002 - 1 December 2003*, at 6.

<sup>37</sup> Special Court of Sierra Leone. *Third Annual Report of the President of the Special Court for Sierra Leone, January 2005 to January 2006*, at 37.

<sup>38</sup> ‘Outreach’, website, International Criminal Court, <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Outreach/>, last accessed 20 September 2011.

<sup>39</sup> Strategic Plan, *supra* note 31, at 3.

<sup>40</sup> T. Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance Army* (2005) at 178.

<sup>41</sup> Strategic Plan, *supra* note 31, at 3.

<sup>42</sup> *Ibid.* at 13.

terms, the ICTY 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’.<sup>43</sup>

However, it remains nebulous in all these accounts what court officials might actually do with this improved understanding. What happens 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? If Court officials do not seriously consider shifting policies in response to community demands, they will continue to meet criticisms like the ones outlined above. But 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 tribunal. 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’.<sup>44</sup> But ICTY President Fausto Pocar explained to a researcher in an interview: ‘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’.<sup>45</sup>

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 they require a direct democratic basis either for their establishment or for their decision-making.

### 3. Theorising the contradiction

The purpose of the rest of this paper is to seek guidance from different conceptions of the role of criminal courts in society in legal sociology and anthropology in determining whether there is a basis for insisting that international criminal courts require popular consent in order to be legitimate, and if so, how they should resolve contradictions between neutrality and attention to popular concerns. 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 stone of the courts and tribunals.

The emphasis is on legal sociology of modern western states, as international criminal courts are decidedly products of late modern western thought, but cut loose from its statist moorings. Yet legal anthropology is also needed, as the courts and tribunals have so far responded 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) decidedly non-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, whereas this piece is less concerned with the general acceptance and legitimacy of law as rules, than with law as institutions, in casu

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<sup>43</sup> ‘Outreach’, ICTY website, *supra* note 29.

<sup>44</sup> *Bridging the Gap between the ICTY and Communities in Bosnia and Herzegovina*, Conference Series, Brcko, 8 May 2004, at 68.

<sup>45</sup> Orentlicher, *supra* note 4, at 88.

criminal courts. Moreover, the classics of legal sociology either speak to ‘legal professionals’ in general, or to ‘judges’ in particular, while the emerging literature on courts and tribunals is exercised by the behavior and decision-making of prosecutors at least as much as judges. Thirdly, 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 paper will be summarising to the point of caricature intricate systems of thought, in order to quickly jump to their potential application to twenty-first century international criminal courts.

Finally, these authors all wrote with domestic laws and courts in mind. International criminal courts are of a very particular nature in at least four ways: they adjudicate crimes of such magnitude that they have shaken society to the core; they are, even in the case of hybrid courts, not altogether part of that society; they are, even if one takes the legacy of Nuremburg and Tokyo into account, a relatively young phenomenon; and the defendants are typically top military or political leaders. All these elements make them very much less natural, and more controversial, than domestic criminal courts. This is why the democracy critique has come up in the first place. Caution is therefore required in applying older bodies of theory to international criminal courts, but it also makes an interrogation of these theories all the more urgent.

### **3.1 Criminal Justice 1.0: community expiation by the collective conscience**

#### *3.1.1 Durkheim*

In 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’.<sup>46</sup> Durkheim argued that in ancient societies the administration of penal law had a religious character. Penal law, administrated through ‘a definite organ as intermediary’,<sup>47</sup> symbolizes solidarity, but also strengthens it: ‘the institution of this power serves to maintain the common conscience itself’.<sup>48</sup> However, Durkheim has very little to say about the ‘definite organ’ itself, and how it remains continually in touch with the collective conscience. This is less surprising when one reads his often decontextualised ‘collective conscience’ as it was intended; as the idealtype of law *before* society’s transition to a modern western capitalist state, characterized by division of labour and contract law. He saw penal law as particularly characteristic of primitive, more solidaristic societies, and regressing in modern western ones.

It is this reading of Durkheim which is the point of departure for Nonet and Selznick, who see law as developing in three phases, with ‘repressive law’ as its first phase.<sup>49</sup> Unlike Durkheim, and rather importantly for this paper, they do problematise the role of the ‘definite organ’, which they see as implementation of the coercive

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<sup>46</sup> E. Durkheim, *The Division of Labour in Society* (1893/1964), at 79.

<sup>47</sup> *Ibid.* at 96.

<sup>48</sup> *Ibid.* at 104.

<sup>49</sup> P. Nonet and P. Selznick (2001). *Law & Society in Transition: Toward Responsive Law* (1978/2001), 29-52.

needs of those in power as much as the expression of collective consciousness. 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).<sup>50</sup>

Weber's account of traditional penal law has a different point of departure, but ends up reaching a similar verdict to Nonet and Selznick regarding its advantages and drawbacks: while he echoes Durkheim on traditional penal law as related to 'magic' and prophesying, he believed that in the majority of cases, there was little distinction between 'crimes' and private disputes. In either case, the injured party sought redress or revenge, although sometimes through the medium of elders, priests or a full community assembly. This was 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 early form of justice (putatively attributed to the Muslim 'Khadi courts') was 'substantive irrational': concerned with substantive justice, but arbitrary due to its connection with temporal authorities.<sup>51</sup>

Durkheim's conception of early penal law as expressing a collective conscience suggests a democratic outcome (judgments 'naturally' expressing the will of the people) without requiring a democratic input to guarantee the outcome. If we could fully believe in this theory, it would be a godsend to international criminal courts. But the comments of later authors that traditional criminal justice might be more likely to express the wishes of those in power than the norms of society as a whole are all too credible, and all too relevant to international criminal courts, to accept this facile solution. However, if we take the 'collective conscience' concept to denote a dynamic, sometimes contentious relation between societal norms and court judgments, it may have a more useful applicability to international criminal courts.

### 3.1.2 Anthropological accounts

Early anthropological accounts nuance Durkheim's idealtypical division between primitive societies characterized by penal law and modern societies where civil law is much more developed. But 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.<sup>52</sup> Malinowski moreover confirmed Weber's 'substantive irrational' verdict both in terms of 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'.<sup>53</sup> Hoebel gives additional substance to Durkheim's 'definite organ', defining it 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, but insisted on a general tendency to follow what is believed

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<sup>50</sup> *Ibid.* at 51.

<sup>51</sup> M. Weber, *Law in Economy and Society* (1926/1954), 49-56.

<sup>52</sup> B. Malinowski, *Bronislaw Crime and Custom in Savage Society* (1926/1970); E.A. Hoebel, *The Law of Primitive Man* (1954).

<sup>53</sup> Malinowski, *supra* note 52, at 78-84, 86, 95-99.

to be the group's conviction of what is right.<sup>54</sup> 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.<sup>55</sup>

In other words, the anthropological classics on crime and punishment 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. Importantly, they have shown that the relation between collective norms and court judgments, if not automatic, has been confirmed in a variety of settings.

### 3.1.3 Whose collective conscience?

Despite the intended historicisation of Durkheim's claim, and some evidence that in western societies, values are in reality only shared at the elite level<sup>56</sup>, penal law as an expression of common values is still the default position of most mainstream legal practitioners who think beyond natural law. According to 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.<sup>57</sup>

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 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 and 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 positing each nation to have its own distinctive morality<sup>58</sup>, but on the other hand arguing that 'there is in all healthy consciences a very lively sense of respect for human dignity'<sup>59</sup> – 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

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<sup>54</sup> Hoebel, *supra* note 52, at 22-28; 278-279.

<sup>55</sup> E. Ehrlich, *Fundamental Principles of the Sociology of Law* (1936/1975).

<sup>56</sup> R. Cotterrell, *The Sociology of Law: An Introduction* (1992), at 103-105.

<sup>57</sup> *Ibid.*, at 84.

<sup>58</sup> Durkheim, *supra* note 46, at 396-7.

<sup>59</sup> *Ibid.* at 400.

the wider human rights agenda<sup>60</sup>, 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 application in a contemporary global context, it does not answer our question on how the 'definite organ' in the form of international criminal courts and their functionaries are in touch with either a global or more specific local common conscience.

One way out this problem is to take Durkheim's hint that courts do not just reflect 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 co-ordinating and structuring diverse moral milieux into an overall social unity'.<sup>61</sup> 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'.<sup>62</sup>

This would suggest that when there is no firmly established social order, which may often be the case during or after crimes against humanity, courts could contribute to shaping one. Clearly however, the existing courts and tribunals have not been unambiguously successful in doing so. On 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.

#### 3.1.4 Legal pluralism

The theorists discussed so far in this article, whether discussing ancient, modern western, or 'primitive' non-western models of law, nearly all conceived of 'societies' as coherent, bounded social realities, matching the boundaries of the polity. Nowadays of course social science is importantly 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'<sup>63</sup> in relation to the law in post-colonial societies. While Pospisil's 'patterned mosaic of sub-groups'<sup>64</sup>, each with their own legal system, 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.<sup>65</sup>

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<sup>60</sup> See for instance M. Walzer, *Thick and Thin: Moral Argument at Home and Abroad* (1994); Bohman, 'Punishment as a Political Obligation: Crimes Against Humanity and the Enforceable Right to Membership', 5 *Buffalo Criminal Law Review* (2002), 2, 551-589.

<sup>61</sup> Cotterrell, *supra* note 56, at 96.

<sup>62</sup> *Ibid.* at 222-225.

<sup>63</sup> M.G. Smith, *Corporations and Society* (1974) at 116.

<sup>64</sup> L. Pospisil, *Anthropology of Law: A Comparative Theory* (1971) at 125.

<sup>65</sup> For seminal treatments see S. Moore, *Law as Process: an Anthropological Approach* (1978); Griffith, 'What is Legal Pluralism?', 24 *Journal of Legal Pluralism and Unofficial Law* (1986) 1, 1-55.

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.<sup>66</sup> In these terms, the existence of international criminal law, which arrogates to itself the right to put on trial local sovereigns, can be considered as an extreme manifestation of legal pluralism (notwithstanding the attempts of 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 guidance as to whether or how international criminal courts should be democratically legitimated. But it does make visible certain dynamics that are relevant to the democracy question. 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 re-invention. It is beginning to show that these processes typically take shape in circumstances of highly unequal power relations and all sorts of vested interests.<sup>67</sup> Finally, it begins to chart how and when legal pluralism can be empowering or disempowering to its subjects/agents.<sup>68</sup> Prosecutors and judges of international criminal courts might be able to strengthen the empowering dynamics pointed at in the discussion above by orienting themselves not just as to the socio-political and cultural environment, but also the wider legal environment they operate in, without reifying what appear to be the tenets of local tradition.

### **3.2 Criminal justice 2.0: autonomy and formal rationality**

In his extensive analysis of law in economy and society, Max Weber is relatively silent about criminal law. Nonetheless, his work gives an unambiguous answer to the question posed by this paper. 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 single-headed hierarchy would re-emerge.<sup>69</sup>

Three idealtypes of domination find expression in three forms of legitimation: rational, through bureaucracy, traditional, through patriarchy, and charismatic, through concrete individuals. Modern western law is, in this account, almost

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<sup>66</sup> See for instance Von Benda Beckmann, 'Globalisation and Legal Pluralism', 4 *Int'l L.F. D. Int'l* 19 (2002) 19-25; S. Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (2006).

<sup>67</sup> B. de Sousa Santos and C.A. Rodriguez-Garavito, *Law and Globalization from Below: Toward a Cosmopolitan Legality* (2005); B. Oomen, *Chiefs in South Africa: Law, Power & Culture in the Post-Apartheid Era* (2005).

<sup>68</sup> See Engle Merry, *supra* note 66; Van Cott, 'A Political Analysis of Legal Pluralism in Bolivia and Colombia', 32 *Journal of Latin American Studies*, 1, (2000), 207-234.

<sup>69</sup> Weber, *supra* note 51, at 334.



exclusively associated with rational-bureaucratic domination (but interestingly, Cotterrell<sup>70</sup> 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 behaviour of certain prosecutors of courts and tribunals).

In modern western society, rational domination through the formal law of fixed abstract concepts has emerged as suited to the purpose rationality of capitalist society. The content of the rules does not matter; order and predictability are prioritized over any substantive sense of justice. 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'.<sup>71</sup> 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 demand for democratic legitimacy at issue in this paper: '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'.<sup>72</sup>

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'.<sup>73</sup> More recently, 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'.<sup>74</sup>

Nonet and Selznick explain the rationale for this extreme 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

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<sup>70</sup> Cotterrell, *supra* note 56, at 229.

<sup>71</sup> G. W.H. Hegel, *Elements of the Philosophy of Right* (1821/1991), §102.

<sup>72</sup> Weber, *supra* note 51, at 356.

<sup>73</sup> Th. Becker, *Comparative Judicial Politics: The Political Functionings of Courts* (1970), at 143.

<sup>74</sup> Fichtelberg, 'Democratic Legitimacy and the International Criminal Court: a Liberal Defence', 4 *Journal of International Criminal Justice* (2006) 4, 778.

influences of kinship or personal influence, to insulate administration from politics, to sustain the integrity of officialdom'.<sup>75</sup>

While more attacked than honoured in social theory, formal rationality continues to exert important influence over legal practice. Luhmann's theory of autopoiesis has gone a long way to explaining this: he discussed law as a self-referential system that 'adopts always its own normative criteria which in themselves owe nothing to its environment'.<sup>76</sup> 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 behaviour 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 paper is not so much this initial behaviour, 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) to engage with their social environment 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. Crisis of legitimacy is both a cause and consequence of crimes against humanity. Far from rational legal domination, at least some of these situations (the Eastern DRC springs to mind) are characterized by complete lawlessness. Moreover, as Fichtelberg has pointed out in a powerful plea for prioritizing procedural fairness over democratic legitimation of international criminal justice, even massive human rights violations may sometimes be democratically legitimised in the minimal sense of enjoying majority support.<sup>77</sup> 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. On this reading, international criminal courts should stick to what they do best: interpreting right and wrong, crime and punishment consistently and predictably on their own terms.

### **3.3 Criminal justice 3.0: cognitive and communicative institutions**

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

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<sup>75</sup> Nonet and Selznick, *supra* note 49, at 65.

<sup>76</sup> Luhmann, 'The Self-Reproduction of the Law and its Limits', in G. Teubner, ed. *Dilemmas of Law in the Welfare State* (1986), at 113-114; See also Teubner, 'How the Law Thinks: Toward a Constructivist Epistemology of Law', *23 Law and Society Review* (1989) 5, 727-758.

<sup>77</sup> Fichtelberg, *supra* note 74.

needed to counterbalanced with a recognition of interdependence of law and society. Bredemeier refined this idea of interdependence with the theory of a series of exchanges between polity, citizenry and legal profession, in which the courts give citizens conceptions of justice as an element of their socialisation, whilst citizens give courts ‘acceptance and use’, i.e. legitimacy.<sup>78</sup>

Nonet and Selznick have gone a step further, describing autonomous legal procedure as a phase which (in western democracies, an important qualification!) is, or ought to be, passing. 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’.<sup>79</sup> They should be results-oriented, and dare to depart from the classic image of justice blind to consequence.<sup>80</sup> Their idealized responsive institution ‘perceives social pressures as sources of knowledge and opportunities for self-correction’.<sup>81</sup>

Jurgen Habermas appears, at a higher level of abstraction, to follow a similar categorization of law and its relation to politics and morality to Nonet and Selznick’s three-phase model. After discussing at length Weber’s account of the move from traditional to formal-rational justice, he critiques Luhmann’s analysis of the self-perpetuation of autonomy. 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’.<sup>82</sup> He makes a distinction, very pertinent to the preoccupation of this paper, 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’.<sup>83</sup> The ‘normative validity claim’ of a legal judgment can be ‘vindicated only through argumentation’ that goes beyond legal casuistry.<sup>84</sup>

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

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<sup>78</sup> See Cotterrell, *supra* note 56, at 85-90.

<sup>79</sup> Nonet and Selznick, *supra* note 49, at 74.

<sup>80</sup> *Ibid*, 84.

<sup>81</sup> *Ibid*, 77, italics in original.

<sup>82</sup> Habermas, ‘Law and Morality: The Tanner Lectures on Human Values’, in S. M. McMurrin (ed.) *The Tanner Lectures on Human Values* (1988), at 255.

<sup>83</sup> *Ibid*. at 277.

<sup>84</sup> *Ibid*. at 279.

communicative action'.<sup>85</sup> 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'.<sup>86</sup>

Roberto Unger, moving beyond his original adherence to critical legal theory, 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'.<sup>87</sup> More concretely, they should do this through 'context-oriented practice of analogical reasoning' and a ... 'commitment to seek guidance in the mentalities and vocabularies of the real political world'.<sup>88</sup> They should be 'guided by the ideal of concern for litigants as real people' and a 'goal of advancing the power of a free people to govern themselves'.<sup>89</sup>

Pablo De Greiff, finally, has applied the deliberative tradition to criminal trials in particular: they can be seen as an expression of deliberative reason-giving, that could in principle persuade 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 offence.<sup>90</sup>

Hence, the parallel thinking of deliberative democracy theorists and responsive law theorists has offered a powerful corrective to the autonomous rationalist tradition. It would ascribe to international criminal courts the need and the capacity not just to explain themselves to, but also to learn from the wider public they are supposed to serve.

### **3.4 Marxism to governmentality: domination with a loophole**

We now turn to another school of thought quite separate from the trajectory from community justice to formal-rational justice to responsive justice charted above, which might seem at first not to hold much promise for conceptualizing the relation between international criminal law and popular consent. This is the 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. In Marx, law in the

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<sup>85</sup> Habermas, 'Law as Medium and Law as Institution' in G. Teubner, *Dilemmas of Law in the Welfare State* (1986) at 212.

<sup>86</sup> Habermas, *supra* note 21, at 170-173.

<sup>87</sup> R. M. Unger, *What Should Legal Analysis Become?* (1996), at 107-113.

<sup>88</sup> *Ibid.* at 115.

<sup>89</sup> *Ibid.*

<sup>90</sup> De Greiff, 'Deliberative Democracy and Punishment', *5 Buffalo Criminal Law Review* (2002) 2, at 392.

capitalist mode of production is a straightforward instrument to keep the working classes in place. In more subtle representations such as structural Marxism<sup>91</sup>, repressive formalism<sup>92</sup> and Foucaultian analysis<sup>93</sup>, the legal order can be relatively autonomous from particular capitalist forces. In governmentality approaches there is not even necessarily a capitalist driver behind the pervasive control mechanisms of the power/knowledge complex. But the emphasis on formal equality still obscures inequality and produces consent.<sup>94</sup> By and large, the dilemma posed in this paper is a non-question for these schools of thought. Courts of law, and by extension also international criminal courts, are not to be conceptualized as having democratic legitimacy, but their independence from state interests and impartiality in decision-making are equally elaborate fictions. Instead they are legitimators of 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 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 rights discourse, whilst 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 international criminal courts just stabilizes the unjust order by allowing it to improve its cosmetic appearance.<sup>95</sup> But 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 concessions from the powerful’.<sup>96</sup>

On 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, in which it is moreover 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 instrumentalise and ‘craft’ victims to fit their own

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<sup>91</sup> E.B. Pashukanis, *Law and Marxism: A General Theory* (1977).

<sup>92</sup> B. Edelman, *Ownership of the Image: Elements for a Marxist Theory of Law* (1979)

<sup>93</sup> Pratt, ‘Towards the Decivilizing of Punishment’, 7 *Social and Legal Studies* (1998), 487-515.

<sup>94</sup> See D. Milovanovic, *An Introduction to the Sociology of Law* (2003) at 21-22.

<sup>95</sup> *Ibid* at 101-102.

<sup>96</sup> E.P. Thompson, *Whigs and Hunters: The Origin of Black Art* (1975) at 258-9.

concepts of justice<sup>97</sup>, victims may equally use courts and tribunals for their own projects of restoring their self-esteem and their position in society.<sup>98</sup>

#### 4 Conclusion

One thing becomes abundantly clear from a survey of the gamut of theories on the basis for and functions of criminal justice: none suggests that the organization of punishment of crimes in a society does or should have democratic foundations in a direct, representative sense. 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 consultative and by Drumbl even in franchise terms, is required for the legitimacy of international criminal courts. Even in the most radical critiques of punitive justice systems, no argument has been made, and I would suggest that no logical argument can be made, that a popular vote is the proper way to take decisions on whether a criminal justice institution should have jurisdiction over a particular population, who should be its judges, which suspects ought to be tried, whether they should be found guilty or innocent, or how they should be punished. The view that populations affected by the decisions of international criminal courts are 'disenfranchised' is theoretical as well as historical nonsense. A weaker view could still be put forward, on the basis of Durkheim and the classical anthropologists, that penal law, and court decisions in particular, should express the norms of a collective conscience of a society. This would pose problems for international criminal courts, which stand outside the societies affected by their adjudication.

However, the expression of collective conscience theory, never intended to apply beyond 'primitive societies', has had little empirical confirmation in application to modern western societies. 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. And finally, recent anthropological work on legal pluralism in contemporary non-western societies calls into question the very notion of a unified society whose conscience is expressed in a single legal order.

So, international criminal courts cannot and should not be asked to be democratically accountable in the strong sense that any aspect of their functioning should be subject to a vote by affected populations. But there are other guiding principles to be found within the different traditions reviewed here for conceptualizing international criminal justice institutions as having a relation with, and responsibilities towards, communities affected by their legal functioning.

From an eclectic synthesis of the legal sociology, anthropology and political theory, I derive three substantive aims to be pursued by international criminal courts in order to be legitimate in their dealings with populations affected by their legal interventions, as well as two principles to guide their conduct in this respect. This will be followed by a brief sketch of how these principles could be translated into concrete policies.

First, the connection between criminal justice and a collective conscience should be interpreted dynamically. International criminal courts should not be rejected on the basis that they are not fit to express a society's fixed normative system, a fixity that is generally unproven and particularly implausible in situations where crimes

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<sup>97</sup> Clarke, *supra* note 2, at 105-109.

<sup>98</sup> Author, 2009.

against humanities have just taken place. Instead, international criminal courts could and should play a (modest) role in the reshaping of a society's evolving, always contested, and temporarily traumatized sense of its normative order.

Second, the will to heal societies and emancipate the marginalized should be tempered by a Weberian recognition that formal justice is if not a sufficient, still a necessary condition for substantive justice. International criminal courts are in a position to provide post-conflict societies with an image of unflappable integrity, and create legal security through predictability, which is likely to have been in short supply in the recent past.

Third, based on a Marxist interpretation of law in the tradition of E.P. Thompson, international criminal courts might (occasionally) take on the function of destabilising power relations and legitimate the claims of those most marginalized in their own context. Arguably, we have seen some of this already in international criminal trials dealing with sexual crimes and, more problematically, child soldiers. A radical orientation would counsel courts to cultivate this function, seeking out and bestowing 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.

These are daunting demands. Two converging sets of literature help conceptualize *how* courts can make these contributions. The literature on responsive law and that on deliberative democracy help us conceptualize a court's ideal relation to the demos as not democratic in the classic sense, but *communicative* and *cognitive* instead. In other words, international criminal courts should expand on the small strides made in explaining themselves, but also open themselves up to social learning. Below I will offer some tentative ideas about how the communicative and cognitive mandates could be translated into concrete policies of international criminal courts.

A communicative relation would entail a) accessibility, b) self-justification and c) encouragement of debate. A communicative court should give affected populations access to the officials of the court: through written communication, open telephone lines, interactive radio programmes or town hall or village tree meetings. Officials should come to consider availability and responsiveness to the public at particular times as a core part of their job description. The outreach programmes of the existing courts and tribunals are already oriented in this direction, but it tends to be considered as a derivative activity carried out by dedicated personnel rather than a core task for judges and prosecutors.

A communicative court would justify decisions by the court and its officials. Naturally, judgments are all about reason-giving, but officials of a communicative court should also be prepared to give reasons for not opening a particular investigation or not prosecuting a particular person, and should give reasons in language and through media accessible to the population, not just to their peers. Examples of existing practices are the ICC prosecutor's reasoned decisions not to open investigations in Iraq or Venezuela, or the ICTY's prosecutor's defence of plea bargaining. In both these cases however, the communication appears to have been directed towards global more than specifically affected local audiences.

Finally, a communicative court should foster debate, about past crimes as well as about appropriate forms of justice. Research has shown that, while its trial proceedings are painfully slow, the International Criminal Court has in various situations had the unintended effect of opening debates on justice in local civil society

which might otherwise have remained closed.<sup>99</sup> Without taking controversial positions itself, a communicative court should welcome such debates as part of its societal mandate, for instance by maintaining relations with journalists and civil society groups, including critical ones.

A cognitive court should a) put in place internal learning mechanisms and b) be open to considering institutional (re-) designs that systematically offer carefully circumscribed citizen deliberation in certain stages of adjudication. Institutional learning mechanisms would ensure that the results of planned and unplanned encounters with concerns of the public are evaluated and fed back into future decision-making by the court's officials. Institutionalisation of societal voices could entail the use of a penal board including victims' groups, prisoner rights movements, different ethnic or religious blocks to set guidelines on sentencing<sup>100</sup> or the use of a jury or sentencing circle to give a binding or advisory opinion on sentencing in a particular case.<sup>101</sup> Such schemes should of course be considered with great caution, as with every 'voice' that is given official status, other voices may be excluded. But a cognitive court would not reject out of hand the policy potential of carefully deliberated and culturally sensitive outcomes from such bodies.

I have shown that while there is no argument to be derived from the legacy of legal sociology and anthropology that supports a direct democratic basis for international criminal courts, there are clear points of departure for insisting that they should pursue wider social aims, for identifying these aims, and for identifying principles that can guide the conduct of relationships with affected populations. International criminal courts should contribute to reshaping a society's sense of normative order, to providing redress for individuals and groups marginalized by the crimes in question, and should project integrity as well as predictability to the societies at large. Their relation with these societies should be communicative and cognitive, entailing accessibility, self-justification, encouragement of debate, internal mechanisms to consolidate social learning, and openness to institutional experimentation with deliberative designs.

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<sup>99</sup> Author, 2009.

<sup>100</sup> See Pettit, 'Is Criminal Justice Politically Feasible?' 5 *Buffalo Criminal Law Review* (2002) 2, 427-450 for such a proposal in a domestic context.

<sup>101</sup> See Bohman, *supra* note 60 and more concretely Gastil, Lingle, and Deess, 'Deliberation and Global Criminal Justice: Juries in the International Criminal Court', 24 *Ethics & International Affairs* (2010), 1, 69-90. Also relevant is Williams, 'Criminal Justice, Democratic Fairness, and Cultural Pluralism: The Case of Aboriginal Peoples in Canada', 5 *Buffalo Criminal Law Review* (2002) 2, 451-495.