In Defense of Hybridity: Towards a Representational Theory of International Criminal Justice

Frederic Megret
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Frédéric Mégret†

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Introduction

It is a testimony to how much international criminal justice has become an established feature of the international system that we have now reached a stage where the issue is typically no longer whether persons suspected of international crimes should be judged, but the finer points of how they should be judged. This points to a thorough “normalization” of international criminal justice, a far cry from the discipline’s early epic days where the case for the very idea of criminal repression had to be made incessantly.

One question that is bound to arise increasingly as part of this process

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of normalization is whether "international criminals" should be judged by domestic or international courts. This is an issue that seems saturated with not only complex policy challenges but also barely-hidden ideological implications. Sovereignty is obviously a pressing concern, and there will be a desire, even by those broadly committed to the fight against impunity, to ensure that it is not brushed aside lightly. At the same time, international criminal justice is also the arena where some of the more utopian aspirations of international lawyers play out, and one where there is a significant clamour for resorting to international institutions as such, if only to give credibility to the idea that there is an "actual" international community backing criminal sanctions.

This is not, however, an issue that has attracted considerable or systematic theoretical attention. International lawyers, of course, have not missed the strictly legal part of that problematique. Particularly, once international criminal tribunals exist, the problem is one of jurisdiction or receivability which is governed by precise legal rules. For example, the rules of "primacy" and "complementarity" seek to allocate cases between international criminal tribunals and domestic courts. When cases will be brought to the International Criminal Court (ICC), the issue of whether they should be judged by that court or by national jurisdictions will no longer be one of general policy, but one of the application of a complex receivability mechanism.

Much of the issue of which tribunals should judge persons suspected of international crimes, however, is not strictly legal. Aside from the legal regime of case allocation in any given jurisdictional regime, the prosecutor still has to make decisions about who to prosecute. These decisions have a strong or, indeed, even stronger bearing on who gets prosecuted by what tribunal than the purely legal part of that regime. In a regime of primacy, that decision will be final, and in a regime of complementarity, it will only be a first step towards determining the issue. In both cases, however, it is a decision that predates the application of the legal rule of allocation. Going further back in time and given that we have an international criminal tribunal, we also need a determination that primacy or complementarity or any other regime is the most appropriate one in the first place. This is not a legal determination per se, and generally one that is left to political negotiations. Finally, for the problem of choice between international criminal tribunals and domestic courts to arise at all, we need the decision to have been made that an international criminal tribunal should exist in a given context (presumably some domestic courts are always available), a decision which again is a major decision of principle or politics, rather than a legal one.

1. I will use this as shorthand for "persons suspected of crimes under international law." By "international criminals," I do not mean to imply that these individuals' crimes are of an interstate nature, or that they should particularly be judged by international criminal tribunals, or, obviously, that they are necessarily guilty of the crimes they are accused of.
Although not absent from the literature, these issues have not been treated in much scholarly depth. There are, of course, many historical explanations of why international criminal tribunals, or a certain regime of allocation, have been chosen in a certain case. Indeed, most of the time it seems that the decisions were largely ad hoc and political, depending on Great Power convergence, the necessities of the time, or various other non-principled circumstances. As a result, the scholarship is overwhelmingly descriptive in scope and in particular fails to link up with scholarship of a more normative nature on the fundamental nature of international criminal justice. All in all, there has not been any significant theoretical attention devoted to the fundamental reasons why one would want to have an individual tried by international criminal tribunals rather than domestic courts.

In this paper I want to try to remedy this flaw by suggesting a “representational theory,” a critical and normative theory of what tribunals international criminals should be tried by. The theory is critical in that it seeks to provide a tool or standpoint whereby certain choices of the international community can be criticized. It is normative in that it is only interested in developing a “just” theory of which tribunals should try international criminals, in a tradition of ethical thinking about the law. I am not interested, therefore, in whether the theory is realistic or would provide a prescriptive potion that might stand a chance of being absorbed by the international community. Nor am I interested in whether the theory adequately describes how the international community has actually ever made such decisions. I am well aware that many decisions about who should judge whom have depended on things as trivial as who caught whom, who occupied whom, or who could be bothered to organize what. I do see the theory as being hermeneutic, however, in that it seeks to tease out what I believe is at least one implicit and somewhat “enlightened” understanding that the international community has about what it does when it chooses who should judge international criminals (even though it may not be aware of it).

In its simplest form, the “representational” theory asserts that persons tried for international crimes should be tried by tribunals that adequately “represent” the nature of the crimes at stake. In other words, there should be as much correspondence as possible between the nature of crimes and the nature of institutions judging them. The representational theory of international criminal justice, in other words, is as much a call to think about international criminal justice as it is a call to think about the nature of international crimes.

Although as a matter of generality this might seem the most obvious thing to say, it is of course precisely not the normative ground on which decisions about what types of tribunals should judge whom have been made. In order to prove that the “representational theory” makes more sense of our intuitions about “good” international criminal justice, I will begin by showing what the actual principles used by the international community have been and what crucial dimension is lost by resorting to these.
In Part I, I briefly show how the international community at times has operated under the belief that international tribunals should be the proper venue for trials of international criminals. In Part II, I show how the idea that domestic courts should be the preferred solution for international trials, except when domestic courts are unavailable (complementarity), has since solidified into the international consensus. I also try to show, however, what the risks are of overinvesting in domestic trials, even when these might be entirely in good faith and respect due process. In Part III, I seek to construe the problem of what tribunals should judge what cases as a fundamental problem of “ownership,” and as a problem of how given crimes relate to a given society. In Part IV, I illustrate the proper way to construe international criminal trials as giving an adequate symbolic “representation” of those being affected by the crimes if “ownership” and giving each “owner” its due are the key concern of international criminal justice. In Part V, I argue that neither primacy nor complementarity allow us to do this because they present trials by domestic or international courts as incommensurable alternatives. Instead, I propose a “strong” normative defense of hybrid tribunals, not only as a symptom of tribunal fatigue and as a second best solution, but as a radically different approach to the role of international criminal justice that makes most sense of the “representational” function of trials. Finally, in Part VI, I seek to apply these theoretical insights by looking at how the trials of Saddam Hussein and Slobodan Milošević, the focus of this symposium, might be perceived.

I. Trials by International Tribunals and Misplaced Universalism

The minority position these days is the idea that international criminals, at least the major ones, should really be first and foremost tried by international criminal tribunals, even if domestic courts are working. This vision of international criminal justice is evidenced in all four ad hoc international criminal tribunals: the Nuremberg tribunal, the Tokyo tribunal, the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).

There are several solid arguments in favor of recourse to international criminal tribunals. One of them is that by virtue of their externality, international trials create an objective distance between judges and judged, which makes it possible for them to render more authoritative judgments. Ruti Teitel, for example, argues that “[t]he transitional normative message is most clearly expressed through the international legal order, as its strengths are a normative machinery with the capacity to comprehend extraordinary political violence deployed outside the ordinary legal order.” Several of the goals that international criminal justice seeks to advance may stand a better chance of being achieved if pursued by international criminal tribunals. International trials have a broader reach. They impress on more people the fact that the crimes committed were indeed atrocious and are therefore likely, all other things being equal, to have a

significant global effect.\textsuperscript{3}

The problem is that a systematic resort to international criminal tribunals is unrealistic. It is unrealistic partly because the international community cannot take on all of the world's international crimes, and because there is a simple logistical problem at stake which makes some choice unavoidable. The deeper problem with systematic resort to international trials, however, is that it clashes head on with the idea of sovereignty. This is a practical problem since any international project that fails to take into account the crucial dimension of sovereignty is unlikely to achieve much. But it is also, to the extent that sovereignty is about more than sheer power and embodies certain normative commitments itself, a normative problem. Indeed, it is for this reason principally that the idea of primacy was rejected in the Rome Conference. States decided that they were simply not ready to accept in the ordinary circumstances of the international system what they had been willing to accept in situations of occupation (Nuremberg, Tokyo) or in situations of Security Council intervention (ICTY, ICTR). Moreover, linked to a defence of sovereignty is a critique of the "international" as at once remote, inefficient and costly. On the whole, therefore, systematic resort to international criminal tribunals can be portrayed as simultaneously unrealistic, normatively unsound, and pragmatically counterintuitive.

But apart from the strict issue of the absence of sovereign consent,\textsuperscript{4} there is a deeper problem with systematic resort to international criminal tribunals than their rootedness in a given societal context, and it is the way the tribunals have placed excessive emphasis on the internationality of the crimes committed. What if crimes have been committed almost entirely within the bounds of one society? Is it legitimate for the international community to claim a case for itself regardless of local demands for transitional justice? Even if the crimes at stake have an international or transnational context, it is likely that the majority of the victims will be located within one society. Is there not a risk that an international trial will partly ignore this "majority interest" that a certain society has in an episode of historical and often traumatic suffering?

Most international crimes, despite international variables, also have broadly domestic roots and can only be understood by reference to political projects that took form within a given polity. It is unlikely that international trials will, all other things being equal, be as effective at

\textsuperscript{3} Note that this argument merely involves accepting that international criminal trials are likely to have a marginally bigger deterrent effect than domestic trials, rather than a significant deterrent effect.

\textsuperscript{4} In theory and albeit indirectly, there was always consent by the successor states of the former Yugoslavia and Rwanda to the creation and operation of the corresponding ad hoc international criminal tribunals in the sense that these states, as members of the United Nations (U.N.), had always agreed "in advance" to comply with whatever compulsory decisions the Security Council might take. What I mean is an "erosion" rather than a "violation" of these states' sovereignty in the sense that, notwithstanding that formal consent, the operation of the international criminal tribunals is necessarily affecting the way these states' sovereignty is seen.
comprehending the complex domestic and social causes that led to the crimes and at giving an account of them.

In light of this, international trials tend to create too great a distance between the place where the crime was committed and the place where it is judged. This distance is partly symbolic. International trials uproot the crime from the place where it was committed. It is also a "legal distance" in that the crimes will be judged largely according to international norms which, in their abstractness, may have little connection with local legal reality. The impact on transitional justice and the ability of the international community to provide meaningful avenues for healing and redress will be diminished.

The critique of the excessive universalism of international criminal tribunals is one that is well established by now, is well taken, and in fact has almost come to represent the discipline's mainstream to the point of risking being overdone. Rather than hammer this point, I want to see what is lost by embracing the opposite view, namely that domestic trials should really always be the obvious, a priori route for trials of international criminals. In other words, although I retain much of what might be called the "communitarian" critique of international criminal justice, I also want to engage in the more delicate exercise of a defence of what I would describe as international criminal trials' necessary cosmopolitanism.

II. Trials by Domestic Courts and the Risk of Discarding Universalism

For many of the sound reasons outlined above, the international community has gradually moved towards asserting a strong bias in favor of domestic prosecutions. The concept here is that domestic trials are a priori always to be favored, and that trials should be international only to the extent that domestic courts have been shown to fail quite significantly. This is what one might refer to as the "idea of complementarity." It is an idea which goes far beyond the ICC's receivability rule and can be seen more generally as the prioritization of domestic prosecutions, whether in the context of existing tribunals or in efforts at devising entirely new judicial solutions.

This is a welcome move generally and a sound reaction to what was clearly an excessive push in the other direction. It is also a move for which international lawyers can at least not be suspected of thrusting their exper-

5. Jose E. Alvarez's brilliant Crimes of States/Crimes of Hate: Lessons from Rwanda, is in my opinion probably the definitive—certainly the most rhetorically potent—statement of this view in the 1990s. 24 YALE J. INT'L L. 365 (1999).
tise on a type of problem that at times only warrants a marginal intervention from them. Complementarity also makes more sense of sovereignty and, even though one may not want it to be an end in itself, it is still, all other things being equal, a positive development. Domestic trials will be more functional, faster and cheaper, operating as they do on the basis of existing courts and law. Most importantly, it is likely that domestic trials will have a greater transitional impact and shape the law closer to those who then have to live with it.

Notwithstanding, the rush to an exclusive emphasis on domestic trials except in the case of the failure of domestic courts also seems to be in danger of being taken too far. The problem with complementarity is not with all of the above very clear advantages, but with what the systematic bias in favor of domestic courts may obscure in some cases. Indeed, the problem is when this very pragmatic discourse, from a concession to the politically achievable and a recognition of the priority claims of populations affected by horrendous crimes, becomes reified into simply an unsophisticated apology for sovereignty. It is this reification of sovereignty that, I argue, can ultimately be very much at odds with the fundamental spirit of international criminal justice.

Of course, complementarity will create opportunities for a court like the ICC to exercise jurisdiction on the basis of the dysfunction of domestic courts, so that complementarity certainly does not mean the abandonment of all international trials. But the problem is that it is not clear that these are the only occasions when international tribunals should really aspire to exercise jurisdiction. It may well be that complementarity will often prevent international criminal tribunals like the ICC from exercising jurisdiction in cases where arguably an international trial would make sense, notwithstanding the existence of functional domestic courts. Indeed, complementarity might even force tribunals to exercise jurisdiction in cases where they do not and should not want to do so. Complementarity may mean too much of a good thing.

First, there is the minor problem that whether domestic courts will be a better avenue for prosecutions of international crimes really depends on which domestic courts we are talking about. The discourse of complementarity does not distinguish between different states' courts. In particular, the Rome Statute seems to assume that trials based on universal jurisdiction, by virtue of their being domestic, are always preferable to international trials.

8. For the related critique of international criminal justice being more generally obsessed with the international in ways that may be sometimes fundamentally self-serving sociologically, see my attempt at a Bourdieusian analysis of the “ICC ideology” in the conclusion of Frédéric Mégret, Three Dangers for the International Criminal Court: A Critical Look at a Consensual Project. Finnish Y.B. Int’l L. 191 (2001).

9. It is worth noting, however, that the logic of complementarity, especially according to many of its advocates, is that ideally the ICC will never have any cases to judge because complementarity and the threat of forfeiture of jurisdiction will have strongly incited states to carry out prosecutions domestically over which they have control.
It is far from clear, however, that this should be the case. Trials on the basis of universal jurisdiction are an interesting stopgap measure when no other domestic court is available, but they remain very problematic for numerous reasons, such as risks of political interference and distance. Strikingly, while the discourse of complementarity often claims to be more rooted in respect for sovereignty and the core values of the international legal order, it may well be that states would consider that trials on the basis of universal jurisdiction are in fact more offensive to and dangerous for dominant concepts of sovereignty than trials which at least have the legitimacy and imprimatur of the international community.

This, however, is a secondary problem. The main point I want to make is the more radical one that even if the courts involved are those of a state that is directly and effectively affected by the crime (e.g. the state whose nationals committed the crime on whose territory and against whose nationals the crimes were committed) and even where these function perfectly, an exclusive preference for domestic trials is something that is not as obvious normatively as the defenders of complementarity make it to be.

Rather than thinking in terms of the types of courts that might be involved in the prosecution of international crimes, I think it is more useful to think in terms of the types of international crimes that the international community is dealing with. In order to do so, however, it is first necessary to make a brief detour to understand one of the fundamental tensions of international criminal justice.

A. The Starting Point: The Idea of the “Schism” in International Criminal Justice

International criminal law enforcement in an age of complementarity relies on a curious paradox or schism. At the substantive level, we know that crimes are properly called “international” by virtue of their source and foundation being international. Crimes are international because they are proclaimed as such and according to the international community’s modes of norm production (treaty, custom). Thus international crimes are unmistakably international regardless, for example, of the fact that they may also be incorporated into domestic law. This incorporation is made only on the authority, and according to the prescriptions, of international law.

The international community’s choice at the level of enforcement is markedly different. There the preferred option is to outsource the repression of international crimes, as a matter of priority, to domestic courts and, in effect, to defer to sovereignty. As already indicated, there are many good reasons why this is the case. But the result is an unmistakable tension, at least potentially and conceptually, between the centralized proclamative/legislative and the decentralized enforcement/judicial functions of international criminal justice.

Most of the time, that schism will not be readily apparent or at least not particularly problematic and simply reflect the nature of the international system—one sufficiently centralized to proclaim international crimes with one voice but too fragmented and polarized to commit firmly
to centralized international prosecutions. It is hard not to see, however, how in the long run the (partly) dual track pursued by the international community may occasionally create some fundamental conceptual dissonance. This dissonance results from situations where, fundamentally, the consequences (domestic trials) might contradict the premises (the universal nature of international crimes).

It is important in this respect to emphasize or rediscover the oft-forgotten fact that there are, and have been historically, many good reasons why one may want international trials that have nothing to do with the fact that domestic courts are dysfunctional. In that respect, the discourse of complementarity risks impoverishing our mental lexicon to deal with the richness of issues involved. The problem with the systematic preference for domestic courts is that it treats all international crimes alike, when a valid case exists that some crimes would clearly be more worthy of being tried internationally. There are in my mind two types of international crimes where the gap between the substantive and the enforcement dimensions of international criminal justice becomes so apparent as to suggest that there is something deeply problematic about delegating repression of international crimes to domestic courts.

B. International Criminal Tribunals and “Transnational” or “Multinational” Crimes

The “international” in “international crimes” most clearly refers to the fact that the source of the criminalization of these crimes is international law. It is not as such an indication that there is something specifically international, in the sense of factually involving several states for example, about the crimes in question. In fact, an international law crime might be entirely domestic. But nor is the possibility that an international crime might be actually international excluded. An international crime may very well be international, for example, in the sense of involving relations between states (aggression, war crimes committed in an international armed conflict) or holding some multinational (perpetrator and victim of different nationalities) or transnational (crime involving outside assistance, crime committed abroad) element. In fact, it is rare that the commission of massive crimes will have been entirely contained within borders. The obvious example here is the crimes of the Nazis during World War II which were thoroughly international in every sense of the word. The war was waged over dozens of countries and made victims in countless territories; the implementation of the Holocaust involved many crossings of borders and foreign complicities.

In this context, it is interesting to note that trials before domestic courts are invariably presented as more respectful of both sovereignty and the “victim society’s” transitional needs for example. It is true that an international trial of an individual whose crimes were committed exclusively domestically is the kind of case where the claims for an international trial will be at their weakest. There would be a strong argument in the case of the Khmer genocide, for example, that, all other things being equal, a
Cambodian court would be the most suitable in view of the largely endoge-
nous nature of the crimes committed.

But the same hardly holds true of crimes that are "literally" interna-
tional. In cases where several states have a keen interest in exercising juris-
diction, leaving the trial to one domestic court will inevitably frustrate the
aspiration of others in a way that is fundamentally in contradiction with
sovereignty. Let us imagine, for the sake of example, that after World War
II there had been the strong bias in favor of domestic courts that is now
evidenced by the idea of complementarity. Who should Goering have been
tried by? Complementarity would have recommended that a domestic
court--any domestic court presumably as long as it was willing and
able--should have taken up the task.

It is not hard to see, however, how such a choice would have turned
out to be profoundly suboptimal. First, it would have been extremely diffi-
cult to find a just and equitable formula of forum conveniens. Who should
take precedence? The state that has most victims? The state whose nation-
ality the offender is from so that it can effect its own democratic transition?
In practice, Goering might well have been judged by whatever nation
captured him first, for example the United States or the Soviet Union.
Although such a trial would clearly be better than nothing (and for the sake
of argument we assume that it would have been conducted according to fair
trial procedures), it is not hard to see how it might have had significant
flaws. It is most likely that a domestic court would have emphasized the
purely domestic component of his crimes. Even if an attempt had been
made at trying crimes that had occurred elsewhere, these crimes would
have not necessarily been judged from one very specific perspective. Even
if an American court had done its best to take into account crimes commit-
ted on the Russian front as well as those committed against U.S. soldiers,
for example, it is quite clear that resulting judgments would have been
tainted by various national prejudices.

Nor could this bias be easily corrected by simply handing Goering
over to a succession of various domestic courts. The problem is that the
exercise of jurisdiction by one state would most likely have frustrated the
exercise of jurisdiction by other states. This would be vividly the case if
the state in question decided to impose the death penalty, but even a long
prison sentence could significantly reduce the prospect of one or several
trials abroad. Even though the principle does not apply strictly from one
state to another, furthermore, all kinds of non bis in idem problems would
have not failed to arise as a result of overlap between the constituent ele-
ments of various crimes. This is of course assuming that the state that had
conducted the first trials was in a position to or wanted to extradite or
transfer the individual in question, something that is unlikely. Both the
sovereign and the societies who had not had the chance to intercept Goe-
ring would thus have been arbitrarily deprived of an opportunity for the
former to defend its public order and for the latter to experience first hand
an account of how the crimes had occurred.
Moreover, even if such multiple trials had been possible, the image of the worst Nazi crimes that would have emerged as a result would have been a highly disaggregated one, incapable of making sense of the unifying complexity of the crimes involved. Different courts might have disagreed on common elements; connections and parallels would have been obscured. When it comes to massive episodes of international criminality, it must be recognized that the total is clearly more than the sum of the parts, and no useful purpose is served by breaking up an overall pattern of systemic criminality into select instances of that criminality.

In such cases only international trials can do justice to the transnational complexity of events that have many dimensions to them. In the case of major war criminals of World War II, resorting to international criminal trials such as the ones organized in Nuremberg and Tokyo helped to solve a problem of competing jurisdiction that would otherwise have plagued the entire enterprise by safeguarding the interests of all states involved.\(^\text{10}\) This was a case where even today one would have to agree that complementarity could not be the end of the matter.

C. International Crimes and the Nature and Function of International Criminal Law

Can a case in favor of international trials be made more generally, even in cases where there are no competing assertions for jurisdiction and an international law crime does not have a factually international dimension? Here the argument becomes naturally more tenuous, as one has to leave the safe shores of the defence of sovereignty to argue from a necessarily more cosmopolitan notion of international criminal justice.

The point, though, is that even in cases of crimes without a transnational dimension a crucial dimension may be lost by systematically resorting to purely domestic trials, except when a failure of domestic courts can be demonstrated. There are both minor and major reasons why this is so. A minor reason is that permanent outsourcing to domestic courts may simply result in discrepancies in the substantive law, as international criminal law is incorporated, interpreted, and applied in ways that inevitably vary from one country to the other, a point recognized early on by Kelsen\(^\text{11}\) or in various preparatory memos to Nuremberg for example.\(^\text{12}\) Although

\(^{10}\) This is something obvious but that is only exceptionally picked up in the literature despite the very significant precedent of the Nuremberg tribunal for example. See William N. Gianaris, The New World Order and the Need for an International Criminal Court, 16 Fordham Int’l L.J. 88, 110 (1992) (pointing out that “[a]n international criminal court would also be useful where two or more states have concurrent jurisdiction and cannot agree on the correct forum state. Thus, where the accused has committed several distinct offenses in two or more states that constitute concerted criminal activity, an international criminal court would more effectively consolidate all the charges in one forum.”).

\(^{11}\) “If war criminals are subjected to various national courts . . . it is very likely that these courts will result in conflicting decisions and varying penalties.” HANS KELSEN, PEACE THROUGH LAW 112 (1944).

\(^{12}\) Colonel Murray C. Bernays, G-1, Subject: Trial of European War Criminals, in THE AMERICAN ROAD TO NUREMBERG: THE DOCUMENTARY RECORD 1944-1945 31 (Bradley F.
international criminal law is clearly fully compatible with some measure of national margin of appreciation, the credibility of the law will be affected by major contradictions.

Complementarity, however, does not allow any internationalization in cases where a domestic court may otherwise interpret international law in a way that is clearly in contradiction with international jurisprudence, or where it would simply make sense, on account of the importance and novelty of an issue, for it to be assessed by an international bench. What seems needed for the coherent development of international law, on the contrary, is that every now and then, when an issue warrants that it be so, trials be conducted that allow a centralization of the formulation of international law, regardless of the issue of the proper functioning of domestic courts. As one author pointed out in an article written during World War II on prospects for trials following it, "courts in different countries might apply even perfectly unified codes so differently that, ultimately, for a number of cases . . . only an International Criminal Court could provide an effective international forum."

Kelsen also insists that "[t]he offenders will become subject to trial under many and divergent codes and procedures. The applicable basic law, law as to justification (e.g., orders of duly constituted superiors), procedures, and rules of evidence will vary from jurisdiction . . . ."

Although the harmonious development of international law is probably a rather secondary goal in relation to the more concrete goal of effecting transitions in war-torn societies or simply respecting sovereignty, one cannot fail to see that there is a powerful interest in the rationalization of international criminal law which might occasionally deserve more recognition than the systematic privileging of domestic trials allows.

The second more important, but also more complex, reason why one might want to internationalize prosecutions even when domestic courts are able and willing is that in resorting systematically to domestic courts one may end up losing or minimizing the sense that the crimes are international at all. Hannah Arendt had made this one of the central themes in her critique of the Eichmann trial: "the very monstrousness of the events [was]

Smith ed., 1982) (pointing out, as an argument in favor of creating an international tribunal, that "[t]he offenders will become subject to trial under many and divergent codes and procedures. The applicable basic law, law as to justification (e.g., orders of duly constituted superiors), procedures, and rules of evidence will vary from jurisdiction . . . .")

13. One might argue that the ability of domestic courts to rightly apply international law is an issue of proper functioning of courts. In a way it is, but for a misapplication of international law to justify the receivability of a case before the ICC under the complementarity regime it would have to manifest a clear unwillingness to try the individual in question and therefore be grossly manifest. The international community may have an interest in intervening judicially before one even gets to this stage to correct more subtle but no less pernicious misinterpretations or "under-optimalizations" of the law which may otherwise end up having significant precedential value.


15. Kelsen, supra note 11, at 112.
'minimized' before a tribunal that represent[ed] one nation only.'\textsuperscript{16} As one author put it, "[i]n limiting jurisdiction to those offen[ses] committed against either nationals or the interests of the state concerned or on the territory of the prosecuting nation, this view tended to emphasize the protection of that state rather than of the international community."\textsuperscript{17} Purely domestic trials can thus be accused of the same thing as purely international trials: that they deny one of the constitutive facets of international crimes, as crimes that in the end are not international for naught. In the same way that international crimes are never entirely international, nor are they ever purely domestic.

In fact, there may be cases which, despite the fact that they occurred within a state's territory, defy boundaries in a very real way: cases which, by their magnitude, so threaten our sense of humanity that they belong to a sort of "world heritage of pain." In such cases, it would seem to make sense to argue that the international community should have an interest in taking repression into its own hands, even when functional domestic courts are available.

This is first because international criminal tribunals will probably do a better job of "translating" what might at first be mistakenly construed as purely domestic crimes into the purportedly universal language of international law. A good example of this is the work of the ICTR.\textsuperscript{18} Indeed, if anything could be rescued of that tribunal's ever-problematic internationality, it is the fact that it probably has done more than any other institution to show that the genocide in Rwanda was not simply an irreducible African tribal specificity, but a crime amenable to international law's universalizing categorizations of abhorrent violence.

But it is also more crucial because it falls upon the international community, if it is to be taken seriously, to affirm its stake in an event that threatens it as such.\textsuperscript{19} For the international community not to do so would make a mockery of the idea of crimes against humanity, or at least severely expose the tensions implicit in the current model of international criminal justice, in a way that would weaken the project's credibility.

There is a long line of thought that has been sensitive to how on some occasions not resorting to international criminal tribunals might simply be construed as an abdication of its responsibility by the international community and a failure to stand up to its values in a way that is commensurate with the horrors it claims to condemn. Renaud and Lapradelle, for example, argued as early as 1919 that there would have been an "antinomy" between the nature of the crimes that Kaiser Wilhelm was accused of,

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\textsuperscript{16} HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL 269 (1963).  \\
\textsuperscript{17} Richard R. Baxter, The Municipal and International Law Basis of Jurisdiction over War Crimes, 28 BRIT. Y.B. INT'L L. 382, 385 (1951) (emphasis added).  \\
\textsuperscript{18} See generally Alvarez, supra note 5.  \\
\textsuperscript{19} This is a point that very few authors make today. But see Burke-White's reference to the "Milošević exception": "Where a globally renowned despot is tried for international crimes, the world at large may have an interest in supranational prosecution." Burke-White, supra note 6, at 93.
\end{flushright}
and the possibility that he could have been tried by a mere domestic court.\(^{20}\) One cannot fail to see how trying the world shattering crimes of the Holocaust before a domestic court would have risked completely defrauding history of at least an attempt at a specifically universalizing narrative of the events at stake.\(^{21}\) As Eagleton put it in the run up to Nuremberg, "[t]he crimes committed are crimes against the United Nations, indeed against all humanity; they are more than crimes against any one national, and should not be open to punishment by any one nation."\(^{22}\) The Rwanda tribunal is also an interesting case in point. The creation of the ICTR is explained almost entirely as a result of the mechanics of Security Council decision making and the bad state of Rwandan jurisdictions. But would it really have been conceivable to behave as if the slaughter of 800,000 individuals in the space of three months was a local event? In effect, it was Rwanda which, when before the Security Council, claimed that recognition for itself arguing that "the genocide committed in Rwanda is a crime against humankind and should be suppressed by the international community as a whole."\(^{23}\)

Nor is this merely a vue de l'esprit which can be accused of misplaced universalism. As Robert Jackson put it, "[a]n attack on the foundations of international relations cannot be regarded as anything less than a crime against the international community" so that it "may properly vindicate the integrity of its fundamental compacts by punishing aggressors."\(^{24}\) Judge Röling of the Tokyo tribunal agreed: "[F]or the very reason that war crimes are violations of the laws of war, that is of international law, an international judge should try the international offences. He is the best qualified."\(^{25}\) If we take the idea of "crimes against humanity" seriously, then we must accept that occasionally the international community will be threatened not simply metaphorically but concretely.

\(^{20}\) See F. Larnaude & A. De Lapradelle, Examen de la responsabilité pénale de l'empereur Guillaume II d'Allemagne, Journal du Droit International 152 (1919) ("[i]l y aurait antinomie entre la nature du crime et le caractère du criminel d'une part, et la nature juridique du tribunal d'autre part" si Guillaume II était jugé par une juridiction nationale. Ce serait même "prendre la question Guillaume II par un bien petit côté, c'est la rapetisser que de la ramener aux proportions d'une affaire de cour d'assises ou de conseil de guerre.").

\(^{21}\) As it is, the Nuremberg tribunal of course did not make a very good job of it, but it is highly likely that a domestic trial would have produced an even more distorted vision of the events.

\(^{22}\) Clyde Eagleton, Punishment of War Criminals by the United Nations, 37 Am. J. Int'l L. 496 (1943).

\(^{23}\) U.N. SCOR, 49th Sess., 3453d mtg. at 14, U.N.Doc. S/PV.3453 (Nov. 8, 1994) (emphasis added) (statement of the Permanent Representative of Rwanda following the voting). It is of course significant that Rwanda then rejected its own position by ultimately pleading for a reorientation in favor of domestic courts. Nonetheless, the fact that it initially sought to invoke the international community's specific interest to legitimize the creation of an international court is revealing.


Even in cases where domestic courts are functioning, and even when the crimes at stake involve no transnational dimension, there would still seem to be a "pure" argument in favor of international trials for certain crimes, which by their very human-bond shattering heinousness are absolute instances of situations where the international community must rise to the occasion, transcend its differences, and assert itself qua international community.

III. Conceptualizing the Relationship of Societies and Crime Through the Idea of "Ownership"

At stake here behind both the problematic features of purely domestic and purely international trials is the problem of determining who, of a given society or the international community, has the most valid claim in any one case. What this points to is a deeper difficulty in conceptualizing the relationship between certain crimes and the social environment in which they occur. One intriguing way of thinking about the issue is as one of ownership. This may seem like a stark idea, but I want to use the metaphor of property rather than, for example, simply the idea of jurisdiction to describe the strong sense of appropriation mixed with a feeling of entitlement that permeates debates about who should judge whom. Although crime is obviously something that societies are keen to eliminate, it is also curiously something about which they feel a strong sense of ownership, especially when competing claims for jurisdiction arise. Many of the debates on allocation of cases can and are thus often conceived in the language of property: appropriation, confiscation, transfer (as of a title). But what might it mean to take that circumlocution seriously? Who do international crimes "belong" to? The domestic society in which they are

26. See Human Rights Watch, Saddam Hussein's Trial: Bringing Justice for the Human Rights Crimes in Iraq's Past, BACKGROUNDEMERS, Dec. 2003, available at http://www.hrw.org/english/docs/2003/12/19/iraq6770.htm ("When national authorities can hold fair and effective trials, that is generally the best option . . . . National judges and prosecutors help create a feeling of 'ownership' of the important process of accountability.") (emphasis added); The U.N. Criminal Tribunals for Yugoslavia and Rwanda: International Justice or Show of Justice?: Hearing Before the H. Comm. on International Relations, 107th Cong. 107–71 (2002) (statement of Pierre-Richard Prosper, U.S. Ambassador-at-Large for War Crimes Issues) ("In the years ahead, the United States will continue to lead the fight to end impunity for genocide, crimes against humanity, and war crimes. . . . We will continue to seek to bring justice as close as feasibly and credibly possible to the victims in order to create a sense of ownership and involvement.") (emphasis added); Kingsley Chiedu Moghalu, Saddam's Trial as Politics and Strategy, GLOBAL VIEWPOINT, July 13, 2004, available at http://www.digitalnpq.org/global-services/global%20view point/07-13-04.html ("[t]he effort to wrap Iraqi ownership around this victor's justice is an important one, for it will help address the questions of legitimacy that will inevitably arise as history is written—and rewritten—by the various parties to the conflict") (emphasis added); Adama Dieng, Africa and the Globalization of Justice: Contributions and Lessons from the International Criminal Tribunal for Rwanda, Paper Presented to the Conference on Justice in Africa (July 30, 2001) ("Careful consideration should be given to the question of ownership and contextual relevance of an international judicial process.") (emphasis added).
committed or the international community which made them crimes in the first place?

There are no easy answers to these questions. One way of conceiving "property" over a given case or case load is to make it dependent on some assertion of a claim to property or effective control. In effect, sovereignty is exactly that: a claim that anything occurring on one's territory or through one's nationals in some way "belongs" to the state. More concretely, custody is also a concrete factor that seems to validate an otherwise nonspecific claim to judging a case. But that does not really tell us how to deal with competing claims for property, particularly those emanating from the international community. To say that cases simply "belong" to whoever asserts jurisdiction over them, is to defer to power, violence, and chance, hardly an appealing normative choice.

Rather, as in property law, the exercise of control must in all likelihood be perfected by a claim to authority, the recognition of a moral entitlement to claim control over a case. The problem here is not unlike some private international law or conflict of jurisdiction issues. What is needed a priori is some sort of nexus. Typically that nexus will be provided by the traditional titles to jurisdiction: territory and personal, both active and passive. On a horizontal level, when the issue is to determine which of two states should exercise jurisdiction or which of two states' law should be applied, these titles provide some of the basic groundwork for more sophisticated rules of legal apportionment to apply. But the relationship of the international to the domestic obviously occurs on a very different plane than private international law, which is vertical in nature.

On that count the international community will always be on the losing side, since it obviously has no sovereignty, and no personal or territorial titles to call its own. The international community has no territory (at least in the legal sense), or its territory is that of all member states metaphorically, which is not very helpful. There are no "citizens of the world," or at least no such concept legally that could help anchor a claim that the international community had a direct enforceable interest in a given case. And the international community is unlikely to directly secure custody over individuals, at least so long as no state wants to transfer such custody to it. Sovereignty still seems to structure our moral understanding of the world.

If some ownership by the international community of some international crimes is going to be justified it must be on a more abstract level. It may seem odd to speak of the international community's "ownership" of certain crimes, when that expression is most often used to describe the situation of civil society. But I use it purposefully here because, as I hope to have shown, the international community can actually claim to have a certain "ownership" of its own as regards some international crimes.

Here the emphasis has to be not on the circumstances of the commission of the crimes (and hence territory or nationality) but on something specific about their nature, that which makes them international crimes at least in an abstract way in the first place. If one were to enrich the parame-
ters of that ownership beyond the idea that certain international crimes are more "international" than others, and seek specifically international elements of a "nexus," I would argue that three complex factors should be taken into account in assessing the legitimacy of the international community's assertion of jurisdiction. First, to what extent were the international community and the values and ideas it stands for affected as such by the commission of the crimes in question? This is essentially the transnational/multinational/universal component of the crimes in question. Second, to what extent did the crimes occur as a result of breakdowns in the fabric of international solidarity? For example, was there a lapse in peace maintenance or diplomatic miscommunication? Third, to what extent would the repetition of such crimes endanger the international community as such because, for example, the international community has since vouched its credibility on the nonrepetition of such crimes (e.g. the Holocaust)?

There is clearly never going to be anything remotely approaching a strict equivalence between the fact that crimes are international and the possibility that they be tried internationally. But while there will be crimes that clearly, on balance, belong more to the domestic sphere than the international, there will also be crimes where a sort of "surplus" of internationality will justify some internationalization—regardless of the issue of whether domestic courts are functional or not. The idea of "ownership" also allows us to transcend one of the apparent limitations of jurisdiction, in that the idea of ownership lends itself well to the possibility of dual or multiple ownership. This opens up the possibility, to which we will return later, that institutional ways may be sought that make sense of the fact that international crimes are both international and domestic.

IV. A Representational Theory of International Criminal Trials

In view of such a conception of "ownership" of international criminal law trials, what institutional setup might most make sense of the respective claims of the international and the national over a given crime? The difficulties encountered in addressing this sort of question have to do with the problem of defining the purpose of trials of international crimes.

The problem with much of the rhetoric surrounding international criminal justice is that it has been focussed on outcome (the repression of given criminals, the fight against impunity, the establishment of the foundations for a new political regime) rather than process. Most of the justifications of international criminal justice insist on results flowing from the verdict and beyond: retribution, deterrence, reconciliation, compensation, and closure. Typically, the emphasis has been on the ability of any given

27. I find echoes of this finding in Ruti Teitel's thinking about transitional justice: "The leading argument for punishment in periods of political flux is consequentialist and forward-looking . . . . At these times in a variant of the conventional 'utilitarian' justification for punishment, the basis for punishment is its contribution to the social good." Teitel, supra note 2, at 28, 30.
mechanism to achieve successful prosecutions that would lead to those desired results.

In doing so, ideas about international criminal justice have also taken a significant turn towards the functionalist. If what matters is outcome, then the way in which that outcome is reached is in and by itself indifferent. Functionalism causes one to treat international and domestic courts as functional equivalents for the purposes of achieving the goal of repressing international crimes. This, then, is what makes the discourse of criminal repression all the more vulnerable or sensitive to the need to respect state sovereignty: if no specific interest is served by having international trials, for example, except to remedy a state's judicial failure, then the international community might as well respect sovereignty which at least is a significant value in its own right. The goal of international criminal justice becomes the repression of international criminals in the most efficient possible way compatible with the smallest encroachment of state sovereignty.

But a case can also be made that trials do not simply or even principally lead to convictions and that trials are instead about process, or at least about a very indirect genus of outcomes. What is excluded by the focus on outcome is what I would call the symbolic, aesthetic, or communicative function of trials. Although deterrence, for example, still features quite prominently among the defences of international criminal justice, the more sophisticated scholarship has evolved (following a move made a long time ago in domestic criminal law jurisprudence) to conceptualizing the role of international criminal law much more in Durkheimian terms as reinforcing social solidarity. Essentially, criminal law is seen as part of a complex theatricalization of society by itself, where society affirms what it is by designating its opposite. Criminal law is society-constituting in that it reinforces the fundamental status of certain norms that the society considers central. Rather than an outcome, trials are a process of constituting the social. And if ordinary criminal trials are foundational, then transitional trials are even more so.28

In international criminal justice this is a uniquely difficult exercise precisely because it is never quite clear—it is indeed quite contentious—to what society international criminal justice refers back. The difference between international criminal law and domestic criminal law is that the latter clearly points back to a social system (the domestic polity), while the former refers ambiguously back to various systems, both domestic and international, one of whose existence (the international) is itself a matter of some conjecture. But this process of implicit societal designation is also a vital exercise that cannot be avoided because, far beyond the contingent outcome of any given trial, defining the border between the national and the international, the universal and the sovereign, and in the process constituting communities of suffering and fate is precisely what international criminal justice is about. Even more so than in domestic justice, the foundational purpose of international criminal justice is the definition/delimita-

28. Id. at 29.
tion/affirmation of political community, even though the resulting political community may be one that is both exclusive and inclusive, localized and immaterial.

One crucial function of international criminal trials, therefore, should be to "represent" the nature of the crimes they are judging, by designating and acknowledging the communities that are being affected by them. This designation is a function that trials of international criminals fulfil by what they do (and I have hinted in passing how domestic and international courts may respectively be better at stressing the domestic–international connotation of the crimes they are judging), but also merely by what they are. In that respect, international and domestic trials are precisely not functional equivalents and do send very different signals. Drawing inspiration from McLuhan's famous aphorism, I would argue that "the medium is the message": international and domestic trials, simply by virtue of being what they are, send profoundly different messages about what they are doing—even as they are supposed (according to the complementarity dogma) to be doing exactly the same thing. They "represent" the normative environment from which they are supposed to have sprung. By virtue of a trial being held internationally, one sends a strong signal that a norm has been offended that is properly considered international and in some peculiar way offends the dignity of mankind. In fact, one sends a strong signal that the international community is ultimately the community of reference for international crimes, the yardstick of universalized understanding of the abominable. By virtue of a trial being organized domestically, one solidifies the vision of certain crimes being above all anchored in a domestic trajectory—which they may well be in certain circumstances and deserve to be treated as such. It is through such assertions that the complex texture of a world that is both domestic and international is being weaved. Herein lies the representational function of criminal justice.

V. Primacy and Complementarity vs. Hybridity

How might a representational theory of international criminal justice actually work institutionally? The short answer is to insist, as General Nikitchenko, the Soviet representative to the London Conference that preceded Nuremberg did, that "local crimes should be tried locally" and, therefore, conversely, that, as J. A. Roux put it, "[t]oo international crimes must correspond an international jurisdiction." The problem is that in the real world, as I hope to have shown, there are few crimes that will be totally international and few crimes that will be totally domestic. Most crimes will clearly be a mix of both, and it will rarely be clear where the balance stands. For example, a pattern of criminal behaviour will have had domestic roots and will have led to political

29. Jackson, supra note 24, at 158.
repression at home, but also possibly have led to an aggressive war against another state which will have led to crimes against humanity or genocide against a group that straddles borders.

In such circumstances, the risk is that trials by exclusively domestic or international courts will require us to choose too much. If a purely international option is chosen, the risk is that the domestic dimension of a crime and the domestic impact of the trial will be reduced. If a domestic trial is chosen, in certain specific cases, a crucial international dimension may well be lost. In both cases, if an individual is tried either domestically or internationally, that means that he or she will never be tried internationally or domestically respectively. In responding to this problem, the international community in recent years has been pursuing two tracks whose subtle tensions and incompatibilities are often overlooked but which I would argue stand for two fundamentally different ways of dealing with the challenge of “representing” international criminality.

Primacy and complementarity is a first track pursued by the international community. Primacy and complementarity are generally contrasted as evidencing fairly opposite visions of the problem of which type of court is best suited to deal with international crimes. Both certainly represent fairly opposite ends of the spectrum on the issue of how to address the issue of allocation of cases. But for our purposes, both are also profoundly similar in that both adopt a very either/or approach to the problem of which courts should judge crimes of international law. The non bis in idem principle effectively ensures that a crime tried by an international court cannot then be tried domestically and, with some caveats, vice versa. Both complementarity and primacy therefore force the international community to choose between domestic and international trials, even though in so doing they do violence to the dual nature of international crimes. Rather than reducing the problem of the dual domestic/international nature of international crimes and international criminal justice’s apparent inability to ever fully apprehend both, primacy and complementarity condition the very problem that they claim to resolve.

How can one transcend that dichotomy? One solution is to introduce occasional correctives to it. As far as the use of primacy is concerned, there has been a significant effort by the ICTY in recent years, as part of its termination strategy, to create the conditions where it would become possible to defer cases “back” to Bosnian courts in particular. This can be seen as part of an at least symbolic recognition of the “ownership” by Bosnian society of some cases that have cruelly impacted it. Intense outreach campaigns by both tribunals also try to deal with the distance created by their

31. I say “fairly” because, of course, complementarity is not the symmetrical equivalent of primacy for domestic courts. A regime of exclusive and final “priority” of domestic courts (leaving to the international only those cases that sovereigns directly referred to it or possibly that no sovereign wanted to try) would be that. Complementarity is still in the end tilted towards the international which has the last say, at least in some circumstances. By the same token, it is also of course much more “sovereign leaning” than primacy.
absorption of leading cases at the expense of affected societies' needs, although outreach efforts often seem spurred more by a diffuse feeling of guilt than a real commitment to throw one's lot behind transitional endeavours. As far as moderating the effect of complementarity, Bill Burke-White is one of the few to have argued, albeit only really in passing, that there might be two exceptions to the priority of domestic trials, which he describes as the "Kunarac" and "Milošević exceptions." These correspond more or less to the two principal grounds that I have identified, short of a failure of domestic courts, for a trial to be held internationally. The "Kunarac exception," by the name of the first ICTY case involving prosecution of rape as a crime against humanity, refers to the idea that "[w]here a case is of groundbreaking precedential value, a supranational court may yield better jurisprudence. In such cases, experience and judicial resources may be required in order to ensure the codification of crucial areas of international criminal law."\(^{32}\) According to the Milošević exception, "[w]here a globally renowned despot is tried for international crimes, the world at large may have an interest in supranational prosecution."\(^{33}\)

There is some merit to these suggestions and one can see how, had the mood at the Rome Conference been more subtly inclined, the Rome Statute could have incorporated them without relinquishing the spirit of complementarity. As far as the "Kunarac exception" is concerned, a procedure similar to that by which cases before the European Court of Human Rights are deferred to the grand chamber on account of its legal importance could have been contemplated (the court is deemed best suited to make decisions where the issue is one of evaluation of the law).\(^{34}\) As far as the "Milošević exception" is concerned, one could have imagined a mechanism by which the Assembly of state parties, as the governing body of the court and its political "conscience" could, by a certain clear majority, have decided that by virtue of its sheer transnational, global or universal importance, a case could be declared ipso facto receivable regardless of the functioning of domestic courts. It probably says a lot about the rigidity of complementar-

\(^{32}\) Burke-White, supra note 6, at 93.

\(^{33}\) Id.

\(^{34}\) Article 30 of the European Convention on Human Rights dictates the conditions for "[r]elinquishment of jurisdiction to the Grand Chamber" as follows:

Where a case pending before a Chamber raises a serious question affecting the interpretation of the Convention or the protocols thereto, or where the resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court, the Chamber may, at any time before it has rendered its judgment, relinquish jurisdiction in [favor] of the Grand Chamber, unless one of the parties to the case objects.

European Convention for the Protection of Human Rights and Fundamental Freedoms art. 30, opened for signature Nov. 4, 1950, 213 U.N.T.S. 221, available at http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/English Anglais.pdf (emphasis added). One might imagine a mechanism whereby an international criminal tribunal could make that determination itself, or at least one where domestic courts feeling they had inherited a case that was too "big" for them could use an expedited procedure to forfeit jurisdiction in favor of the international tribunal. Alternatively, a referral system similar to the one existing with the European Court of Justice might go a long way to reducing risks of discrepancies.
ity that such exceptions were not even contemplated. However, although the varied correctives outlined above create new and subtle ways to deal with the dichotomy, they still seem to accept it as inevitable, something which I am inclined to think it is not.

Hybrid tribunals are of course living proof of this. The dichotomy between international and domestic trials only arises as a result of these being considered as alternatives. To the extent that tribunals can be created that are somehow both domestic and international, the dichotomy vanishes.

There is of course nothing new about presenting hybrid tribunals as an option in the international community’s toolkit to deal with problems of international crimes. But to my knowledge, there has been little awareness that there may be a deeper contradiction about a system that simultaneously promotes complementarity or hybridity as the ways of the future. In the sort of quasi-euphoric discourse about a “community” of international institutions devoted to international criminal justice, hybrid tribunals are often presented as one in many institutional innovations but without much thought as to how they might potentially reflect a fundamentally different vision of international criminal justice. My first contention is that hybridity’s relationship to the primacy/complementarity duo is more problematic than it looks, because hybridity threatens to deconstruct the false dichotomy of international/domestic trials in which the international community has trapped itself.

Furthermore and more interestingly, there has not been a vigorous normative defense of hybrid tribunals on the grounds that I suggest, namely that hybrid tribunals make more sense of the complex representational functions of international criminal justice. Typically, hybridity is sometimes presented as a concession to what may be obtainable from a sovereign state in the absence of a Security Council resolution, or as a second best solution born from “tribunal fatigue.” Alternatively, hybridity is defended on purely functional grounds, either as a manifestation of the international community’s concern for due process, as a more cost-efficient solution, or as one that will be more “legitimate” domestically. But there is little hint that hybridity might be something profoundly desirable nor-

35. See Burke-White, supra note 6, at 3.
36. Suzanne Katzenstein describes hybrid tribunals as “one of the latest attempts to seek justice for crimes of mass atrocity.” Suzanne Katzenstein, Note, Hybrid Tribunals: Searching for Justice in East Timor, 16 HARV. HUM. RTS. J. 245, 245 (2003); see also Laura A. Dickinson, The Promise of Hybrid Courts, 97 AM. J. INT’L L. 295, 308 (2003) (pointing out that hybrid tribunals “complement” international and domestic tribunals). Although that is undeniably true in practice, this "soft" compatibility discourse does not particularly highlight the fact that, at a conceptual level, hybrid tribunals also contradict some of the conceptual premises of the opposition between domestic and international tribunals.
37. For example, Dickinson concentrates, as with the disadvantages and advantages of purely domestic and purely international trials, on the fact that hybrid tribunals may have more legitimacy and offer more prospects for capacity building and norm penetration. Dickinson, supra note 36, at 306-08.
38. See generally Katzenstein, supra note 36.
matively as such, over and above, for example, a regime such as complementarity.

I argue, on the contrary, that the great merit of hybrid tribunals is that they deal with the artificial distinction between the domestic and the international by simply collapsing it. Rather than asking crimes to fit their perspective, they (ideally) mold themselves into the shape of the crimes they are judging. As a result, they are the institutional mechanism that makes most sense of the dual nature of international crimes as both domestic and international and our intuition that one of the primary functions of international criminal trials is to echo/reverberate/constitute that underlying reality. Hybrid tribunals can be seen as sophisticated attempts at striking the best possible balance between the competing pulls of sovereignty and universalism in a way that maximizes the "representational" function of international criminal justice.

Although both the existing hybrid tribunals--the Cambodian Extraordinary Chambers and the Special Court for Sierra Leone--are probably above all a result of the pull and shove of international political negotiations, they can be analyzed in this way. The Cambodian genocide was, as already suggested, primarily a domestic genocide, borne from the nihilist folly of a totalitarian regime. At the same time, a purely domestic trial would not have done justice to the fact that, as one of only a handful of genocides in the 20th century, the Cambodian killing fields also belong to world history in their own right. The presence of international judges flags that interest, just as it sends the message that norms fundamental to humanity were offended in Cambodia.

The international connection in the case of Sierra Leone is even more obvious. The conflict involved several countries, most notoriously Liberia but also a peacekeeping mission such as the Economic Community of West African States Ceasefire Monitoring Group (ECOMOG). Many of the problems that it raises, for example the use of child soldiers, are universal issues in much need of an international response. As one of the worst state breakdowns of the 1990's in a continent fraught with conflict, the conflict raises the issue of the United Nations' credibility in dealing with endemic ethnic strife. For the international community not to get minimally involved in the trials would send the wrong signal and open it up to accusations of double standards (if Rwanda, why not Sierra Leone?). By the same token, it would be wrong to underestimate the extent to which Sierra Leone is also above all a domestic conflict created by the uninterrupted coups and ethnic strife.

The Sierra Leone Special Court and the Cambodian Extraordinary Chambers reflect this assessment about the competing international and local interests involved adequately, if perhaps fortuitously. The fact that the Sierra Leone Special Court is clearly a little more on the international

39. See Burke-White, supra note 6, at 24 ("internationalized domestic courts can demonstrate the general global consensus that international crimes will not be tolerated").
side institutionally than the Extraordinary Chambers, for example, can be seen as premised on an analysis (in the details of which I will not go) that the Cambodian genocide was probably more of a domestic matter than the war in Sierra Leone was.

VI. An Analysis of the Hussein and Milošević Trials in Light of the Representational Theory

I now turn to the issue of the trials of Milošević and Hussein, knowing full well that these are cases where the international community has made its choices about whether to turn to domestic or international trials. What kind of normative critique can the representational theory of trials of international criminals nonetheless yield?

A. The Trial of Slobodan Milošević

Let us first look at the trial of Milošević. This is a case where trial by an international criminal tribunal, via the medium of primacy, was favored. This is largely because a Security Council resolution simply gave the ICTY the possibility of ignoring the functioning of domestic courts, but also because in all likelihood domestic courts were not or have been, at any point since the creation of the ICTY, sufficiently functional to handle such a case. But a broader, more principled defense of the internationalization of the Milošević trial, even in the event that domestic courts had been functioning, can be made on “representational” grounds. There are, for example, many clearly transnational and multinational elements in the crimes that Milošević is accused of, such as the commission of acts of genocide or crimes against humanity in territories and against nationals of other states. In fact, Milošević probably committed few crimes that an international criminal tribunal could hear against nationals of or on the territory of Serbia alone.

Had Milošević been tried in Bosnia, for example, and apart from the fact that there would always have been suspicions of partiality, it is highly probable that he would have been tried for the crimes that he committed there, rather than the crimes he committed in Croatia or Kosovo. Purely from the point of view of avoiding conflicts of jurisdiction, a trial by an international criminal tribunal was preferable to one by one of the successor states to the former Yugoslavia (assuming that domestic courts had been willing and able). Thanks to the trial being conducted internationally, the prosecutor of the ICTY managed to obtain the merging of three acts of accusation (Kosovo, Croatia and Bosnia) so that a much stronger sense of the connection of these events emerges. In addition, the sheer magnitude of the crimes committed by Milošević, the involvement of the international community in the conflict almost from the start, and his overall responsibility as head of state in a situation that not only massively destabilized international peace and security but also reawakened the specter of genocide in Europe would on their own make the Milošević case an
ideal case for internationalization. It would have been wrong to entirely deny that dimension by entrusting the trial to functioning domestic courts in the former Yugoslavia (had they existed).

By the same token, clearly something is missed by having a purely international trial. One can see an international trial as the price that has to be paid for conducting successful prosecutions in a situation where little could be expected of domestic courts, but that is still a price to pay. The entire origin and context of the commission of crimes by Milošević is in political projects and ambitions nurtured in Serbia. The Republic of Yugoslavia to this day continues to be heavily penalized by the legacy of the crimes that were committed by his regime. The key to the Republic’s future and its capacity to move ahead lies in a thorough understanding of what led to the regime and what the responsibilities are in allowing crimes to be committed, something which an international tribunal can only partially achieve. Indeed, the fact that the trial is being conducted internationally may make it easier for sectors of Yugoslav society to present it as “foreign” or “exterior,” thus effectively deferring the time of reckoning. It is therefore also profoundly problematic that the trial is not, in any distinct way, also “domestic.”

Specifically, it is problematic that, as a result of primacy being what it is, there has been no measure or even possibility of hybridization of the Milošević trial. This is not simply for the reason that local expertise might have helped the judges in understanding the complexities of the domestic situation, or for the instrumental reason that a hybrid tribunal would have more legitimacy domestically (even though both these reasons are valid). It is more fundamentally because, by extracting completely the crimes committed from the reach of domestic appropriation, a crucial dimension of Milošević’s criminal enterprise is neglected. The risk is that the crimes will be performatively misportrayed as crimes committed in an international abstraction rather than crimes rooted in a particular societal failure.

Rather than trial solely by the ICTY, therefore, and from an ideal normative point of view, some intermediary solution involving Balkanic judges and perhaps the occasional application of Yugoslav law would have made more sense of what international criminal justice is trying to achieve.

B. The Trial of Saddam Hussein

If we look at the trial of Saddam Hussein, the image is initially the reverse since the starting point is the decision to prosecute the former Iraqi dictator before a domestic tribunal. The decision to have a domestic trial was largely based on political, pragmatic, and policy grounds although there is also probably a sense that, in application of the fundamental idea of complementarity, it makes sense for revamped domestic courts to be given the first try at prosecuting crimes for which they would normally have jurisdiction.

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40. In this I am only making the case that the “Milošević exception” (see supra note 19), as it were, actually works in the case of Milošević.
But a more principled defence of some measure of domesticization can be made. There is an obvious and strong Iraqi interest in the crimes of Saddam Hussein being tried in Iraq. Iraqis have suffered greatly at the hands of Saddam Hussein. The massacre of Halabja alone made 5,000 casualties. A trial in Iraq is meant to make a point about the new Iraq and its willingness to move on to a society based on accountability. In that sense, the trial of Saddam Hussein can properly be said to "belong" to Iraqi society, and a domestic trial makes ample sense.

But the danger is that the specifically international dimension of Hussein's trial will be minimized. The crimes committed by Saddam Hussein clearly have a strong international dimension both in the "transnational" and "universal" sense. Saddam Hussein is on the wanted list of at least two countries where his acts caused utter devastation: Iran and Kuwait. In addition, Iraqi troops under Hussein's command are responsible for war crimes committed against Coalition soldiers during the first and second Gulf War. A trial in Iraq means, first, that these other states will in all likelihood never get to try him, and, second, that these crimes are likely to be given comparatively short shrift. In fact, unsurprisingly enough, and although the invasion of Kuwait is included in the court's jurisdiction, the indictment of Hussein does not include the aggression of Iran in 1980, nor does it include the use of gas against the Iranians, even though this can be seen as a rehearsal for the much later use of gas against Iraqi Kurds. Even if these crimes had been included, however, it is difficult not to see how a domestic Iraqi court would have been an exceedingly odd place to try them, and how the outcome might not have been heavily tilted towards an Iraqi understanding of these events, even if principles of judicial impartiality and independence had been respected.

In addition, many of Saddam's crimes were committed in clear and explicit defiance of international law and the norms of the international community, at times in a way that specifically seemed to challenge these norms' very existence--surely a ground for the international community to intervene. The massacre of Halabja alone, even though it was committed entirely domestically, must surely count as one of the most horrifying acts of barbarity of the twentieth century, one of the few instances of gas being used massively against a civilian population, something that the international community as such has a keen interest in repressing diligently.

These arguments militate in favor of what would have been at least a partial internationalization of the Hussein trial, not one that would have compromised the status of the trial as an at least partly domestic one, but one that would have impressed the importance of the international community as a stakeholder in the trial, for example through the presence of international judges.

Conclusion

There is no easy answer to the question of who should try crimes of international law. The absence of any strict legal principle means that for
the most part the scholar must resort to a more thorough normative analysis of the goals pursued by trials of international crimes in general. Either purely domestic or purely international trials seem to miss an important dimension of international criminality. If the goal of international trials were simply to prosecute individuals successfully then that would not particularly be a problem. But I have tried to argue that the real goal of international criminal justice, apart from sending people to jail, is to make a more symbolic case about the nature and existence of society that gave rise to the norms. If that is so, then the crucial issue becomes that of defining who has a better "ownership" claim to any given criminal episode. The role of trials of international criminals, from thereon, is to give the best "representation" possible of that sense of respective ownership. Complementarity and primacy do not really help us in solving this dilemma: they are the dilemma itself in that they construe the debate in entirely either/or terms.

Hybridity, in this respect, deserves a more principled and scholarly defence than it has garnered so far as a way of thinking about these issues. On the one hand, it is profoundly at odds with complementarity and primacy, but on the other hand, it seems to be the best way of giving subtle recognition that one community's claim of ownership does not cancel another's and showing that international crimes are always in a meaningful way both domestic and international.

In this light, both the Milošević and Hussein trials could have gained significantly from being organized in a more hybrid fashion, weaving together these two constitutive narratives of international criminal justice.