

HAGUE INTERNATIONAL TRIBUNALS INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS

Towards a Principled Justification for the Mixed Composition of Hybrid International Criminal Tribunals

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Abstract

The justification for a majority of international judges sitting on hybrid international criminal tribunals is tremendously undertheorized. At present, policymakers must rely on base pragmatic considerations that allege that local judges are either too incapable or too corrupt. This may or may not be true. It is, however, certainly unattractive and inadequate as an argument. In this article, I sketch out a principled theoretical argument defending internationalization of hybrid tribunals. Drawing on debates in municipal jurisdictions on the principle of fair reflection, my principled justification centres on institutional and sociological legitimacy. As international crimes strike at two societies – the local and the global – hybrid tribunals should be composed of both international and local judges. In principle, the severity of international crimes dictates that international judges should predominate. However, peculiar contextual factors may suggest moderating the principle of fair reflection in appropriate circumstances.

Key words

composition of courts; hybrid tribunals; international criminal law; principle of fair reflection; sociological legitimacy

I. INTRODUCTION

A curious development is underway in international criminal law – the return of the hybrid international criminal tribunal. At the turn of the twenty-first century, six hybrid courts were established in countries transitioning from mass atrocity or reeling from international crimes. Considered uniquely tailored to the peculiar features of the crimes they were designed to handle, proponents of these courts argued that they offered the potential for a catalytic transition to normalcy, based on a tri-partite grounding of legitimacy, capacity building and norm-penetration.¹ Unfortunately, however, despite the best intentions and some limited successes,

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¹ L. Dickinson, 'The Promise of Hybrid Courts', (2003) 97 *AJIL* 295, at 306.

these courts largely failed to achieve their considerable (and perhaps unrealizable) promise. Their popularity declined dramatically and no further hybrid courts were established – that is, until last year.

On 3 June 2015, Catherine Samba-Panza, interim President of the Central African Republic (CAR), promulgated a law establishing a ‘Special Criminal Court’ to try all war crimes and crimes against humanity committed in the CAR since 2003.² Two months later, on 3 August 2015, Kosovo lawmakers enacted legislation establishing a ‘Specialist Chambers’ comprised of international judges to try members of the Kosovo Liberation Army accused of atrocities against Serbs, Roma and Kosovar Albanians.³ Elsewhere, the United Nations Mission in South Sudan has recommended a special or hybrid court be considered in order to ‘pursue genuine accountability’ of perpetrators involved in a civil war that has raged since December 2013;⁴ a coalition of 146 national and international NGOs have called upon the government of the Democratic Republic of the Congo (DRC) to establish a ‘Specialised Mixed Chambers’;⁵ and the United Nations High Commissioner for Human Rights has recommended the establishment of a ‘hybrid special court’ to address systemic human rights violations in Sri Lanka.⁶ After a period of dormancy, it appears that hybrid criminal tribunals have returned as a viable option in international criminal justice.

This should not come as a surprise. Despite a range of teething problems concerning design and implementation, for many in the international criminal justice field, hybrid tribunals still hold significant promise.⁷ Yet, in large part this is not due to the successes of previous hybrid tribunals, but rather the uncertain state of international criminal justice more broadly. Indeed, today, international criminal justice appears to be suffering a crisis of legitimacy:⁸ the slow collapse of the case against Kenyan President Uhuru Kenyatta;⁹ the African Union’s push to guarantee immunity for sitting heads of state;¹⁰ and South Africa and Namibia’s moves to withdraw from the International Criminal Court¹¹ are just three stark illustrations of the current

² G. Mattioli-Zeltne, ‘Taking Justice to a New Level: The Special Criminal Court in the Central African Republic’, *Human Rights Watch*, 13 July 2015, available at www.hrw.org/news/2015/07/13/taking-justice-new-level-special-criminal-court-central-african-republic.

³ Republika e Kosovës, Law No.05/L-053 *On Specialist Chambers and Specialist Prosecutor’s Office*.

⁴ United Nations Mission in the Republic of South Sudan, ‘Conflict in South Sudan: A Human Rights Report’ (2014), Recommendation 5 and para. 312.

⁵ ‘Democratic Republic of Congo: No More Delays for Justice – Establish Specialized Mixed Chambers and Adopt ICC Implementing Legislation During the Current Parliamentary System’, *Human Rights Watch*, 1 April 2014, available at www.hrw.org/news/2014/04/01/democratic-republic-congo-no-more-delays-justice.

⁶ Human Rights Council, ‘Report of the OHCHR Investigation on Sri Lanka, 14 July – 2 October 2015’, U.N. Doc. A/HRC/30/CRP.2 (2015), Recommendation 20, at 250.

⁷ United Nations, Office of the United Nations High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States: Maximizing the Legacy of Hybrid Courts* (2008).

⁸ D. Luban, ‘After the Honeymoon: Reflections on the Current State of International Criminal Justice’, (2013) 11 JICJ 505.

⁹ *Prosecutor v. Uhuru Muigai Kenyatta*, Decision on the withdrawal of charges against Mr Kenyatta, ICC-01/09-02/11-1005, T. Ch. V(B), 13 March 2015. See further S. Mueller, ‘Kenya and the International Criminal Court (ICC): Politics, the Election and the Law’, (2014) 8 *Journal of East African Studies* 25.

¹⁰ Decision on Africa’s Relationship with the International Criminal Court (ICC), Ext/Assembly/AU/Dec.1 (October 2013), para. 10.

¹¹ African National Congress, National Governing Council 2015 Resolutions on International Relations, Recommendation 2.9; Shinovene Immanuel, ‘Cabinet affirms ICC withdrawal’, *The Namibian*, 24 November 2015, available at www.namibian.com.na/index.php?page=read&id=34394; Ndaitwah clarifies Namibia’s with-

dilemma. If international criminal justice is to be resuscitated, this new generation of hybrid courts must be more successful than their previous incarnations. If we are to avoid the mistakes of the past, it is crucial that these new hybrid courts are not simply constructed as *sui-generis* ‘expedient stopgaps’,¹² or (even worse) copied without thought. The design of the CAR Special Criminal Court, the Kosovo Specialist Chambers, and the proposed courts in South Sudan, the DRC and Sri Lanka should be based on extensive evaluation of the failings of the previous hybrid courts.

This article adds to the literature examining and evaluating the first iteration of hybrid tribunals with the aim of systemic development for this new generation of hybrid courts. It does so by analyzing an area often taken for granted, but absolutely critical in ensuring successful functional operation of *all* courts – the composition of the Bench. Since the emergence of hybrid tribunals, scholars have attempted to corral these heterogeneous institutions in order to define their common features. Despite some diversity of opinion around the edges, it is recognized that the mixed composition of local and international judges is a defining characteristic of these tribunals.¹³ While there is growing scholarship on international judges,¹⁴ few scholars have focused specifically on the composition of hybrid criminal tribunals,¹⁵ and there has been little attention to providing a principled justification for mixed composition.

On the primary question of whether the majority of the Bench should be composed of local or international judges, competing justifications can be proffered. A majority of local judges can enhance the legitimacy of the court in the affected state. It may weaken the (often valid) critique that international criminal law is simply imperialism by another name, by enabling the national authorities to take a leading role in the trial of their own war criminals. In doing so the international community provides moral backing for the local judiciary, implicitly recognizing that they are not biased, corrupt or incapable. At the same time, a minority of international judges can complement their local counterparts in both subtle and unsubtle ways; for example, through informal conversations and deliberations in chambers, and in reasoned decisions in open court. As the experience of the Extraordinary Chambers in the Courts of Cambodia (ECCC) has demonstrated, however, in societies transitioning from mass atrocity with devastated judicial institutions, a majority of local judges can have significant negative consequences. Credible

drawal from ICC’, *New Era*, 11 March 2016, available at www.newera.com.na/2016/03/11/ndaitwah-clarifies-namibias-withdrawal-icc/.

¹² P. McAuliffe, ‘Hybrid Tribunals at Ten: How International Criminal Justice’s Golden Child Became an Orphan’, (2011) 7 *Journal of International Law and International Relations* 1, at 7.

¹³ S. Nouwen, ‘“Hybrid courts”: The Hybrid Category of a New Type of International Crimes Courts’, (2006) 2 *Utrecht Law Review* 190, at 213; S. Williams, *Hybrid and Internationalized Criminal Tribunals* (2012), 204; E. Higonnet, ‘Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform’, (2006) 23 *Arizona Journal of International and Comparative Law* 347, at 356.

¹⁴ R. Mackenzie et al., *Selecting International Judges: Principles, Process and Politics* (2010); D. Terris, C. Romano and L. Swigart, *The International Judge: An Introduction to the Men and Women Who Decide the World’s Cases* (2007).

¹⁵ The only significant examination is C. Romano, ‘The Judges and Prosecutors of Internationalized Criminal Courts and Tribunals’, in C. Romano, A. Nollkaemper and J. Kleffner (eds.), *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia* (2010) 235–70. For a recent effort see H. Hobbs, ‘Hybrid Tribunals and the Composition of the Court: In Search of Sociological Legitimacy’, (2015) 16 *Chicago Journal of International Law* 482.

allegations of bias, political interference and corruption have bedevilled the ECCC, suggesting that this approach must be managed carefully.

But a focus on the experience in Cambodia is liable to miss the real issue. What about states where the judiciary's independence is not compromised? Should a majority of international judges be preferred *ipso facto*? A principled justification for internationalization must instead focus on the particular characteristic of international crimes. Drawing on debates in domestic jurisdictions on the link between the principle of 'fair reflection' and institutional sociological legitimacy, I provide a principled justification for the mixed composition of hybrid courts.

Legitimacy can be understood as the 'quality that leads people (or states) to accept authority – independent of coercion, self-interest, or rational persuasion – because of a general sense that the authority is justified'.¹⁶ Thus, legitimacy has normative and sociological dimensions: a hybrid court may be normatively legitimate because it was established by municipal law after agreement between a state and the United Nations,¹⁷ and it may be sociologically legitimate because the people of the affected state accept, or perceive, it as justified.¹⁸ Legitimacy is particularly crucial for hybrid courts.¹⁹ As a practical matter, absent any police force these courts are 'especially vulnerable to being ignored'.²⁰ However, more significantly, the total breakdown of civic trust, both horizontally and vertically, that characterizes states transitioning from authoritarianism or mass atrocity, severely weakens the prospect of acceptance of authority – particularly where a sizeable number of people may disagree with the court's judgment. If institutions are not considered legitimate, social regulation is more difficult and costly, and may be impossible in transitioning states. Without legitimacy, the promised benefits of hybrid courts will be lost.

The general acceptance of judicial decisions as 'justified' relies on public confidence, not simply coercion. If hybrid tribunals are to be accepted as legitimate, and are to realize their potential for (limited) capacity building and norm-penetration, the composition of these courts must be a fair reflection of the society in question. As international crimes strike at two societies – the local and the global – to be legitimate, both local and international judges must necessarily staff hybrid courts.²¹ It should be remembered, however, that there is no homogenous international community, and both principled and pragmatic reasons militate in favour of splitting the inter-

¹⁶ D. Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?', (1999) 93 AJIL 596, at 600. See also T. Franck, *The Power of Legitimacy Among Nations* (1990), 16.

¹⁷ See, for example, the ECCC: *Khmer Rouge Trials*, GA Res 57/228, UN GAOR 57th session, Agenda item 109(b), UN Doc. A/57/806 (22 May 2003); *Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea*, NS/RKM/1004/006 (27 October 2004).

¹⁸ Bodansky, *supra* note 16, at 601. See further M. Weber, *The Theory of Social and Economic Organization* (1964), 382.

¹⁹ Y. Shany, 'How can International Criminal Courts Have a Greater Impact on National Criminal Proceedings?', (2013) 46 *Israel Law Review* 431, at 449–50.

²⁰ N. Grossman, 'Sex Representation on the Bench and the Legitimacy of International Criminal Courts', (2011) 11 ICLR 643, 644

²¹ Cf. M. Markovic, 'International Criminal Trials and the Disqualification of Judges on the Basis of their Nationality', (2014) 13 *Washington University Global Studies Law Review* 1.

national judges into greater particularity.²² Consideration of contextual factors in the appointment of international judges is critical in ensuring a clearer connection between the court and the primary victims.

In setting out and answering the need for a principled justification, I divide the article into two parts. In the first section I examine the principle of fair reflection in municipal jurisdictions, exploring the emergence of the principle and assessing its meaning and operation in comparative jurisdictions. While in the domestic context the principle has primarily been employed to advocate for greater gender and ethnic balance, in the international sphere the application of the principle turns on issues of representation of geographic and legal tradition.²³ In this section I argue that a court's sociological legitimacy is intimately tied to its composition. In the second part of the article I examine the dualism inherent in international criminal law – that international crimes are violations against two societies, the local and the global. Drawing on the principle of fair reflection, I argue that sociological legitimacy demands that the composition of the courts tasked with jurisdiction over these crimes reflect these two societies. I argue further that *in principle* the severity of international crimes necessitates a majority of international judges on any internationalized court. This presumption, however, may be departed from in appropriate contexts.²⁴ For example, in situations where civic trust has been decimated it may make sense to have a majority of international judges; in situations where restorative justice efforts are prioritized, a majority of local judges may be necessary. My aim in this article is modest: Where hybrid courts are under consideration, policymakers should bear in mind that the principle of fair reflection can enhance sociological legitimacy, leading to greater support amongst the victim community, and offering greater potential for the promises of hybrid courts to be realized.

2. THE PRINCIPLE OF FAIR REFLECTION

Debates concerning the composition of domestic judiciaries can inform the approach taken for internationalized courts. Over the last 30 years an emergent soft-law principle concerning the composition of the judiciary has developed. First clearly enunciated in the 1983 *Montreal Universal Declaration on the Independence of Justice*,²⁵ the principle of 'fair reflection' has since been reaffirmed in numerous international instruments²⁶ and operationalized in many domestic and international judicial appointment procedures, including, in part, the ICC.²⁷ The essence of this emergent

²² E. Bruch, 'Hybrid Courts: Examining Hybridity Through a Post-Colonial Lens', (2010) 28 *Boston University International Law Journal* 1, at 36; Hobbs, *supra* note 15, at 482, 513–20.

²³ Mackenzie et al., *supra* note 14, at 24–5.

²⁴ And has been in the Central African Republic Special Criminal Court, which is composed of 27 judges, 14 national and 13 international.

²⁵ *Montreal Universal Declaration on the Independence of Justice*, Art. 2.13.

²⁶ It has been expressly reaffirmed in *The Burgh House Principles on the Independence of the International Judiciary*, Art. 2.2 (2005), and the *Mt Scopus International Standards on Judicial Independence*, Art. 2.15 (2008). For implicit endorsement on the basis of non-discrimination in judicial appointment see: United Nations, *Basic Principles on the Independence of the Judiciary*, UN Doc. A/CONF.121/22/Rev.1 (1985), Art. 10.

²⁷ 1998 Rome Statute of the International Criminal Court, 2187 UNTS 90, Art. 36(8).

principle is neatly distilled in Article 2.15 of the *Mt Scopus International Standards on Judicial Independence*, which requires that ‘the process and standards of judicial selection shall give due consideration to ensuring a fair reflection by the judiciary of the society in all its aspects’. In short, judges should mirror the society over which they exercise jurisdiction. This section will examine the meaning and status of the principle in municipal jurisdictions, with the aim of elucidating an understanding that can inform the composition of hybrid courts.

2.1. What does the principle of ‘fair reflection’ require?

Legal and political theorists have long emphasized the importance of judicial independence and impartiality as either a formal or procedural characteristic of the rule of law.²⁸ For Locke, men come together in civil society in order to ‘avoid, and remedy those inconveniencies of the state of nature, which necessarily follow from every man’s being judge in his own case’.²⁹ A formal division of powers between co-equal branches of government, as recognized by Montesquieu and persuasively argued for in the *Federalist Papers*,³⁰ offers the clearest avenue for formally guaranteeing this independence. Judicial independence thus has two dimensions: independence from the apparatus of the state, and impartiality towards the parties at issue. The former institutionally secures the latter,³¹ and both are recognized across the globe as of paramount importance.³² However, if judges are to be independent and impartial, then how are we to speak of mirroring societal interests? Is the principle of fair reflection at odds with the fundamental principle of judicial impartiality?

Indeed, it is important at the outset to distinguish between ‘reflection’ and ‘representation’. Representation can be defined broadly as meaning ‘the making present *in some sense* of something which is nevertheless *not* present literally or in fact’.³³ More specifically it can be delineated between the concepts of ‘standing for’ and ‘acting for’. The principle of judicial independence and impartiality leaves no room for this second form of representation: Judges are required to perform their duties and exercise their powers ‘honourably, faithfully, impartially and conscientiously’,³⁴ to ‘do right to all manner of people according to law without fear of favour, affection or ill-will’,³⁵ and should not be seen to act for, or as representatives of, any particular interest. Rather, the Judge is said to represent ‘the law’ or ‘justice’. Of course, unlike the judiciary, the duty of a politician *is* to act ‘in the interests of the represented in a manner responsive to them’.³⁶

²⁸ J. Raz, ‘The Rule of Law and its Virtue’, in *The Authority of Law: Essays on Law and Morality* (1979) 210, 216–17.

²⁹ J. Locke, *Two Treatises of Government* (1821) Book II, Ch. 7 [90].

³⁰ C. de Montesquieu, *The Spirit of the Laws* (1748) (A. Cohler trans, 1989) Book XI, Ch. 6, at 157; *The Federalist Nos. 47, 51* (James Madison), No. 78 (Alexander Hamilton).

³¹ W. Schabas, *The UN International Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (2006), 506.

³² For a comprehensive account of the standards see S. Shetreet, ‘The Normative Cycle of Shaping Judicial Independence in Domestic and International Law’, (2009) 10 *Chicago Journal of International Law* 275.

³³ H. Pitkin, *The Concept of Representation* (1967), 8–9.

³⁴ International Court of Justice, Rules of the Court (1978) (adopted on 14 April 1978 and entered into force on 1 July 1978), Art. 4(1).

³⁵ *High Court of Australia Act 1979* (Cth) s. 11, schedule. Similar oaths exist in every country.

³⁶ Pitkin, *supra* note 33, at 209. Pitkin defines this as ‘substantive representation’.

The former notion of representation, ‘standing for’, can be further delineated between symbolic and descriptive representation.³⁷ A flag does not resemble a nation but symbolizes one; a map represents the physical configuration of a country drawn to scale.³⁸ When we speak of ‘fair reflection’ we are talking about descriptive representation. This concept requires a body reflective of society: ‘an exact portrait, in miniature, of the people at large’.³⁹ It is this descriptive notion of representation that underpins the fair reflection principle; though note that ‘fair’ reflection does not require exact proportion. Conceptualized in this sense, the principle of fair reflection does not necessarily disturb judicial impartiality. It simply requires that in its composition, the judiciary should mirror society in all its diversity – religious, gender, geographical, social, ideological, etc.

However, when framed in this broad sense the principle is open to significant criticism. At least in most states, the legitimacy of the judiciary is not of a political form gained through democratic processes but an institutional legitimacy achieved through consistent, procedurally fair, unbiased and transparent application of norms to particular fact scenarios.⁴⁰ If the sole, or even dominant consideration for judicial appointment were a candidate’s religious belief, gender, ethnicity, or ideological leaning etc. than public confidence in the judiciary would be significantly undermined in two important respects. First, the criteria may lead to a drop in the quality of appointees, leading to a drop in the quality of the court’s decisions. Second, particularly in the case of an ideological criterion but relevant for any criterion other than ‘merit’,⁴¹ it may taint the judiciary as simply an institution of political patronage. The international standards recognize this and are careful to acknowledge that the principle should cede to issues of professional skill and qualification. Article 11.2 of the comprehensive *Mt Scopus Standards* provides:

11.2 While procedures for nomination, election and appointment should consider fair representation of different geographic regions and the principal legal systems, as appropriate, as well as of female and male judges, appropriate personal and professional qualifications must be the overriding consideration in the nomination, election and appointment of judges.

This mild conception of the principle subjects it to the functional and institutional necessity of maintaining ‘the professional quality and the moral integrity of the judiciary’.⁴² In doing so it avoids some of the more persuasive criticism. In practice, it requires that of two candidates with the requisite skill and qualifications, the candidate who would enhance the representative character of the judiciary should be preferred.

³⁷ Ibid., at 60 and 92.

³⁸ Ibid.

³⁹ Ibid., at 60.

⁴⁰ M. Loth, ‘Courts in Quest for Legitimacy: A Comparative Approach’, in N. Huls et al. (eds.), *The Legitimacy of Highest Courts’ Rulings: Judicial Deliberation and Beyond* (2009), 267.

⁴¹ Of course the concept of ‘merit’ in judicial appointment is not uncontroversial: M. Thornton, ‘“Otherness” on the Bench: How Merit is Gendered’, (2007) 29 *Sydney Law Review* 391.

⁴² S. Shetreet, ‘Who Will Judge: Reflections on the Judicial Process and Standards of Judicial Selection’, (1987) 61 *Australian Law Journal* 766, at 776.

Such a policy, though not able to convince everyone, is said to guarantee not political legitimacy, but institutional and sociological legitimacy by enhancing public confidence in the courts.⁴³ This occurs in two ways: first, the very presence of a ‘non-traditional’⁴⁴ judge will lead to greater support of the institution by that identified community; and second, the diversity of experience, knowledge, expertise and outlook that heterogeneous judges will bring to the case at issue may lead to more well-rounded decisions that command greater support throughout the entire community.

Public trust and confidence is of critical importance for the judiciary. In *The Federalist No. 78* Alexander Hamilton remarked that the judiciary has ‘neither Force nor Will, but merely judgment’,⁴⁵ and therefore, as the European Court of Human Rights has held, ‘must enjoy public confidence if it is to be successful in carrying out its duties’.⁴⁶ The concern is that any institution that fails to reflect the ‘make-up of the society from which it is drawn will sooner or later lose the confidence of that society’.⁴⁷ Indeed, the principle of fair reflection has emerged in opposition to the prevailing orthodoxy of judicial appointments in numerous countries, which led to a ‘narrow social, ideological, or geographical background of judges’.⁴⁸ Certainly this has been the experience in Australia,⁴⁹ and other countries.⁵⁰

This role model rationale is intuitive but deficient for it ignores the agency of the non-traditional judge. While a socially or culturally homogenous judiciary composed of eminently qualified individuals is capable of producing sound decisions, a more diverse court made up of equally eminently qualified and skilled individuals will likely produce better decisions.⁵¹ Non-traditional judges can make a ‘unique and transformative contribution’ by introducing ‘traditionally excluded perspectives and values into judicial decision-making’.⁵² The failure to incorporate diversity results in a stunted law that diminishes confidence and legitimacy in the institution as a whole. Barbara Hamilton has made this argument persuasively in the Australian context in relation to gender diversity:

The absence of women judges on the Bench may compromise the community’s ability to accept judgments, particularly where gender issues appear relevant to the outcome.⁵³

The first female Justice of the Canadian Supreme Court, Justice Bertha Wilson, has made similar remarks:

⁴³ *Ibid.*, 776; Shetreet, *supra* note 32, at 311; MacKenzie et al., *supra* note 14, at 171.

⁴⁴ E. Rackley, *Women, Judging and the Judiciary: From Difference to Diversity* (2013), 196.

⁴⁵ *The Federalist No. 78* (Alexander Hamilton).

⁴⁶ *Prager and Oberschlick v. Austria* (1995) 313 Eur. Ct. H.R. (ser. A), para. 34.

⁴⁷ S. Evans and J. Williams, ‘Appointing Australian Judges: A New Model’, (2008) 30 *Sydney Law Review* 295, at 300.

⁴⁸ Shetreet, *supra* note 32, at 310.

⁴⁹ E. Neumann, *The High Court of Australia: A Collective Portrait 1903 to 1972* (1973), 105–6.

⁵⁰ See Shetreet, *supra* note 32, at 310–11.

⁵¹ On the idea that deliberation between conflicting views is the best means for discovering the truth see: J. Habermas, *Communication and the Evolution of Society* (1979), 58–60.

⁵² S. Ifill, ‘Racial Diversity on the Bench: Beyond Role Models and Public Confidence’, (2000) 57 *Washington & Lee Law Review* 405, at 479.

⁵³ B. Hamilton, ‘Criteria for Judicial Appointment and “Merit”’, (1999) 15 *QUT Law and Justice Journal* 10, at 18.

Some aspects of the criminal law in particular cry out for change because they are based on presuppositions about the nature of women and women's sexuality that in this day and age are little short of ludicrous.⁵⁴

While Hamilton and Justice Wilson may have had the common law's historical marital rape exemption,⁵⁵ or the position of battered women syndrome⁵⁶ in mind, the long struggle to classify rape and sexual violence as war crimes under international law⁵⁷ offers additional support for their view. That the breakthrough came from the targeted inquiry of Judge Navanethem Pillay, the sole woman on the ICTR Trial Chamber hearing the case,⁵⁸ and sustained pressure from women's human rights organizations, suggests as such. To our shame, female judges on international courts still remain the exception.⁵⁹

Of course it is not correct to suggest that a diverse Bench will necessarily enhance public confidence or that an individual (for example, female) judge will by virtue of her gender approach (or decide) a particular case in a distinct manner. As many have remarked, the years of legal education and training required of judges may have a homogenizing effect on their attitudes, perceptions and outlook, irrespective of gender or culture.⁶⁰ This is an important reminder when extrapolating the principle into hybrid courts. The presence of national judges may not be enough in and of itself to ground legitimacy. A local judge may be from a particular cultural or ideological community and their presence may in fact diminish public confidence and legitimacy in the institution as a whole. This warning demonstrates that the principle of fair reflection in domestic and hybrid courts must always cede to 'traditional' integral judicial qualities of impartiality and professional skill. Though of course 'merit' should not prevent diverse candidates from selection.

2.2 Application of the principle in municipal law

The mild form of the principle of fair reflection has been endorsed in a number of international declarations and an increasing number of states. Significantly, the principle is 'most commonly found in federal or multicultural countries where a reflection of the constituent political units or cultures is expected on the bench'.⁶¹ The growing awareness of the importance and legitimating qualities of the principle in these states lends credence to its potential successful translation as a reasoned principle for the composition of hybrid courts.⁶²

⁵⁴ B. Wilson, 'Will Women Judges Really Make a Difference?', (1990) 28 *Osgoode Hall Law Journal* 507, at 515.

⁵⁵ Australia: *R v. L* (1991) 174 CLR 379; England: *R v. R* [1991] 4 All ER 481.

⁵⁶ See in particular the judgment of Wilson J in *R v. Lavallee* [1990] 1 S.C.R. 852.

⁵⁷ *Prosecutor v. Akayesu*, Judgement, Case No. ICTR 96-4-T, T. Ch., 2 September 1998, para. 598.

⁵⁸ R. Copelon 'Gender Crimes as War Crimes: Integrating Crimes Against Women into International Criminal Law', (2001) 46 *McGill Law Journal* 217, at 225.

⁵⁹ Mackenzie et al., *supra* note 14, at 161–5; For statistics see N. Grossman, 'Sex on the Bench: Do Women Judges Matter to the Legitimacy of International Courts?', (2012) 12 *Chicago Journal of International Law* 647, at 652–4, 678–81.

⁶⁰ R. Graycar, 'The Gender of Judgments: An Introduction', in M. Thornton (ed.), *Public and Private: Feminist Legal Debates* (1996), 262, at 268–9.

⁶¹ Shetreet, *supra* note 32, at 311.

⁶² Note that each judiciary is a creature of institutional context and care should be taken not to engage in unconscious translation. This section aims simply to identify that the principle of fair reflection is accepted in a range of domestic (and supranational) courts.

In Canada, the *Supreme Court Act 1985* guarantees at least three (of nine) positions on the Bench to individuals from Quebec.⁶³ These seats are only eligible for current members of the Quebec bar or Quebec superior courts.⁶⁴ By convention the other six positions are also divided, albeit less rigidly, amongst the provinces.⁶⁵ In Belgium, the Constitutional Court is composed of 12 judges equally divided between two linguistic groups of ‘six Dutch-speaking judges . . . and six French-speaking judges’. In addition, one of the 12 judges must have an adequate knowledge of German. Each linguistic group selects a President⁶⁶ and ‘the Presidency of the court as a whole alternates between these two each year’.⁶⁷ Further, in line with its ‘transformative constitutional philosophy’⁶⁸ the South African Constitution expressly directs the President to consider the ‘need for the judiciary to reflect broadly the racial and gender composition of South Africa’ when appointing Judges.⁶⁹ The particular arrangement in Canada, Belgium and South Africa is predicated on the necessity of accommodating the diverse interests within each society. A court that did not adequately reflect Dutch-speaking Belgians, civil law Québécois or black Africans would (and in the case of South Africa, did)⁷⁰ lack authority and legitimacy within those communities.

The same is true for the United Kingdom (UK). In the UK, by convention at least one judge from Scotland and one from Northern Ireland always sat on the House of Lords, the former ultimate appellate court.⁷¹ The Supreme Court of the United Kingdom, the successor to the House of Lords, appears to operate under a similar convention. Australia has also flirted with the idea of requiring a geographic balance in its ultimate court. During the Convention Debates in Australia, it was suggested that the puisne justices of the High Court might be composed of the Chief Justices of the various states.⁷² While the chief proponent of this measure predicated his argument on: (1) financial savings; (2) judicial efficiency; and (3) a lack of faith that the Court would be used,⁷³ a close reading indicates that underlying the proposal was the idea that to be legitimate, the Court must be reflective of the constituent parts of the nation. This proposal was ultimately defeated on, *inter alia*, partiality grounds, with concern that it may ‘lead to the suspicion that the Chief Justices chosen from

⁶³ *Supreme Court Act*, R.S.C., 1985, c. S-26, s 6.

⁶⁴ *Reference re Supreme Court Act*, ss. 5 and 6 [2014] SCC 21.

⁶⁵ Three are selected from Ontario, two from the Western Provinces, and one from the Atlantic Provinces: Shetreet, *supra* note 32, at 311.

⁶⁶ *Special Act of 6 January 1989 on the Constitutional Court*, Arts 31, 33, 34.4.

⁶⁷ V. Comella, *Constitutional Courts and Democratic Values: A European Perspective* (2009), 45.

⁶⁸ *Minister of Finance and Other v. Van Heerden* [2004] 6 SA 121 (Constitutional Court) 48 [81] (Mokgoro J); 84 [142] (Sachs J); *South African Police Service v. Solidarity obo Barnard* [2014] ZACC 23 (2 September 2014) [29] (Moseneke ACJ).

⁶⁹ *South African Constitution*, s 174(2).

⁷⁰ In 1994 of the 166 Superior Court Judges in South Africa, 161 were white males: See R. Cowan, ‘Women’s Representation on the Courts in the Republic of South Africa’, (2006) 6 *University of Maryland Journal of Race, Religion, Gender & Class* 291, at 298.

⁷¹ Shetreet, *supra* note 32, at 311.

⁷² *Official Record of the Debates of the Australasian Federal Convention*, Melbourne (28 January 1898) 265 (Patrick Glynn).

⁷³ *Ibid.*, at 266–8.

the various states were intended to be in some sort of way the representatives of provincial interests'.⁷⁴

While this concern reverberates heavily in the literature on mixed composition of hybrid criminal courts,⁷⁵ the discussion above has illustrated that a mild form of the principle of fair reflection can accommodate diverse interests without compromising the efficacy of the institution in domestic contexts. Properly structured and with appropriate safeguards, there is no reason why this could not be the case in hybrid criminal courts. Of course, the ECCC's experience suggests that this can be very difficult to achieve and perhaps *may* be impossible in some cases. However, generally speaking, these are issues of implementation, not conception. Where serious questions surround the independence and impartiality of a state's judiciary, policy makers should establish measures designed to strengthen these critical judicial qualities. If this proves impossible then the principle of fair reflection should cede to other considerations: biased or partial judges will not strengthen the legitimacy of the court, notwithstanding that they happen to have a connection to the local community.

Significantly, the principle of fair reflection is not anathema to the international order; all supranational courts impose various nationality qualifications on appointment. For example, the European Court of Justice is composed of 'one judge per Member State',⁷⁶ by convention seats on the African Court on Human and People's Rights and the International Court of Justice are divided between geographic regions,⁷⁷ and, in the ICJ, states who do not have a national sitting on the court, may nominate a national to hear a case concerning them.⁷⁸ As the extensive literature on domestic courts suggests, public confidence and accompanying sociological legitimacy demand that judges of a court reflect the society or community from which they are drawn – all that has changed in the international criminal law forum is the boundaries of society. The next section will explore these enlarged boundaries.

3. THE DUALISM OF INTERNATIONAL CRIMES

The CAR has experienced 'serious and unabated violations of human rights and international humanitarian law' which 'are committed in a climate of total impunity'.⁷⁹ Government estimates suggest that in 2014 up to 44.5 per cent of the

⁷⁴ *Ibid.*, at 269 (Edmund Barton).

⁷⁵ This unease is most marked in reaction to the ECCC. For concerns raised during the negotiations of the ECCC see United Nations, 'Report of the Group of Experts for Cambodia Established pursuant to General Assembly Resolution 52/135', UN Doc. A/53/850-S/1999/231, para. 137 (16 March 1999), available at www1.umn.edu/humanrts/cambodia-1999.html. For concerns raised during the operation of the ECCC see, for example, J. Ciorciari and A. Heindel, 'Experiments in International Criminal Justice: Lessons from the Khmer Rouge Tribunal', (2014) 35 *Michigan Journal of International Law* 370.

⁷⁶ *Consolidated Version of the Treaty on European Union*, Art. 19(2).

⁷⁷ Mackenzie et al., *supra* note 14, at 165–6.

⁷⁸ Statute of the International Court of Justice, Art. 31. In fact, it is expressly recognized that 'States would be much more likely to have confidence in the court ... if each contending party had a judge on the bench': Terris, Romano and Swigart, *supra* note 14, at 151.

⁷⁹ United Nations Security Council, Report of the Secretary-General on the situation in the Central African Republic, UN Doc. S/2014/562 (2014), para. 2.

population have suffered sexual violence.⁸⁰ Across the border in South Sudan, the UN is concerned that while the intensity of fighting has decreased the ‘conflict may be spreading to previously-less affected States’.⁸¹ In the DRC, ‘serious human rights violations continue[] to be committed by [both] armed groups and state agents’.⁸² Are these matters for domestic or international prosecutors? The question of international participation is a vexed one. What is it about a particular crime that triggers international jurisdiction? Normatively, why does the international community have an interest in the prosecution and punishment of certain criminal acts, but not others? And how should a court designed for this purpose be composed?

3.1. The local and the global

While victim-centric dispute resolution was historically ‘the natural order for societies’,⁸³ the development of the criminal law reveals a ‘steady evolution away from the “private”, or individual, sphere to the “public” or societal one’.⁸⁴ In England, this began with the gradual centralization of power under the Norman Kings, resulting in a reconceptualization of crime as an offence against the state, not just the individual. Social contract theorists such as Hobbes advanced this notion, arguing that ‘a sin is not only a transgression of a law, but also any contempt of the legislator’.⁸⁵ This remains the dominant view today. Though civil cases are conducted in the names of the parties, *Victim v. Alleged Thief*; criminal prosecutions are conducted in the name of the state, *R v. Alleged Thief*. The state, as the symbolic representative of the community,⁸⁶ has a legitimate and separate interest in the prosecution and punishment of violations of criminal law.

The state’s interest can be conceptualized in two distinct ways. First, that public wrongs harm the community as a whole; and second, as Antony Duff has argued, that public wrongs define our responsibilities as rational agents to our fellow citizens.⁸⁷ Under the former notion, we could argue that ‘a crime is not committed only against the victim, but primarily against the community whose law is violated’.⁸⁸ Under the latter we might say that those who commit crimes are answerable to the entire polity for their actions, rather than simply to their victims. At the domestic level the result is the same – the community has a legitimate interest in punishment. For example, the government of the CAR is properly regarded as the authority responsible for prosecuting and punishing individuals who commit criminal acts

⁸⁰ Ibid., para. 17.

⁸¹ United Nations Human Rights Council, Report of the United Nations High Commissioner for Human Rights on the Situation of Human Rights in South Sudan, UN Doc. A/HRC/27/74 (2014), para. 77.

⁸² United Nations Security Council, Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo, UN Doc. S/2014/698 (2014), para. 72.

⁸³ T. Markus Funk, *Victims’ Rights and Advocacy at the International Criminal Court* (2010), 19.

⁸⁴ L. Henderson, ‘The Wrongs of Victims’ Rights’, (1985) 37 *Stanford Law Review* 937, at 938–40.

⁸⁵ T. Hobbes, *The Leviathan* (1688) (Edwin Curley ed., 1994), 190.

⁸⁶ In the classic symbolic ‘standing for’ conception of representation: Pitkin, *supra* note 33, at 93.

⁸⁷ R.A. Duff, ‘Answering for Crime’, (2006) 106 *Proceedings of the Aristotelian Society* 87, at 94.

⁸⁸ T. Taylor, ‘Large Questions in Eichmann Case’, *New York Times*, 22 January 1961, 22.

on its territory. Difficulties arise, however, where the criminal conduct is said to affect two communities – the local and the global.⁸⁹

Five primary theoretical bases for the triggering of international interest can be discerned from the literature. First, that the nature and gravity of the crimes ‘deeply shock the conscience of humanity’⁹⁰ by violating norms and values considered important to the international community.⁹¹ Second, that in their scale, these crimes can ‘threaten the peace, security, and well-being of the world’,⁹² and therefore must be dealt with collectively. Third, that international crimes capture the particular evil that is the abuse of state power to harm, rather than to protect.⁹³ Fourth, that international crimes are directed at groups, and ‘all human beings share an interest in ensuring that people are not killed . . . solely because of their group affiliation’.⁹⁴ And fifth, ontologically, that in their assault on human dignity these crimes negate the very nature of humaneness.⁹⁵ These bases are not freestanding pillars but rather interact and complement each other, and may be emphasized to varying degrees depending on the particular context. Certainly the situations in the CAR, South Sudan and the DRC appear to involve all five moral bases.

But if such serious crimes are ‘of concern to the international community as a whole’,⁹⁶ should prosecution be ‘confiscated’ by a particular state, just because it is the one in which the crime was committed?⁹⁷ Leaving to one-side (significant) issues of practicality, efficacy and domestic legacy, *should* an international criminal court generally (and the ICC specifically) prosecute all ‘international’ crimes? Is there scope for national judges?

This question can be answered by distilling two discourses of international criminal justice.⁹⁸ Robert Sloan has noted that the ‘prevailing paradigm’ approaches international criminal law as a form of proxy justice for the interests of disenfranchised primary victims.⁹⁹ Complementarity under the *Rome Statute* accords with this view,¹⁰⁰ operating as a presumption in favour of national prosecutions and

⁸⁹ On the problematic concept of an inchoate or ‘monolithic international community’ see, for example, I. Tallgren, ‘The Voice of the International: Who is Speaking?’, (2015) 13 JICJ 135. Cf. H. Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* (1920), 271–4.

⁹⁰ Rome Statute, Preamble para. 2, Art. 17(1)(d).

⁹¹ A. Cassese, *International Criminal Law* (2nd edn., 2003), 23.

⁹² Rome Statute, Preamble para. 3. Of course, the ICTY and ICTR were both established under the Chapter VII powers of the UN Security Council: SC Res 827, UN SCOR, 48th sess, 3217th mtg, UN Doc. S/RES/827 (1993), as amended by SC Res 1877, UN SCOR, 64th sess, 6155th mtg, UN Doc. S/RES/1877 (2009) (ICTY Statute). SC Res 955, UN SCOR, 49th sess, 3453rd mtg, UN Doc. S/RES/955 (1994) annex (Statute of the International Tribunal for Rwanda).

⁹³ W. Lee, ‘International Crimes and Universal Jurisdiction’, in L. May and Z. Hoskins (eds.), *International Criminal Law and Philosophy* (2010) 15, at 21.

⁹⁴ D. Luban, ‘A Theory of Crimes Against Humanity’, (2004) 29 *Yale Journal of International Law* 85, at 138–9.

⁹⁵ M. Renzo, ‘Crimes Against Humanity and the Limits of International Criminal Law’, (2012) 31 *Law and Philosophy* 443, at 449.

⁹⁶ Rome Statute, Preamble para. 4.

⁹⁷ A. Pellet, ‘Internationalized Courts: Better than Nothing...’, in C. Romano, A. Nollkaemper and J. Kleffner (eds.), *supra* note 15, at 437, 438.

⁹⁸ R. Sloane, ‘The Expressive Capacity of International Punishment’, (2007) 43 *Stanford Journal of International Law* 39, at 48.

⁹⁹ *Ibid.*, at 49.

¹⁰⁰ The ‘cornerstone’ of the ICC: S. Williams and W. Schabas, ‘Article 17’, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (2nd ed., 2008), 605, 606.

relegating the ICC to a mechanism designed to simply ‘fill the gap created by the failure of States’.¹⁰¹ International criminal law is simply an adjunct to domestic law, necessary because of unfortunate political realities. The second approach emphasizes the interests of a ‘figurative international community’, both in the sense of the values shared by a common humanity and the values shared by a community of states.¹⁰² The five bases for the triggering of international interest rest on these two senses of Sloan’s figurative international community. While the first, fourth and fifth appear to rest on ideas centring on a universal humanity, the second and third are suggestive of an international community of states.

Sloan argues that the nature and structure of international criminal tribunals will invariably (and should) prioritize the interests of the symbolic international community that they represent. International criminal courts derive their normative authority from ‘the concerted action of states’ through either Chapter VII of the UN Charter or multilateral treaties, not through any Hobbesian social contract by an affected community.¹⁰³ In a recent paper, Milan Markovic has drawn on Sloan to argue that judges at the ICC and other international criminal tribunals that preside over trials concerning crimes committed by or against their fellow nationals should recuse themselves.¹⁰⁴ Markovic is concerned about apprehensions of bias and questions whether judges can truly act as representatives of the international community in those circumstances.

Sloan and Markovic do note that hybrid tribunals are ‘analytically distinct’,¹⁰⁵ as they are established via state consent¹⁰⁶ and are often constituted as domestic courts. The ECCC for example is a domestic Court, established under domestic law following agreement between Cambodia and the international community.¹⁰⁷ The memorandum between the government of the CAR and the United Nations Multidimensional Integrated Stabilization Mission required the CAR to ‘establish, by [domestic] law, a special criminal court’.¹⁰⁸ Legislation to establish a Specialized Mixed Chambers in the DRC is before the Parliament of the DRC. Those Chambers too will be domestic. As such, there is more scope for the taking into account of national

¹⁰¹ Note that this is how the OTP conceptualizes its role: ICC, Office of the Prosecutor, Paper on Some Policy Issues Before the Office of the Prosecutor (September 2003) 6. However, it is not clear whether the Judges follow this approach as successful admissibility challenges are very rare. For discussion see C. Stahn, ‘Admissibility Challenges before the ICC: From Quasi-Primacy to Qualified Deference?’, in C. Stahn (ed.), *The Law and Practice of the International Criminal Court* (2015), 228, at 231–2.

¹⁰² Sloan, *supra* note 98, at 48.

¹⁰³ *Ibid.*, at 52–3.

¹⁰⁴ Markovic, *supra* note 21. Cf. Hobbs, *supra* note 15, at 482, 507.

¹⁰⁵ Sloan, *supra* note 98, at 51 note 57; Markovic, *supra* note 21, at 10 note 48.

¹⁰⁶ As opposed to established under the Chapter VII powers of the United Nations Security Council. Of course the legality of the International Criminal Court is consent-based. Note that in some cases hybrid tribunals are established with limited to no state consent; in relation to Lebanon, see, for example, F. Mégret, ‘A Special Tribunal for Lebanon: The Council and the Emancipation of International Criminal Justice’, (2008) 21 LJIL 485.

¹⁰⁷ See, for example, the ECCC: *Khmer Rouge Trials*, GA Res 57/228, UN GAOR 57th sess, Agenda item 109(b), UN Doc. A/57/806 (2003); *Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea*, NS/RKM/1004/006 (2004).

¹⁰⁸ Memorandum of Intent between the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic and the Government of the Central African Republic (Unofficial translation) (7 August 2014), para. 4.

interests. However, as the previous section demonstrated, sociological legitimacy requires that judges reflect the community over which they exercise jurisdiction. A focus on the legal legitimacy of international criminal courts fundamentally misses the point. The crucial aspect is the dual nature of international crimes.

International crimes are properly understood as both international *and* local crimes. The ‘extraordinary evil’ that is genocide, crimes against humanity and war crimes, are not simply an assault on the international community at large or the international order, but also principally a direct attack on the local society.¹⁰⁹ This twin-quality can be considered by transposing conceptions of individual victimhood in domestic jurisdictions, in order to distinguish between primary or direct victims, and secondary or indirect victims. A primary victim is a person who is injured or dies as a direct result of an act of violence. A secondary victim is a person who is injured as a direct result of witnessing the act of violence that resulted in the injury or death of the primary victim of that act. Under this approach, the local society that directly suffers the atrocity can be considered the primary victim, while the international community – either as an international community of states or a figurative cosmopolitan community – who witnesses the mass violence, is considered a secondary victim. The international community is a victim of the act of violence not because ‘we’ directly suffered physical or psychological abuse, but because one of the five theoretical bases for the triggering of international interest has been met.

In moving towards a principled justification for mixed composition courts it is not necessary to, *a priori*, adopt a particular theoretical basis for international participation to the exclusion of all others. This is the case for two reasons. First, as noted above, separating these bases is akin to splitting hairs and some may be more relevant than others. Second, each basis leads to the same principled conclusion for mixed composition – that is, wherever, for example, the nature, scale and gravity of criminal action violates norms and values considered important to the international community or assaults human dignity so to negate the very nature of humanness, international participation is likely justified – though valid (and not so valid) competing considerations may caution against it.

Nevertheless, in each instance it remains important to accurately identify the basis claimed, for this will affect the institutional response. For example, the assassination of Prime Minister Rafic Hariri led to the creation of the Special Tribunal of Lebanon. Why? Of course pragmatic reasons connected to Lebanon’s situation were important, but significantly, the understanding that this assassination ‘threaten[ed] peace and security not only in the region, but throughout the world’¹¹⁰ grounded international involvement on the second theoretical basis, notwithstanding that this was – ordinarily – a purely domestic matter,¹¹¹ and unlikely to meet any severity threshold. On the same point the genocide against Rohingya Muslims in Burma¹¹²

¹⁰⁹ M. Aukerman, ‘Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice’, (2002) 15 *Harvard Human Rights Journal* 39, at 46.

¹¹⁰ Security Council Meeting Record, UN Doc. S/PV.5685 (2007), at 9 (Mr. Mitri, Lebanon).

¹¹¹ Security Council Meeting Record, UN Doc. S/PV.5685 (2007), at 3 (Mr. Kleib, Indonesia).

¹¹² Allard K. Lowenstein International Human Rights Clinic, Yale Law School, ‘Persecution of the Rohingya Muslims: Is Genocide Occurring in Myanmar’s Rakhine State?’ (October 2015).

clearly gives rise to international involvement on the first, second, fourth and fifth theoretical bases and, as such, an international court to try those responsible *could* justifiably be established. Unless and until the consequences of this heinous crime cross the Bangladesh or Thai border, however, it is unlikely to threaten international peace and security, and the second basis is unavailable as grounding. Unfortunately, despite already possessing a clear principled basis for international involvement, *realpolitik* prevents action.

Assuming any of the bases are satisfied, as the primary victim of these dual crimes the local community has a special interest in seeing the perpetrators prosecuted. But, importantly, the international community still has a general interest in seeing such a trial. The principle of fair reflection suggests that institutional and sociological legitimacy requires that both international and local judges adjudicate these crimes. Of course, states can choose to prosecute these crimes internally or domestically – and historically they have done so¹¹³ – but in principle, and in order to reflect the characteristic of crimes that trigger international interest, these prosecutions should involve a mix of international and local components.¹¹⁴ This idea is drawn from Frédéric Mégret’s representational theory of international criminal justice, which offers a cogent defence of hybrid tribunals as the particular adjudicative mechanism that best encapsulates the particular characteristic of international crimes.¹¹⁵ However, Mégret’s theory is only a step on the way to a principled justification for the *extent* of internationalization.

3.2. Hybrid courts and international crimes

Evoking Hanna Pitkin’s work on representation, Mégret contends that ‘persons tried for international crimes should be tried by tribunals that adequately “represent” the nature of the crimes at stake’.¹¹⁶ While there is nothing strictly international about Mégret’s theory – a person alleged to have breached domestic national security laws should be tried by a domestic court because that court best ‘represents’ the nature of the crime – it is compelling in the international criminal justice field because of the peculiar characteristic of the criminal activity.

Although not directly referring to it, it is clear that Mégret is using representation in the symbolic sense of ‘standing for’.¹¹⁷ In this dimension the hybrid tribunal, with its mixed composition and mixed material jurisdiction, is, in the words of Susanne Langer, a vehicle for the conception of the dual communities.¹¹⁸ It is ‘an exact reference to something indefinite’.¹¹⁹ ‘The great merit of hybrid tribunals’, Mégret notes,

¹¹³ See, for example, the Israeli trial of Adolph Eichmann (1961), the US Court Martial of Lieutenant William Calley (1971) and the French trial of Klaus Barbie (1987).

¹¹⁴ Although my focus is limited to the position of hybrid courts, in principle, this argument could be carried to purely international tribunals, such as the ICC. Of course, as I have stressed, the principle of fair reflection is but one element in the design of criminal courts – it may not be feasible for each and every case before the ICC.

¹¹⁵ F. Mégret, ‘In Defense of Hybridity: Towards a Representational Theory of International Criminal Justice’, (2005) 38 *Cornell International Law Journal* 725.

¹¹⁶ *Ibid.*, at 727.

¹¹⁷ Pitkin, *supra* note 33, at 92–111.

¹¹⁸ S. Langer, *Philosophy in a New Key: A Study in the Symbolism of Reason, Rite, and Art* (3rd edn., 2009), 60–61.

¹¹⁹ W. Tindall, *The Literary Symbol* (1955), 6.

is that institutionally they ‘deal with the artificial distinction between the domestic and international by simply collapsing it’.¹²⁰ Rather than risk ignoring a core dimension of an individual’s crime – either the international or domestic element – hybrid tribunals ‘mould themselves into the shape of the crimes they are judging’.¹²¹ Both societies – the local and the global – are represented in the adjudicative mechanism. On this conception, hybrid tribunals are no longer a second-best option¹²² but a principled and justifiable response to mass-atrocity.

Unfortunately, despite Mégret’s optimistic assertion that hybrid tribunals collapse the distinction between the international and domestic, the two spheres still exist: judges and lawyers are deliberately selected from both communities, and the accused will be subject to domestic and international law. Physical and social barriers (e.g., language, culture, pay differentials) between the international staff and the local population often amplify this recurrent structural differentiation, and result in *de facto* segregation.¹²³ Perhaps more disconcertingly from a functional perspective, these same barriers operate at the institutional level: for example, first-hand accounts at the ECCC suggest that linguistic barriers have hampered genuine discussion and debate between international and local staff.

This is not an oversight. Mégret’s theory does not intend to flesh out a principled case for the extent of internationalization. In some respects his theory is a threshold inquiry to a critical problem: It is one thing to agree that hybrid tribunals best *represent* the particular crimes at stake in international criminal justice, but it is another to determine the modalities of that internationalization. In the next part, I seek to answer this second question: If the principle of fair reflection requires that international crimes be adjudicated by local and international judges, the question arises, should the court be composed of a majority of international or local judges?

3.3. A majority of international or local judges?

Delineating the composition of *all* future hybrid tribunals is, of course, unhelpful. Rather, this section will provide a principled rebuttable presumption from which policy makers can begin with. It is to be remembered that the peculiar context of each situation must be the overriding concern of those tasked with designing and implementing hybrid tribunals. In this sense, issues to be aware of include: the nature of the crimes, the independence of the local judiciary, and the phase of the state’s rebuilding. In practice, these factors may tend towards a different composition. What follows therefore, is necessarily somewhat abstract.

Despite the slightly distinct philosophical grounding of each moral justification for international involvement, at the core of each basis is an element of extreme severity. It is this severity that re-conceptualizes a purely local crime into a crime of international concern. Severity can be understood in a number of ways. It can refer to the systemic nature of violations either temporally or geographically, the

¹²⁰ Mégret, *supra* note 115, at 747.

¹²¹ *Ibid.*

¹²² For a collation of comments to this effect see Higonnet, *supra* note 13, at 356–7 note 20.

¹²³ J. Cockayne, ‘Hybrids or Mongrels? Internationalized War Crimes Trials as Unsuccessful Degradation Ceremonies’, (2005) 4 *Journal of Human Rights* 455, at 458.

scale of the violations, the seriousness or intensity of those violations and their likelihood to reverberate beyond state boundaries, their impact on victims, or the manner in which they were committed.¹²⁴ For Luban, it brings to mind ‘something extraordinary’, a ‘cataclysm’ beyond the ‘normal part of the daily functioning of government’.¹²⁵ In this regard, justification is self-evident, ‘it just feels right’.¹²⁶

The concept itself is indistinct, purposely so.¹²⁷ Yet it conjures up recognizable imagery. Once a specific crime or pattern of criminal activity crosses this threshold, in principle, it should be properly regarded as ‘not the concern of one state alone’,¹²⁸ but ‘the business of all of us’.¹²⁹ This approach is not morally subjective but its precise contours are difficult to discern – and it is likely that a principled case for international involvement cannot be made until at least two or three of the five theoretical bases are satisfied.¹³⁰ Of course, as noted above, realpolitik and selective enforcement often acts to prevent legitimate and principled opportunities for international involvement. This simply means that even if an act qualifies, international involvement does not necessarily follow.

Indeed, unlike the international human rights regime, the concept (as opposed to the all-too-selective enforcement) of international criminal law is not subject to the same critiques of Western imperialism.¹³¹ This is unsurprising: the Geneva Conventions have been ratified by 196 states, including all UN member states, both UN observer states, as well as the Cook Islands, and scholars and jurists have emphasized that all major cultural and religious traditions prohibit these crimes.¹³² In *Legality of the Threat or Use of Nuclear Weapons Advisory Opinion*,¹³³ Judge Weeramantry’s dissenting opinion explored this relationship:

It greatly strengthens the concept of humanitarian laws of war to note that this is not a recent invention, nor the product of any one culture. The concept is of ancient origin, with a lineage stretching back at least three millennia. As already observed, it is deep-rooted in many cultures – Hindu, Buddhist, Chinese, Christian, Islamic and traditional African.¹³⁴

That the severity of a criminal act makes it a crime of universal concern is reflected in the emergence of universal jurisdiction. Under this concept certain crimes, because

¹²⁴ ICC, Office of the Prosecutor, Policy Paper on Preliminary Examinations (2015), 15–16, paras 59–66.

¹²⁵ D. Luban et al., *International and Transnational Criminal Law* (2014), 17.

¹²⁶ I. Tallgren, ‘The Sensibility and Sense of International Criminal Law’, (2002) 13 *EJIL* 561, at 561. I agree with Tallgren that this intuitive approach is not sufficient for grounding international criminal law.

¹²⁷ M. deGuzman, ‘How Serious Are International Crimes? The Gravity Problem in International Criminal Law’, (2012) 51 *Columbia Journal of Transnational Law* 18.

¹²⁸ R. Cryer, ‘International Criminal Law vs State Sovereignty: Another Round?’, (2005) 16 *EJIL* 979, at 985.

¹²⁹ G. Evans, ‘The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All’, (2009) 20 *Irish Studies in International Affairs* 7, at 7. On ‘us’ see Tallgren, *supra* note 89.

¹³⁰ Of course, other reasons for international involvement do exist, not least where a state is unwilling or unable to investigate.

¹³¹ The African National Congress National Governing Council predicated its recommendation that South Africa withdraw from the ICC on ‘double standards and selective actions’ and the influence of the permanent members of the Security Council: African National Congress, National Governing Council 2015, *supra* note 11, Recommendation 2.8.

¹³² Though the situation may be more complex: C. Evans, ‘The Double-Edged Sword: Religious Influences on International Humanitarian Law’, (2005) 6 *Melbourne Journal of International Law* 1.

¹³³ Advisory Opinion of 8 July 1996, [1996] ICJ Rep. 226.

¹³⁴ *Ibid.*, at 478 (Dissenting Opinion of Judge Weeramantry).

of their very nature, do not require a jurisdictional nexus to a particular state. Instead, any state may exercise jurisdiction, and in doing so, ‘acts on behalf of the international community . . . because it has an interest in the preservation of world order as a member of that community.’¹³⁵ The classic example is that of piracy—although this crime may rise to the level of international concern for instrumental reasons. Even ‘before International Law in the modern sense of the term was in existence, a pirate was already considered an outlaw, a “*hostis humani generis*”, an enemy of all mankind. Today this notion is codified in the UN Convention on the Law of the Sea,¹³⁶ and actualized through the UN Office of Drugs and Crime ‘Maritime Crime Program’.

That the subject matter of international criminal law under the *Rome Statute* is restricted to *jus cogens* crimes is significant. As is the episodic exercise of universal jurisdiction. Both reinforce and explicitly endorse these crimes as a universal moral concern. Questions of appropriate theories of punishment, the utility of transposing municipal concepts into the international sphere, and effectiveness of specific criminal mechanisms are secondary issues. In these cases, for these crimes, ‘humanity’ at large is denoted the primary community, rather than any particular political community of humans. In this respect, the international community should bear a greater role and responsibility in any trial. In *principle* therefore, hybrid courts should be staffed by a majority of international judges.

Of course, ‘a majority’ does not mean an overwhelming majority. International crimes quite clearly have a more pronounced impact on local communities than the diffuse international community. It is impossible to argue persuasively that the systematic use of rape as an instrument of genocide in Rwanda harmed a broadly defined humanity more than the Rwandan community. This would suggest that local judges should predominate. However, it ignores the important normative effect of grounding these crimes as crimes of international concern. If we take Antony Duff’s conception of crime as responsibility,¹³⁷ a majority of international judges can both reflect and affirm the international polity. Those who commit crimes that cross the severity threshold should be answerable to the international community for their actions. The particular theory of criminal justice one chooses to prioritize does not necessarily affect this conclusion. While I acknowledge that on a purely restorative model a majority of local judges (if judges at all) may be preferred, an individual convicted of committing an international crime has still victimized two communities, and must repair the harm caused to both.¹³⁸

This principled approach is supported by pragmatic reasons. First, it is likely that there will be a greater number of international judges with expertise in the subject matter of the hybrid court than local judges. Second, majority international involvement also carries symbolic weight, demonstrating international commitment to the victims of mass atrocity. Third, a majority of international judges may weaken

¹³⁵ M. C. Bassiouni, ‘Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice’, (2001) 42 *Virginia Journal of International Law* 81, at 88.

¹³⁶ 1994 United Nations Convention on the Law of the Sea, 1883 UNTS 397, Art. 105.

¹³⁷ See *supra* note 87 and accompanying text.

¹³⁸ See generally J. Braithwaite, *Restorative Justice and Responsive Regulation* (2002).

allegations of victor's justice. And fourth, it is impossible to avoid the likelihood that a transitioning state's judiciary will not be sufficiently independent from executive influences. In these circumstances majority international involvement may enhance the legitimacy of the court in the eyes of the people of the affected state. Nevertheless, quite apart from anxiety about the capacity of an affected State's judiciary, in their representative character, hybrid courts should in principle be composed of a majority of international judges. This composition more accurately reflects the core element of the triggering of international concern – extreme severity of criminal activity: either in affecting the international community of states, or a common humanity.

Nevertheless, this principle should properly be regarded as only a rebuttable presumption. In particular contexts there may be valid reasons to moderate the exact composition. For example, where the severity of the alleged criminal acts does not reach a sufficient gravity, the interests of the international community may not be sufficiently engaged to justify a majority of international judges. Furthermore, in the course of a hybrid court's operation it may make practical or political sense to transition to a majority of national judges.¹³⁹ This shift would be in recognition of a transition in political ownership to the affected state.¹⁴⁰ As the Special Criminal Court, for example, becomes a politically and sociologically legitimate feature in the CAR it may make sense to reflect the changed dynamics.¹⁴¹ This gradual phase-out of international judges could be combined with the establishment of an independent judicial commission managing the selection of local judges and prosecutors across the CAR or other embedded rule of law capacity building institutions. Assuming such appropriate safeguards are introduced, as Section 2 demonstrated, it would likely increase the courts legitimacy in the eyes of Central Africans.¹⁴² It would also present an opportunity for the international community to gradually withdraw from the Court.¹⁴³ It is to be remembered that hybrid courts are not meant to be enduring. They are a limited mechanism operating on a limited time frame.

4. CONCLUSION

The operation of international criminal tribunals 'often entails serious legitimacy challenges'.¹⁴⁴ This article has argued that the principle of fair reflection can offer a cogent defence for mixed composition of hybrid courts potentially enhancing legitimacy, and leading to better outcomes for the local community. It has also argued

¹³⁹ This method was adopted in the War Crimes Chamber for Bosnia and Herzegovina: See Williams, *supra* note 13, at 107.

¹⁴⁰ For discussion of 'ownership' see P. Rapoza, 'Hybrid Criminal Trials and the Concept of Ownership: Who Owns the Process', (2006) 21 *American University International Law Review* 525.

¹⁴¹ Though note that the Special Criminal Court will begin with a majority of local judges.

¹⁴² For an analysis of the link between sociological legitimacy and the composition of hybrid courts through detailed examination of existing tribunals see Hobbs, *supra* note 15, at 482, 498–512.

¹⁴³ Something akin to the ICTY and ICTR completion strategies: SC Res 1503, UN SCOR, 4817th mtg, UN Doc. S/RES/1503 (2003); SC Res 1534, UN SCOR, 4935th mtg, UN Doc. S/RES/1534 (2004).

¹⁴⁴ Y. Shany, 'Seeking Domestic Help: The Role of Domestic Criminal Law in Legitimizing the Work of International Criminal Tribunals', (2013) 11 JICJ 5, at 8.

that the peculiar character of international crimes necessitates both international and local involvement in the trial of alleged perpetrators. That we sit on the cusp of a new generation of hybrid international criminal justice, suggests that this is a lesson that is, at least subconsciously, understood.

This is not a radical proposal. In 1474, Sir Peter von Hagenbach was accused of ‘tramp[ing] under foot the laws of God and man’ for atrocities committed during the occupation of Breisach. In what is widely accepted as the start-point of international criminal justice,¹⁴⁵ von Hagenbach was brought before an *ad hoc* tribunal composed of 28 judges:

Eight of [the judges] were nominated by Breisach, and two by each of the other allied Alsatian and Upper Rhenanian towns [Strasbourg, Selestat, Colmar, Basel, Thann, Kensingen, Neuburg am Rhein, and Freiburg im Breisgau], Berne, a member of the Swiss Confederation, and Solothurn, allied with Berne.¹⁴⁶

The local community, Breisach, nominated a plurality of judges, with the majority being nominated by the international community of states.

In international criminal law’s quest for legitimacy it may seem odd to return to a time before the birth of international law. However, much of the concern surrounding international criminal justice is its alienation from the primary victims. For too long international justice has been ‘justice divorced from local realities’.¹⁴⁷ International criminal law’s challenge is to make justice available on a personal level. The principle of fair reflection can provide significant insight to the composition of hybrid criminal courts by focusing attention on relevant communities. This focus offers greater scope for the promise of hybrid courts to be realized.

¹⁴⁵ G. Schwarzenberger, *International Law as applied by International Courts and Tribunals* (1949) Vol. II, 462–6; G. Gordon, ‘The Trial of Peter von Hagenbach: Reconciling History, Historiography and International Criminal Law’, in K. Heller and G. Simpson (eds.), *The Hidden Histories of War Crimes Trials* (2013), 13–49.

¹⁴⁶ Schwarzenberger, *supra* note 145, at 463.

¹⁴⁷ P. Hazan, *La justice face à la guerre, De Nuremberg à La Haye* (2007).