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Harry Hobbs

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

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 paper, 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: international criminal law, sociological legitimacy, composition of courts, hybrid tribunals, principle of fair reflection

1. 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, these courts largely failed to achieve their considerable (and perhaps unrealisable) 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

3 Republika e Kosovës, Law No,05/L-053 On Specialist Chambers and Specialist Prosecutor’s Office.
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; 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'; 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. 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. 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: the slow collapse of the case against Kenyan President Uhuru Kenyatta; the African Union’s push to guarantee immunity for sitting heads of state; and South Africa and Namibia’s moves to withdraw from the International Criminal Court are just three stark illustrations of the current 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’, 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 paper 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 analysing 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

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10 Decision on Africa’s Relationship with the International Criminal Court (ICC), Ext/Assembly/AU/Dec.1 (Oct 2013) [10]
around the edges, it is recognised that the mixed composition of local and international judges is a defining characteristic of these tribunals. While there is growing scholarship on international judges, few scholars have focused specifically on the composition of hybrid criminal tribunals, 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. However, as the experience of the Extraordinary Chambers in the Courts of Cambodia (ECCC) has demonstrated, in societies transitioning from mass atrocity with devastated judicial institutions, a majority of local judges can have significant negative consequences. Credible 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’. 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, and it

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17 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 (May. 22, 2003); Law on the Establishment of the Extraordinary Chambers in the Courts of
may be sociologically legitimate because the people of the affected state accept, or perceive, it as justified.\textsuperscript{18} Legitimacy is particularly crucial for hybrid courts.\textsuperscript{19} As a practical matter, absent any police force these courts are ‘especially vulnerable to being ignored’.\textsuperscript{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.\textsuperscript{21} However, it should be remembered that there is no homogenous international community, and both principled and pragmatic reasons militate in favour of splitting the international judges into greater particularity.\textsuperscript{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 paper 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.\textsuperscript{23} In this section I argue that a court’s sociological legitimacy is intimately tied to its composition. In the second part of the paper 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.\textsuperscript{24} For example, in situations where civic trust has been decimated it may make sense to have a majority of


\textsuperscript{20} N. Grossman, ‘Sex Representation on the Bench and the Legitimacy of International Criminal Courts’ (2011) 11 ICLR 643, 644


\textsuperscript{23} Mackenzie, supra note 14, at 24-25.

\textsuperscript{24} And has been in the Central African Republic Special Criminal Court, which is composed of 27 judges, 14 international and 13 local.
international judges; in situations where restorative justice efforts are prioritized, a majority of local judges may be necessary. My aim in this paper 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 thirty 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, the principle of “fair reflection”, has since been reaffirmed in numerous international instruments and operationalized in many domestic and international judicial appointment procedures, including, in part, the ICC. The essence of this emergent 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. 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’. A formal division of powers between co-equal branches of government, as recognized by Montesquieu and persuasively argued for in the Federalist Papers, 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, and both are recognized across the globe as of paramount importance. However, if judges are to be independent and

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29 J. Locke, Two Treatises of Government (1821) Book II Ch 7 [90].
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’. 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’, to ‘do right to all manner of people according to law without fear of favour, affection or ill-will’, 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’.

The former notion of representation, “standing for,” can be further delineated between symbolic and descriptive representation. A flag does not resemble a nation but symbolizes one; a map represents the physical configuration of a country drawn to scale. 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’. 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. 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”, 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

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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”.
37 Id. at 60 & 92.
38 Id.
39 Id. at 60.
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’. 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 whom would enhance the representative character of the judiciary should be preferred.

Such a policy, though not able to convince everyone, is said to guarantee not political legitimacy, but institutional and social legitimacy by enhancing public confidence in the courts. This occurs in two ways: first, the very presence of a ‘non-traditional’ 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’, 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’. 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. 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’. Certainly this has been the experience in Australia, and other countries.

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. Non-traditional judges can make a ‘unique and transformative contribution’ by introducing

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43 Ibid, 776; Shetreet, supra note 32, at 311; MacKenzie et al, supra note 14, at 171.
45 The Federalist No. 78 (Alexander Hamilton).
48 Shetreet, supra note 32, at 310.
50 See Shetreet, supra note 32, at 310-311.
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.
‘traditionally excluded perspectives and values into judicial decision-making’. 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.

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

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.

While Hamilton and Justice Wilson may have had the common law’s historical marital rape exemption, or the position of battered women syndrome in mind, the long struggle to classify rape and sexual violence as war crimes under international law, 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, and sustained pressure from women’s human rights organizations, suggests as such. To our shame, female judges on international courts still remain the exception.

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. 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.

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57 Prosecutor v Akayesu (1998), Case No. ICTR 96-4-T, Judgment [598].
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

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 twelve 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

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.
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, 34.4, 33.
67 V. Comella, Constitutional Courts and Democratic Values: A European Perspective (2009), 45.
69 South African Constitution, s 174(2).
71 Shetreet, supra note 32, at 311.
measure predicated his argument on: (1) financial savings; (2) judicial efficiency; and (3) a lack of faith that the Court would be used,\textsuperscript{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, \textit{inter alia}, partiality grounds, with concern that it may ‘lead to the suspicion that the Chief Justices chosen from the various states were intended to be in some sort of way the representatives of provincial interests’.\textsuperscript{74}

While this concern reverberates heavily in the literature on mixed composition of hybrid criminal courts,\textsuperscript{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’,\textsuperscript{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,\textsuperscript{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.\textsuperscript{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’.\textsuperscript{79} Government

\textsuperscript{73} \textit{Id.} at 266-268.
\textsuperscript{74} \textit{Id.} at 269 (Edmund Barton).
\textsuperscript{76} \textit{Consolidated Version of the Treaty on European Union}, art 19(2).
\textsuperscript{77} Mackenzie et al, \textit{supra} note 14, at 165-166.
\textsuperscript{78} \textit{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 & Swigart, \textit{supra} note 14, at 151.
estimates suggest that in 2014 up to 44.5% of the population have suffered sexual violence.\textsuperscript{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.’\textsuperscript{81} In the DRC, ‘serious human rights violations continue[] to be committed by [both] armed groups and state agents.’\textsuperscript{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’,\textsuperscript{83} the development of the criminal law reveals a ‘steady evolution away from the “private”, or individual, sphere to the “public” or societal one.’\textsuperscript{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.’\textsuperscript{85} This remains the dominant view today. Though civil cases are conducted in the names of the parties, \textit{Victim v Alleged Thief}; criminal prosecutions are conducted in the name of the state, \textit{R v Alleged Thief}. The state, as the symbolic representative of the community,\textsuperscript{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.\textsuperscript{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’.\textsuperscript{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 on its territory. Difficulties arise, however, where the criminal conduct is said to affect two communities—the local and the global.\textsuperscript{89}

\textsuperscript{80} Id. at [17].
\textsuperscript{83} T. Markus Funk, \textit{Victims’ Rights and Advocacy at the International Criminal Court} (2010), 19.
\textsuperscript{86} In the classic symbolic “standing for” conception of representation: Pitkin, supra note 33, at 93.
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’ by violating norms and values considered important to the international community. Second, that in their scale, these crimes can ‘threaten the peace, security, and well-being of the world’, 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. 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’. And fifth, ontologically, that in their assault on human dignity these crimes negate the very nature of humaneness. 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’, should prosecution be ‘confiscated’ by a particular state, just because it is the one in which the crime was committed? 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. 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. Complementarity under the *Rome Statute* accords with this view, operating as a presumption in favour of national prosecutions and relegating the ICC to a mechanism designed to simply ‘fill the gap created by the failure of States’. 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.

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90 *Rome Statute*, preamble para 2; art 17(1)(d).
92 *Rome Statute*, preamble para 3. Of course, the ICTY and ICTR were both established under the Chp VII powers of the UN Security Council: SC Res 827, UN SCOR, 48th sess, 3217th mtg, UN Doc S/RES/827 (May. 25, 1993), as amended by SC Res 1877, UN SCOR, 64th sess, 6155th mtg, UN Doc S/RES/1877 (July. 7, 2009) (‘ICTY Statute’). SC Res 955, UN SCOR, 49th sess, 3453nd mtg, UN Doc S/RES/955 (Nov. 8, 1994) annex (‘Statute of the International Tribunal for Rwanda’).
99 Id. at 49.
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* 6 (September 2003). 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, 231-232.
of states. 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. 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. 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’, as they are established via state consent 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. 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’. 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 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. This twin-quality can be considered by transposing conceptions of individual victimhood in domestic jurisdictions, in order to

102 Sloan, supra note 98, at 48.
103 Id. at 52-53.
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 (May. 22, 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 (Oct. 27, 2004).
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’ grounded international involvement on the second theoretical basis, notwithstanding that this was—ordinarily—a purely domestic matter, and unlikely to meet any severity threshold. On the same point the genocide against Rohingya Muslims in Burma 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 be established. However, unless and until the consequences of this heinous crime cross the Bangladesh or Thai border, 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 so but in principle, and in order to reflect the characteristic of crimes that trigger international

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111 Security Council Meeting Record, UN Doc. S/PV.5685 (2007), at 3 (Mr. Kleib, Indonesia).
113 See for e.g. the Israeli trial of Adolph Eichmann (1961), the US Court Martial of Lieutenant William Calley (1971) and the French trial of Klaus Barbie (1987).
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, 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

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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.
116 Id. 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 (3d ed. 2009), 60-61.
120 Mégret, supra note 116, at 747.
121 Id.
122 For a collation of comments to this effect see Higonnet, supra note 13, at 356-7 note 20.
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 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. For Luban, it brings to mind ‘something extraordinary’, a ‘cataclysm’ beyond the ‘normal part of the daily functioning of government’. In this regard, justification is self-evident, ‘it just feels right’.126

The concept itself is indistinct, purposely so. 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’, 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

130 Of course, other reasons for international involvement do exist, not least where a state is unwilling or unable to investigate.
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.\textsuperscript{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.\textsuperscript{132} In \textit{Legality of the Threat or Use of Nuclear Weapons Advisory Opinion},\textsuperscript{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.\textsuperscript{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 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.’\textsuperscript{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,\textsuperscript{136} and actualized through the UN Office of Drugs and Crime ‘Maritime Crime Program’.

That the subject matter of international criminal law under the \textit{Rome Statute} is restricted to \textit{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 \textit{principle} therefore, hybrid courts should be staffed by a majority of international judges.


\textsuperscript{132} Though the situation may be more complex: Carolyn Evans, \textit{The Double-Edged Sword: Religious Influences on International Humanitarian Law}, 6 Melb. J. Int’l. L. 1 (2005).

\textsuperscript{133} 1996 I.C.J. 226.

\textsuperscript{134} \textit{Id.} at 478 (Dissenting Opinion of Judge Weeramantry).


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, 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.

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 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. This shift would be in recognition of a transition in political ownership to the affected state. 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. 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 II demonstrated, it would likely increase the courts

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137 See supra note 87 and accompanying text.
139 This method was adopted in the War Crimes Chamber for Bosnia and Herzegovina: See Williams, supra note 13, at 107.
141 Though note that the Special Criminal Court will begin with a majority of local judges.
legitimacy in the eyes of Central Africans.\textsuperscript{142} It would also present an opportunity for the international community to gradually withdraw from the Court.\textsuperscript{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’.\textsuperscript{144} This paper 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 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 ‘trampling’ 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,\textsuperscript{145} von Hagenbach was brought before an ad hoc tribunal composed of 28 judges:

\begin{quote}
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, Kenzingen, Neuburg am Rhein, and Freiburg im Breisgau], Berne, a member of the Swiss Confederation, and Solothurn, allied with Berne.\textsuperscript{146}
\end{quote}

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’.\textsuperscript{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.

\begin{footnotes}
\textsuperscript{142} For an analysis of the link between sociological legitimacy and the composition of hybrid courts through detailed examination of existing tribunals see: H. Hobbs, ‘Hybrid Tribunals and the Composition of the Court’, supra note 15, 493, 510-524.

\textsuperscript{143} Something akin to the ICTY and ICTR completion strategies: SC Res 1503, UN SCOR, 4817\textsuperscript{th} mtg, UN Doc S/RES/1503 (28 August 2003); SC Res 1534, UN SCOR, 4935\textsuperscript{th} mtg, UN Doc S/RES/1534 (26 March 2004).

\textsuperscript{144} Y. Shany, ‘Seeking Domestic Help: The Role of Domestic Criminal Law in Legitimizing the Work of International Criminal Tribunals’ (2013) 11 JICJ 5, 8.


\textsuperscript{146} Schwarzenberger, supra note 145, 463.

\textsuperscript{147} P. Hazan, \textit{La justice face à la guerre, De Nuremberg à La Haye} (2007).
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