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Hybrid Tribunals and the Composition of the Court: In Search of Sociological Legitimacy

Harry Hobbs*

Abstract

Sociological legitimacy is a critical yet undertheorized element of a successful international criminal tribunal. This Article examines the link between sociological legitimacy and the composition of hybrid courts by analyzing the practice of five international criminal tribunals: the ICC, ICTY, ICTR, SCSL, and the ECCC. It finds that the presence of local judges on international criminal courts offers a firmer normative basis for enhancing their legitimacy among the local community. However, the Article also finds that despite impressive scholarly efforts to demystify the “homogenous” international community, international judges are not sufficiently particularized. The solution I offer is both principled and pragmatic. The appointment of international judges should prioritize individuals from regional states (provided the states were not involved in the conflict), those of the same legal tradition, and individuals who speak a language of the affected state. This solution pays greater respect to national sovereignty and enhances the prospect that judges sensitive to local customs will be involved, increasing the likelihood that the court will be regarded as legitimate. The court’s sociological legitimacy, in turn, heightens the court’s prospect of success.

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I. INTRODUCTION

On August 7, 2014, the government of the Central African Republic (CAR) and the U.N. Multidimensional Integrated Stabilization Mission in the Central African Republic signed a memorandum obligating the government to establish a “Special Criminal Court.”¹ On April 22, 2015, the National Transitional Council, the country's interim parliament, adopted a law establishing such a court, and on June 3, 2015, Catherine Samba-Panza, interim President of the CAR, promulgated that law.² The Court will have jurisdiction throughout the CAR, and the authority to conduct preliminary investigations, judicial examinations, and to try “all war crimes and crimes against humanity committed on the territory of the Central African Republic since 2003.”³ It will be comprised of twenty-seven judges, fourteen from the CAR and thirteen from other states.

This significant development comes only sixteen months after the U.N. Mission in South Sudan recommended that a special or hybrid court be considered in order to “pursue genuine accountability” of perpetrators involved in the civil war that has raged since December 2013.⁴ One month before the issuance of that Report, in April 2014, a coalition of 146 national and international NGOs called upon the government of the Democratic Republic of the Congo (DRC) to pass draft legislation establishing a “Specialized Mixed Chambers” in an effort to “bring an end to Congo’s history of rampant abuse.”⁵ More recently, on August 3, 2015, Kosovo lawmakers passed legislation establishing “Specialist Chambers” comprised of international judges to try members of the Kosovo Liberation Army accused of atrocities against Serbs, Roma, and Kosovo Albanians who were suspected of collaboration with the Serbian regime.⁶ Additionally, on September

¹ Memorandum of Intent between the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic and the Government of the Central African Republic, 4 (Aug. 7, 2014) (unofficial translation).

² Géraldine Mattioli-Zeltne, *Taking Justice to a New Level: The Special Criminal Court in the Central African Republic*, HUMAN RIGHTS WATCH (July 13, 2015), <https://www.hrw.org/news/2015/07/13/taking-justice-new-level-special-criminal-court-central-african-republic>.

³ Mark Kersten, *Courtside Justice: Central African Republic's Hybrid Tribunal Could be a Game-Changer*, JUSTICE HUB (May 13, 2015), <https://justicehub.org/article/court-side-justice-central-african-republics-hybrid-tribunal-could-be-game-changer>.

⁴ U.N. Mission in the Republic of South Sudan, Rep., *Conflict in South Sudan: A Human Rights Report*, Recommendation Five, ¶ 312-13 (May 8, 2014).

⁵ *Democratic Republic of Congo: No More Delays for Justice – Establish Specialized Mixed Chambers and Adopt ICC Implementing Legislation During the Current Parliamentary Session*, HUMAN RIGHTS WATCH, (April 1, 2014), <https://www.hrw.org/news/2014/04/01/democratic-republic-congo-no-more-delays-justice>.

⁶ Marija Ristic, *Kosovo's New War Court: How Will it Work?*, BALKAN INSIGHT (Aug. 6, 2015), <http://www.balkaninsight.com/en/article/how-will-special-kosovo-court-work--08-05-2015>; Marija Ristic, Ivana Nikolic & Petrit Collaku, *Kosovo's New War Court: Major Challenges Ahead*,

16, 2015, the U.N. High Commissioner for Human Rights recommended the establishment of a “hybrid special court” to address systemic human rights violations in Sri Lanka.⁷ After a period of dormancy,⁸ it appears that hybrid criminal tribunals have returned as a viable option in international criminal justice.⁹

This should not come as a surprise. Despite facing a range of problems concerning design and implementation,¹⁰ hybrid tribunals still hold significant promise for many in the international criminal justice field¹¹—not to mention for victims of international crimes. For countries suffering from systemic violations of international criminal law, hybrid tribunals are seen as offering the potential for a catalytic transition to normalcy based on a tripartite grounding of legitimacy, capacity building, and norm penetration.¹² However, it is important to contextualize this shift back towards hybrid courts. Today, international criminal justice is suffering something of a crisis of legitimacy.¹³ The slow collapse of the

BALKAN INSIGHT (Aug. 12, 2015), <http://www.balkaninsight.com/en/article/kosovo-s-new-war-court-major-challenges-ahead-08-11-2015>; *Statement by Federica Mogherini on the Law on Specialist Chambers and Specialist Prosecutor's Office*, EUROPEAN WESTERN BALKANS (Aug. 4, 2015), <http://europeanwesternbalkans.com/2015/08/04/statement-by-federica-mogherini-on-the-law-on-specialist-chambers-and-specialist-prosecutors-office/>.

⁷ Rep. of the Human Rights Council, *Report of the OHCHR Investigation on Sri Lanka*, July 14–Oct. 2, 2015, Recommendation 20 at 250, U.N. Doc. A/HRC/30/CRP.2, 30th Sess. (Sept. 16, 2015); see also *id.* ¶¶1246, 1278.

⁸ Between 2000 and 2007, six hybrid courts were created. No further hybrid courts were established until the CAR Special Criminal Court in June 2015.

⁹ See Serge Brammertz, Prosecutor, Int'l Criminal Trib. for the Former Yugoslavia, *Criminal Law Goes International: 20 Years of Accountability and the Future of International Criminal Law* (July 7, 2014) (lecture delivered at the ANU College of Law) (arguing that the future of international criminal law is less international justice, more hybrid courts).

¹⁰ See, for example, Caitlin Reiger, *Hybrid Attempts at Accountability for Serious Crimes in Timor Leste*, in *TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY: BEYOND TRUTH VERSUS JUSTICE* 143, 164 (Naomi Roht-Arriaza & Javier Mariezcurrena eds., 2006); Suzannah Linton, *Cambodia, East Timor and Sierra Leone: Experiments in International Justice*, 12 *CRIM. L.F.* 185, 186 (2001); Charles T. Call, *Is Transitional Justice Really Just?*, 11 *BROWN J. WORLD AFF.* 101, 107-109 (2004).

¹¹ See, for example, Office of the U.N. High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States: Maximizing the Legacy of Hybrid Courts*, U.N. Doc. HR/PUB/08/2, U.N. Sales No. E.08.XIV.2 (2008); Neha Jain, *Conceptualising Internationalisation in Hybrid Criminal Courts*, 12 *SING. Y.B. INT'L L.* 81, 88 (2008); Jane Stromseth, *Justice on the Ground: Can International Criminal Courts Strengthen Domestic Rule of Law in Post-Conflict Societies?*, 1 *HAGUE J. ON RULE L.* 87 (2009); Parinaz Kermani Mendez, *The New Wave of Hybrid Tribunals: A Sophisticated Approach to Enforcing International Humanitarian Law or an Idealistic Solution with Empty Promises?*, 20 *CRIM. L.F.* 53, 55 (2009).

¹² Laura A. Dickinson, Comment, *The Promise of Hybrid Courts*, 97 *AM. J. INT'L L.* 295, 300 (2003).

¹³ David Luban, *After the Honeymoon: Reflections on the Current State of International Criminal Justice*, 11 *J. INT'L CRIM. JUST.* 505, 509 (2013).

case against Kenyan President Uhuru Kenyatta,¹⁴ the halting of investigations against Sudanese President Omar al Bashir,¹⁵ and the African Union's push to guarantee immunity for sitting heads of state¹⁶ are just three stark illustrations of the current dilemma. If we are to avoid the mistakes of the past, it is crucial that future hybrid courts are not simply constructed as *sui generis* "expedient stopgaps" or as generic imitations of other hybrid courts.¹⁷ If the proposed courts in South Sudan, the DRC, and Sri Lanka are to be established, it should be after extensive evaluation of the failings of previous hybrid courts.

This Article adds to the literature examining and evaluating hybrid tribunals. Its aim is to aid policymakers tasked with establishing such tribunals. It does so by analyzing an area often taken for granted, but absolutely critical, in ensuring the successful functional operation of *any* court: the composition of the bench. Since the emergence of hybrid tribunals in the late 1990s, scholars have attempted to corral these heterogeneous institutions in order to define their common features. Despite some diversity of opinion around the edges, scholars widely recognize that the mixed composition of local and international judges is a defining characteristic of these tribunals.¹⁸ However, while there is growing scholarship on international judges,¹⁹ few scholars have focused specifically on the

¹⁴ ICC Drops Uhuru Kenyatta Charges for Ethnic Violence, BBC NEWS (Dec. 5, 2014), <http://www.bbc.com/news/world-africa-30347019>; see also Susanne D. Mueller, *Kenya and the International Criminal Court (ICC): Politics, the Election and the Law*, 8 J. E. AFR. STUD. 25, 29-37 (2014).

¹⁵ ICC Prosecutor Shelves Darfur War Crimes Inquiries, BBC NEWS (Dec. 12, 2014), <http://www.bbc.com/news/world-africa-30458347>.

¹⁶ Extraordinary Session of the Assembly of the African Union, *Decision on Africa's Relationship with the International Criminal Court (ICC)*, Ext/Assembly/AU/Dec.1 (Oct. 2013).

¹⁷ Pdraig McAuliffe, *Hybrid Tribunals at Ten: How International Criminal Justice's Golden Child Became an Orphan*, 7 J. INT'L L & INT'L REL. 1, 7 (2011).

¹⁸ Sarah Nouwen argues that the mixed composition of the Bench is the "only defining commonality" of hybrid tribunals. Sarah M.H. Nouwen, *'Hybrid courts': The Hybrid Category of a New Type of International Crimes Courts*, 2 UTRECHT L. REV. 190, 213 (2006). More recently, Sarah Williams has established a six-part definition, though she recognizes that "[p]erhaps the most clearly defining feature of a hybrid or internationalised tribunal is the mixed composition of the tribunals . . . particularly regarding the participation of international judges." SARAH WILLIAMS, *HYBRID AND INTERNATIONALIZED CRIMINAL TRIBUNALS: SELECTED JURISDICTIONAL ISSUES* 204 (2012); see also Laura A. Dickinson, *The Relationship Between Hybrid Courts and International Courts: The Case of Kosovo*, 37 NEW ENG. L. REV 1059, 1059 (2003); Dickinson, *supra* note 12, at 295; Etelle R. Higonnet, *Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform*, 23 ARIZ. J. INT'L & COMP. L. 347, 356 (2006).

¹⁹ See, for example, RUTH MACKENZIE ET AL., *SELECTING INTERNATIONAL JUDGES: PRINCIPLE, PROCESS, AND POLITICS* (2010); DANIEL TERRIS ET AL., *THE INTERNATIONAL JUDGE: AN INTRODUCTION TO THE MEN AND WOMEN WHO DECIDE THE WORLD'S CASES* (2007).

composition of hybrid tribunals,²⁰ and there has been little attention to analyzing in detail the link between tribunal composition and sociological legitimacy.

In this Article, I argue that the principle of fair reflection may provide a firmer conceptual basis for the selection of judges on hybrid tribunals. In short, this principle suggests that the composition of a court should mirror the society over which the judges exercise jurisdiction. I test this hypothesis by investigating the links between sociological legitimacy and the composition of a spectrum of international criminal tribunals, ranging from purely international to purely hybrid. The courts examined are: the International Criminal Court (ICC), the two *ad hoc* tribunals—the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)—as well as the Extraordinary Chambers in the Courts of Cambodia (ECCC) and the Special Court for Sierra Leone (SCSL). The analysis of these courts supports my hypothesis, but it also reveals that an inadequate theorization of mixed composition has limited the potential legitimacy benefits that hybrid courts can offer.

Indeed, this Article argues that theoretical analysis of the sociological legitimacy of international courts is underdeveloped. Despite impressive scholarly efforts to demystify the “homogenous” international community²¹ and practical judicial training exercises aimed at ensuring that all judges on international tribunals are sensitive to local context, international judges on international tribunals are not sufficiently particularized. In many respects, a simple dichotomy is proffered, dividing between “local” and “international” judges.²² Too often, the “local” judge is deeply personalized and contextualized to the point of suspicion of bias, corruption, or incompetence, while the “international” judge is entirely abstracted, neutralized, and decontextualized as expert.²³ This unstated presumption is both naïve and potentially destabilizing.

²⁰ The only significant examination is Cesare P.R. Romano, *The Judges and Prosecutors of Internationalized Criminal Courts and Tribunals*, in *INTERNATIONALIZED CRIMINAL COURTS AND TRIBUNALS: SIERRA LEONE, EAST TIMOR, KOSOVO, AND CAMBODIA* 235–70 (Cesare P.R. Romano, André Nollkaemper & Jann K. Kleffner eds., 2004). For a brief but useful discussion on “nationality,” see Leigh Swigart, *The “National Judge”: Some Reflections on Diversity in International Courts and Tribunals*, 42 *MCGEORGE L. REV.* 223 (2010).

²¹ See, for example, Sarah M.H. Nouwen & Wouter G. Werner, Symposium: *Pursuing Global Justice Through International Criminal Law*, 13 *J. INT’L CRIM. JUST.* 73 (2015).

²² At this point, it is helpful to explain certain terminology used here. Throughout the Article, I will refer to “local” and “international” judges, as well as “judges on international tribunals”. A “local” judge refers to a judge of the same nationality of the affected state, whereas an “international” judge refers to a judge of a different nationality. The catchall phrase “judges on international tribunals” refers to both local and international judges.

²³ Elizabeth M. Bruch, *Hybrid Courts: Examining Hybridity Through a Post-Colonial Lens*, 28 *B.U. INT’L L.J.* 1, 35–36 (2010).

This Article is divided into four substantive sections. In Section II, I provide a brief definition of hybrid tribunals and explain how they are positioned to offer greater sociological legitimacy than purely international tribunals. The third Section delineates the Article's theoretical framework, linking the principle of fair reflection to the concept of sociological legitimacy. In Section IV, I argue that the absence of guaranteed local judges on the ICC, as well as the ICTY and ICTR, has served as a spark for criticism, weakening the courts' legitimacy within affected states and undermining international criminal justice as a whole. In Section V, I extend the analysis a step further, arguing that although all supranational criminal courts have recognized the importance of geographic representation or representation of pluralistic legal traditions, none have really engaged in what representation should mean for hybrid courts in a way that enhances sociological legitimacy. The solution I offer is both principled and pragmatic. The international dimension can be particularized in order to favor selection of judges from regional states (provided the states were not involved in the conflict), judges from states of the same legal tradition, and judges who speak a language of the affected state. This solution pays greater respect to national sovereignty and enhances the prospect that judges sensitive to local customs will be involved, which offers potentially firmer grounding for the court's sociological legitimacy.

II. ON HYBRID TRIBUNALS

Writing in 2011, Pdraig McAuliffe noted that the hybrid court, “international criminal justice’s golden child,” had become an “orphan” over the second half of the first decade of the new millennium.²⁴ While six hybrid courts were established between 2000 and 2007, no additional courts were created until earlier this year.²⁵ Significantly, it appears that more will be created soon, as efforts are mobilizing to establish new hybrid criminal courts in South Sudan, the DRC, and Sri Lanka.²⁶ This flurry of activity necessitates an element of caution. Hybrid tribunals initially fell out of favor because they failed to achieve their lofty goals.²⁷ Therefore, before rushing headfirst into a second era of hybrid criminal justice, it is important to take stock. In this section, I will survey definitions of hybrid and internationalized criminal courts and explore where these courts have been established. I will also briefly note that in balancing sovereignty with accountability, these courts have the potential to disarm the imperialism critique

²⁴ McAuliffe, *supra* note 17, at 1.

²⁵ Philippe Flory, *International Criminal Justice and Truth Commissions*, 13 J. INT'L CRIM. JUST. 19, 25 n.22 (2015).

²⁶ See Williams, *supra* note 18, at 149–85 for other proposed potential hybrid courts.

²⁷ Whether they could ever have hoped to achieve such lofty goals is another question. See McAuliffe, *supra* note 17, 63–65.

of international criminal law. However, an inadequate theorization of hybridity that fails to understand the importance of sociological legitimacy will torpedo this potential benefit. This is why the composition of hybrid courts is so crucial.

Hybrid and internationalized criminal courts emerged during the late 1990s and early 2000s. Characterized as a “third generation” of international criminal law²⁸ or “international criminal justice 3.0,”²⁹ their development owed much to a peculiar convergence of factors. These included a wavering international commitment to the sprawling, costly, and lengthy *ad hoc* tribunals; the absence of a permanent supranational criminal court; and a growing appreciation that states should have primary responsibility to investigate and prosecute international crimes, combined with a keen awareness that post-conflict states may not be able to try cases in accordance with international standards.³⁰ With a “pared-down budget, tightly focused mandate [and a] limited period of operation,”³¹ these courts were conceived as being effective, expeditious, and “specially tailored to the unique features of the crimes they are designed to handle.”³²

The courts most commonly referred to as “hybrid” or “internationalized” are a diverse group. They comprise the “Regulation 64” Panels in the Courts of Kosovo³³; the Special Panels for Serious Crimes in East Timor³⁴; the SCSL³⁵; the ECCC³⁶; the War Crimes Chamber for Bosnia and Herzegovina³⁷; and the Special

²⁸ Higonnet, *supra* note 18, at 352.

²⁹ Harold Hongju Koh, *International Criminal Justice 5.0*, 38 YALE J. INT'L L. 525, 531 (2013).

³⁰ Williams, *supra* note 18, at 60–63, 201; Higonnet *supra* note 18, at 347.

³¹ Beth K. Dougherty, *Right-Sizing International Criminal Justice: The Hybrid Experiment at the Special Court for Sierra Leone*, 80 INT'L AFF. 311, 311 (2004).

³² Antonio Cassese, *Reflections on the Current Prospects for International Criminal Justice*, in LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN 433, 437 (Mahmoud H. Arsanjani et al. eds., 2011) (emphasis omitted).

³³ U.N. Interim Admin. Mission in Kosovo, Reg. No. 2000/64 on Assignment of International Judges/Prosecutors and/or Change of Venue, UNMIK/REG/2000/64 (Dec. 15, 2000).

³⁴ U.N. Transitional Admin. in East Timor, Reg. No. 2000/11 on the Organization of Courts in East Timor, UNTAET/REG/2000/11 (Mar. 6, 2000).

³⁵ Statute of the Special Court for Sierra Leone, U.N. Doc. S/2002/246, art. 13(1) (Jan. 16, 2002), annexed to the Agreement between the U.N. and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone [hereinafter SCSLSt].

³⁶ Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, U.N.-Cambodia, June 6, 2003, 2329 U.N.T.S. No. 41723.

³⁷ Agreement between the High Representative for Bosnia and Herzegovina and Bosnia and Herzegovina on the Establishment of the Registry for Section I for War Crimes and Section II for Organised Crime, Economic Crime and Corruption of the Criminal and Appellate Divisions of the Court of Bosnia and Herzegovina and the Special Department for War Crimes and the Special Department for Organised Crime, Economic Crime and Corruption of the Prosecutor's Office of Bosnia and Herzegovina. Official Gazette of BiH, No. 12/04, Dec. 1, 2004.

Tribunal for Lebanon.³⁸ A seventh court, the Iraqi High Tribunal was established in 2003,³⁹ but there is debate as to whether this tribunal can be categorized as a hybrid court,⁴⁰ because, *inter alia*, it did not require, nor did it ever appoint, any international judges.⁴¹ Debate over classification of the Iraqi High Tribunal illuminates a significant difficulty in the literature on hybrid courts. It goes without saying that the “promise of hybrid courts” cannot be realized without understanding their defining characteristics or features.⁴² Rather, “omitting this initial step” will invariably lead to disappointed expectations.⁴³ A critical first stage before unconsciously accepting the drive back towards hybrid courts is, therefore, a technical, yet surprisingly demanding one: defining what is a “hybrid court.”

Scholars have generally sought to define hybrid courts through deduction. By surveying the field of existing or proposed courts, it is hoped that the lowest common denominator of attributes can be identified.⁴⁴ This approach has an attractive simplicity about it, but can create problems. For example, Sarah Nouwen has noted that this methodology leaves two fundamental issues unaddressed: Do these common characteristics override the significant distinctions between what may otherwise be described as *sui generis* courts; and which of the common characteristics are shared but are not necessarily defining?⁴⁵ However, there is a third issue bound up in the framing of the question, for the breadth of courts surveyed will impact the number of common characteristics. In part, this may be why the most exhaustive examination of these tribunals found that there is “no comprehensive definition” of a hybrid tribunal.⁴⁶

Instead, Sarah Williams has distilled “several defining features.” Williams concludes that hybrid tribunals: (1) primarily serve a criminal (as opposed to a civil, administrative or investigatory) judicial function; (2) operate for a limited duration as an *ad hoc* or temporary response to a specific situation; (3) provide for the possibility of participation by international judges, who do not necessarily

³⁸ S.C. Res. 1757, 5685th Sess., U.N. Doc. S/RES/1757 (May 30, 2007).

³⁹ Iraqi Governing Council Decree of 10 December 2003, Establishing A Special Tribunal (2003).

⁴⁰ See Nouwen, *supra* note 18, at 192; Sylvia de Bertodano, *Were There More Acceptable Alternatives to the Iraqi High Tribunal?*, 5 J. INT'L CRIM. JUST. 294 (2007). Cf. Williams, *supra* note 18, at 109–20.

⁴¹ See Williams *supra* note 18, at 117, though international experts did provide assistance to the Trial Chambers and Appeal Chambers.

⁴² Dickinson, *supra* note 12, at 295.

⁴³ Nouwen, *supra* note 18, at 193.

⁴⁴ See, for example, Jann K. Kleffner & André Nollkaemper, *The Relationship Between Internationalized Courts and National Courts*, in INTERNATIONALIZED CRIMINAL COURTS AND TRIBUNALS: SIERRA LEONE, EAST TIMOR, KOSOVO, AND CAMBODIA, *supra* note 20, at 359; Higonnet, *supra* note 18, at 356; Williams, *supra* note 18.

⁴⁵ Nouwen, *supra* note 18, at 193.

⁴⁶ Williams, *supra* note 18, at 249. Williams includes the Iraqi High Tribunal.

compose a majority on the bench; (4) may be partially financed by international actors; (5) enjoy material jurisdiction over a mix of international and national crimes; and (6) involve a party other than the affected state, whether the U.N., a regional organization, or another state(s).⁴⁷ On the other hand, Nouwen, who does not include the Iraqi High Tribunal, argues that mixed composition of judges is “the only defining commonality.”⁴⁸ While all hybrid courts “share [additional] features,” those features are “not necessarily defining.”⁴⁹

It is not surprising that these courts defy simple definition. International criminal law is a creature of international politics, and hybrid tribunals in particular owe their genesis to a complex set of circumstances. These courts are not the product of “grand institutional design”⁵⁰ but “forced compromises and haphazard bargains”⁵¹ to fill a “functional need”⁵²; “impunity gaps in emergency situations.”⁵³ Their establishment requires a “serendipitous” and “unique” convergence of international and national aims.⁵⁴ Cassese has suggested that, at a minimum, the following factors need to present themselves: (1) geopolitical concerns and political will favor the establishment and financing of a tribunal; (2) but not a purely international court; (3) the national judiciary must be, at least, partly available in order to rely to some extent on national courts; and (4) the affected state, for nationalistic and sovereignty reasons, demands involvement in the tribunal.⁵⁵

In some respects, a precise definition beyond an agreed upon set of key characteristics is unnecessary. In a more abstract designation, Bruch invokes hybridity’s biological and botanical origins, “the intermingling of two previously separate entities (or species), forming a new and distinct creation.”⁵⁶ It is this “blending” of international and national features that most characterizes these

⁴⁷ *Id.* at 201–52.

⁴⁸ Nouwen, *supra* note 18, at 213.

⁴⁹ *Id.* These features include: their location in the affected state; involvement by the UN; no coercive enforcement powers over third party states; and a more precarious financial model. *See id.*

⁵⁰ Dickinson, *supra* note 12, at 296.

⁵¹ McAuliffe, *supra* note 17, at 2.

⁵² Pemmaraju Sreenivasa Rao, *Multiple International Judicial Forums: A Reflection of the Growing Strength of International Law or its Fragmentation?*, 25 MICH. J. INT’L L. 929, 944 (2004).

⁵³ McAuliffe, *supra* note 17, at 2.

⁵⁴ Tom Perriello & Marieka Wierda, *Lessons from the Deployment of International Judges and Prosecutors in Kosovo* 12–14 (2006), INT’L CTR. FOR TRANSITIONAL JUST., https://www.ictj.org/sites/default/files/ICTJ-FormerYugoslavia-Courts-Study-2006-English_0.pdf.

⁵⁵ Antonio Cassese, *The Role of Internationalized Courts and Tribunals in the Fight Against International Criminality*, in INTERNATIONALIZED CRIMINAL COURTS AND TRIBUNALS: SIERRA LEONE, EAST TIMOR, KOSOVO, AND CAMBODIA, *supra* note 20, at 1, 5.

⁵⁶ Bruch, *supra* note 23, at 5.

tribunals.⁵⁷ But hybridity is a many-splintered thing: “A tribunal may be hybrid in its origins (created through domestic and international processes), its mandate (splicing together domestic and international law) or its composition (combining domestic and ‘international’ members).”⁵⁸

This general connotation is the sense in which I use the term, for there is a rich diversity of internationalized criminal tribunals. Particular hybrid and internationalized criminal courts can be placed along a spectrum ranging, at the one end, from purely international criminal courts, such as the ICC, to purely domestic criminal courts at the other.⁵⁹ Whether they are established independently of the domestic court system or are based within that legal system,⁶⁰ these criminal courts are joint ventures between the local and international communities.

It is the blending of the international and national that has most attracted proponents. This blending has been hailed as offering the “potential to address . . . serious drawbacks of both international and domestic tribunals.”⁶¹ Compared to purely domestic or purely international trials, hybrid courts may offer enhanced sociological legitimacy, further capacity building efforts, and promote deeper norm-penetration.⁶² In practice, many of these claims have proven overblown. For one, securing enduring political and financial commitment on both the international and national side has been difficult for almost every tribunal, and the tribunals have proven just as costly and lengthy as the *ad hoc* courts they were supposed to replace. Nevertheless, conceptually these courts do still hold merit, for the presence of local judges *can* enhance the sociological legitimacy of the court.

The potential for greater sociological legitimacy is an understated benefit of hybrid courts. To date, the uneven enforcement of international criminal law has enabled a small group of African leaders “to present the ICC as a new form of

⁵⁷ Higonnet, *supra* note 18, at 352; Dickinson *supra* note 12, at 295; Williams, *supra* note 18, at 8; Dickinson, *supra* note 18, at 1059; McAuliffe, *supra* note 17, at 4; William Burke-White, *International Legal Pluralism*, 25 MICH. J. INT'L L. 963, 974 (2004).

⁵⁸ Bruch, *supra* note 23, at 6.

⁵⁹ See Williams, *supra* note 18, at 249–52; Cesare P.R. Romano, *Preface*, in INTERNATIONALIZED CRIMINAL COURTS: SIERRA LEONE, EAST TIMOR, KOSOVO, AND CAMBODIA, *supra* note 20, at x.

⁶⁰ See Williams, *supra* note 18, at 250–51. Williams makes a distinction, arguing that tribunals established outside the domestic legal system should be designated “hybrid” tribunals, whereas courts legally constituted within the domestic legal system are “internationalized” tribunals. For the purposes of this paper, this distinction is unnecessary.

⁶¹ Dickinson, *supra* note 12, at 310.

⁶² *Id.* at 306. The availability of victim participation may also enhance the legitimacy of the court in the eyes of the affected population. See generally Harry Hobbs, *Victim Participation in International Criminal Proceedings: Problems and Potential Solutions in Implementing an Effective and Vital Component of Justice*, 49 TEX. INT'L L.J. 1, 9–12 (2014).

imperialism.”⁶³ In the last few years, these accusations have increased. In December 2014, Uganda’s President Yoweri Museveni claimed that the court is “a vessel for oppressing Africa” and called on African nations to “get out of that court of the West.”⁶⁴ Before the case against him collapsed, Kenyan President Kenyatta named the ICC the “toy of declining imperial powers,”⁶⁵ while his Foreign Minister chastised the Court for treating Africans “like toddlers.”⁶⁶ Ethiopian Prime Minister Hailemariam Desalegn has gone further, complaining of “unfair” and “unacceptable” treatment,⁶⁷ and asserting that the Court has denigrated into “some kind of race hunting.”⁶⁸

The characterisation of the ICC as anti-African has rhetorical weight, but is not supported by the facts.⁶⁹ Nevertheless, that these claims have resonated throughout Africa is not surprising. International law has a complex relationship with colonialism,⁷⁰ and its continued focus on African leaders does, superficially, create problems. In balancing sovereignty with accountability, hybrid courts could chart a path out of this mess and disarm the imperialism critique of international criminal law. However, an inadequate theorization of hybridity that denies the importance of sociological legitimacy and unconscious belittling of domestic actors will torpedo the potential benefits of hybrid courts. Ultimately, the

⁶³ Elise Keppler, *Managing Setbacks for the International Criminal Court in Africa*, 55 J. Afr. L. 1, 6 (2011).

⁶⁴ *Ugandan Leader Calls on Africa to Quit the ICC*, ALJAZEERA (Dec. 12, 2014), <http://www.aljazeera.com/news/africa/2014/12/ugandan-leader-calls-africa-quit-icc-201412121712353977.html>.

⁶⁵ *African Union Urges ICC to Defer Uhuru Kenyatta Case*, BBC NEWS (Oct. 12, 2013), <http://www.bbc.co.uk/news/world-africa-24506006>.

⁶⁶ Michael Birnbaum, *African Leaders Complain of Bias at ICC as Kenya Trials Get Underway*, THE WASHINGTON POST (Dec. 5, 2013), https://www.washingtonpost.com/world/europe/african-leaders-complain-of-bias-at-icc-as-kenya-trials-are-underway/2013/12/05/0c52fc7a-56cb-11e3-bdbf-097ab2a3dc2b_story.html.

⁶⁷ *Id.*

⁶⁸ *African Leaders Accuse ICC of “Race Hunt”*, ALJAZEERA (May. 28, 2013), <http://www.aljazeera.com/news/africa/2013/05/201352722331270466.html>.

⁶⁹ Scholars have recognized that despite the ICC being a criminal court, it should not and cannot focus solely on criminal prosecution: *See, for example*, William Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Criminal Justice*, 49 HARV. INT’L L. J. 53 (2008). As an institution with a potentially universal jurisdiction and a decidedly limited capacity, its success or otherwise should be measured more broadly. For example, through preliminary examinations, the Court has the potential to monitor developments by threatening intervention: Nirej Sekhon, *Complementarity and Post-Coloniality*, 27 Emory Int’l L. Rev. 799, 800 (2013) (arguing that the Court can “educate, persuade, and prod” states). This strategy has most clearly been exemplified in Colombia, where the protracted peace negotiations between government forces, paramilitary and rebel armed forces has been under preliminary examination since June 2004.

⁷⁰ *See generally* ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* (2007); *See also* CRITICAL APPROACHES TO INTERNATIONAL CRIMINAL LAW: AN INTRODUCTION (Christine Schwöbel ed., 2014).

particular politico-legal context and relative bargaining power of the affected state and the international community will determine the exact modality of each court.⁷¹ Whether or not the presence of international judges is a required element of properly defined hybrid courts, I argue that sound, principled reasons dictate that all hybrid courts *should* be comprised of a mix of international and local judges. This argument will be developed further below.

III. THE PRINCIPLE OF FAIR REFLECTION AND SOCIOLOGICAL LEGITIMACY

Legitimacy is 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.”⁷² Legitimacy therefore has normative and sociological dimensions:⁷³ a hybrid court may be normatively legitimate because it was established by municipal law after agreement between a state and the U.N.,⁷⁴ and it may be sociologically legitimate because the people of the affected state accept or perceive it as justified.⁷⁵ Legitimacy is particularly crucial for hybrid courts.⁷⁶ As a practical matter, absent any police force, these courts are

⁷¹ For example, that a majority of national judges sit on the ECCC owes much to the superior bargaining power of Cambodia once the General Assembly forced the U.N. Office of Legal Affairs back to the negotiating table. G.A. Res. 57/228, U.N. GAOR, 57th Sess. U.N. Doc. A/RES/57/228A (Feb. 27, 2003).

⁷² Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, 93 AM. J. INT’L L. 596, 600 (1999). See also THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 16 (Detler Vagts ed., 1990) (“A partial definition of legitimacy adapted to the international system could be formulated thus: a property of a rule or rule-making institution which itself exerts a pull towards compliance on those addressed normatively.”) (emphasis omitted).

⁷³ Allen Buchanan & Robert Keohane, *The Legitimacy of Global Governance Institutions*, 20 ETHICS & INT’L AFF. 405, 405 (2006).

⁷⁴ See, for example, the ECCC: Khmer Rouge Trials, G.A. Res. 57/228, U.N. GAOR 57th Sess, Agenda item 109(b), U.N. 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 (2001), amended by NS/RKM/1004/006 (Oct. 27, 2004).

⁷⁵ Bodansky, *supra* note 72, at 601. See also MAX WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 382 (1964); Ian Hurd, *Legitimacy and Authority in International Politics*, 53 INT’L ORG. 379, 387–89 (1999).

⁷⁶ Yuval Shany identifies the limited degree of legitimacy enjoyed by international judicial bodies as having hampered the impact of international criminal proceedings on domestic criminal proceedings in mass atrocity cases. See Yuval Shany, *How Can International Criminal Courts Have a Greater Impact on National Criminal Proceedings? Lessons From the First Two Decades of International Criminal Justice in Operation*, 46 ISR. L. REV. 431, 449–50 (2013). Legitimacy is, of course, a recurrent problem of all international adjudicative bodies. See generally Armin von Bogandty & Ingo Venzke, *In Whose Name? An Investigation of International Courts’ Public Authority and its Democratic Justification*, 23 EUR. J.

“especially vulnerable to being ignored.”⁷⁷ 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. Moreover, 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. As Section IV will demonstrate, however, international criminal tribunals struggle with questions of legitimacy. What can be done? I argue that the principle of fair reflection may provide a firmer conceptual base for the selection of judges on hybrid tribunals and has the potential to enhance the sociological legitimacy of these courts.⁷⁸

An emergent soft law norm, the principle of fair reflection has been affirmed in numerous international instruments,⁷⁹ and operationalized in many domestic and international judicial appointment procedures,⁸⁰ including, in part, the ICC.⁸¹ The essence of the 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.”⁸² In short, judges should mirror the society over which they exercise jurisdiction. However, international law requires that individuals receive a “fair and public hearing by a

INT’L L. 7 (2012); Marlies Glasius, *Do International Criminal Courts Require Democratic Legitimacy?*, 23 EUR. J. INT’L L. 43 (2012).

⁷⁷ Nienke Grossman, *Sex Representation on the Bench and the Legitimacy of International Criminal Courts*, 11 INT’L CRIM. L. REV. 643, 644 (2011).

⁷⁸ For a more in-depth discussion of the relationship between sociological legitimacy and international criminal courts, see Harry Hobbs, *Towards a Principled Justification for the Mixed Composition of Hybrid International Criminal Tribunals* (Working Paper, Oct. 30, 2015).

⁷⁹ See, for example, First World Conference on the Independence of Justice, *Montreal Universal Declaration on the Independence of Justice*, art. 2.13 (June 10, 1983); The Burgh House Principles on the Independence of the International Judiciary, art. 2.2 (2005); International Project of Judicial Independence of the International Association of Judicial Independence and World Peace, *Mt Scopus International Standards on Judicial Independence*, art. 2.15 (March 19, 2008).

⁸⁰ See, for example, S. AFR. CONST., 1996, § 174(2); Constitutional Reform Act., 2005, c. 4 §§ 63–64 (U.K.); U.N. Charter annex, *Statute of the International Court of Justice*, art. 31.

⁸¹ Rome Statute of the International Criminal Court, U.N. Doc. A/Conf.183/9, art. 36(8) (July 17, 1998) [hereinafter ICCSt]. See *infra* Section IV(B).

⁸² *Mt. Scopus International Standards of Judicial Independence*, *supra* note 79, at art. 2.15.

competent, independent and *impartial* tribunal.”⁸³ 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?

This is a significant concern, and it is therefore important to distinguish reflection from 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.”⁸⁴ More specifically, it can be divided between the concepts of “acting for” and “standing for.” The principle of fair reflection does not require a judge to *act for* any interest. This is consistent with both municipal and international law, which requires that a judge not “represent” the interests of any particular individual; rather, a judge is said to impartially act for “the law” or “justice.”

The second understanding of representation mentioned above, “standing for,” can be further delineated between symbolic and descriptive representation.⁸⁵ A few examples may help elucidate this distinction. Take the image of Lady Justice—blindfolded, balancing a set of scales, and wielding a sword. For Western audiences, this image symbolizes both “the law” generally and “the law’s” critical elements:⁸⁶ her blindfold represents objectivity, the scales represent the weighing of evidence, and the sword represents punishment.⁸⁷ On the other hand, a map does not symbolize a nation, but descriptively represents the physical configuration of a country drawn to scale.⁸⁸ When we speak of fair reflection, we mean descriptive representation. This concept requires a body reflective of society: “an exact portrait, in miniature, of the people at large.”⁸⁹ It is this descriptive notion of representation that underpins the fair reflection principle, though note that “fair” reflection does not require exactly proportional representation.

The principle of fair reflection suggests that a judiciary reflective of society will be more likely to be perceived by that society as legitimate or justified. This is

⁸³ International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316, at art. 14(1) (Dec. 16, 1966) (entered into force Mar. 23, 1976) [hereinafter ICCPR] (emphasis added); Human Rights Committee, 90th Sess., *General Comment No. 32, art. 14: Right to Equality Before the Courts and Tribunals and to a Fair Trial*, U.N. Doc. CCPR/C/GC/32, at ¶3 (2007).

⁸⁴ HANNA FENCHEL PITKIN, *THE CONCEPT OF REPRESENTATION* 8–9 (1967).

⁸⁵ *Id.* at 60, 92.

⁸⁶ Daniel S. Lev, *The Lady and the Banyan Tree: Civil-Law Change in Indonesia*, 14 AM. J. COMP. L. 282, 282 (1965).

⁸⁷ See Dennis E. Curtis & Judith Resnik, *Images of Justice*, 96 YALE L.J. 1727, 1754–64 (1987).

⁸⁸ See PITKIN, *supra* note 84, at 60.

⁸⁹ *Id.*

said to occur in two ways: first, the very presence of diverse judges will lead to greater support of the institution by different communities; 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. These arguments have some force. Public trust and confidence is of critical importance for the judiciary. As the European Court of Human Rights has noted, a court “must enjoy public confidence if it is to be successful in carrying out its duties.”⁹⁰ The risk 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.”⁹¹ Complementing this rationale is the second argument, which highlights the agency of diverse judges. While a socially or culturally homogenous judiciary comprised of eminently qualified individuals is capable of producing sound decisions, a more heterogeneous court made up of equally eminently qualified and skilled individuals will likely produce better decisions.⁹² For example, the lack of female judges on international courts may have contributed to the long struggle to classify rape and sexual violence as war crimes.⁹³

However, it is not correct to suggest that a diverse bench per se will enhance public confidence or that an individual judge, by virtue of her experiences, will approach a particular case in a distinct manner.⁹⁴ 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.⁹⁵ This is an important reminder when extrapolating the principle of fair reflection to hybrid courts. The presence of local judges may not be enough in

⁹⁰ Prager and Oberschlick v. Austria, 313 Eur. Ct. H.R. (ser. A) 13 (1995).

⁹¹ Simon Evans & John Williams, *Appointing Australian Judges: A New Model*, 30 SYDNEY L. REV. 295, 300 (2008).

⁹² On the idea that deliberation between conflicting views is the best means for discovering the truth, see JOHN STUART MILL, ON LIBERTY 20 (1859) (“it is only by the collision of adverse opinions that the remainder of the truth has any chance of being supplied.”).

⁹³ Prosecutor v Akayesu, Case No. ICTR 96-4-T, Judgment, ¶598 (Sept. 2, 1998). See KELLY DAWN ASKIN, WAR CRIMES AGAINST WOMEN: PROSECUTION IN INTERNATIONAL WAR CRIMES TRIBUNALS (1997); Rhonda Copelon, *Gender Crimes as War Crimes: Integrating Crimes Against Women into International Criminal Law*, 46 MCGILL L. J. 217, 225 (2001).

⁹⁴ It is, of course, important to distinguish between the legitimacy of a court as an institution and the quality of individual decisions of that court. The quality of an individual decision may be assessed via many measures, including formal, procedural and substantive metrics. See, for example, QUALITY PROJECT OF THE COURTS IN THE JURISDICTION OF THE COURT OF APPEAL OF ROVANIEMI, FINLAND, EVALUATION OF THE QUALITY OF ADJUDICATION IN COURTS OF LAW: PRINCIPLES AND PROPOSED QUALITY BENCHMARKS (2006). The legitimacy of a court, on the other hand, relies on a slow, steady and accumulative process of “quality” decisions.

⁹⁵ Regina Graycar, *The Gender of Judgments: An Introduction*, in PUBLIC AND PRIVATE: FEMINIST LEGAL DEBATES 262, 268–69 (Margaret Thornton ed., 1995).

and of itself to ground legitimacy. A local judge may be from a particular cultural or ideological community and her 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 the traditional integral judicial qualities of impartiality and professional skill. In practice, it requires that of two candidates with the requisite skill and qualifications, the candidate whom would enhance the descriptively representative character of the judiciary should be preferred. The international standards recognize this and are careful to acknowledge that the principle should cede to issues of professional skill. Article 11.2 of the comprehensive Mt. Scopus Standards provides:

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.⁹⁶

Notwithstanding these caveats, the principle of fair reflection offers a strong conceptual base for the selection of judges for hybrid tribunals. The principle suggests that 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—both local and international judges must necessarily staff hybrid courts to be legitimate. This much is uncontroversial. However, as Section V will show, there is no homogenous international community, and both principled and pragmatic reasons militate in favor of defining international judges on international tribunals with greater particularity,⁹⁷ including attentiveness to regional, legal tradition, and linguistic dimensions. Considering contextual factors in the appointment of international judges is critical to ensuring a clearer connection between the court and the affected community, offering greater scope for the promise of hybrid courts to be realized. However, before that, Section IV will examine the link between local judges and sociological legitimacy in a spectrum of international tribunals.

IV. INTERNATIONAL CRIMINAL TRIBUNALS AND LOCAL JUDGES

It is only recently—most recently with the CAR Special Criminal Court—that international criminal tribunals have guaranteed the presence of local judges on the bench. This is curious as the earliest incantations of these tribunals and

⁹⁶ *Mt. Scopus International Standards of Judicial Independence*, *supra* note 79, at art. 11.2.

⁹⁷ Bruch, *supra* note 23, at 36.

international criminal law as a field appear to have recognized the importance of local actors taking a leading role in the trial of their own war criminals. This Section will trace this development, examining in detail the *ad hoc* tribunals, the ICC, the SCSL, and the ECCC. It will begin, however, with a short history.

The establishment of an international court to try political leaders accused of international crimes was first proposed in the aftermath of the First World War. The Commission of Responsibilities, tasked with investigating the causes of the war, recommended the creation of a “High Tribunal” consisting of twenty-two judges, three from each of the major allied powers and an additional six from other countries.⁹⁸ Although this recommendation was not adopted at the Paris Peace Conference, Articles 227-230 of the Treaty of Versailles did envisage the arrest and prosecution of German officials, including Kaiser Wilhelm II. However, the German government refused to extradite some nine hundred German citizens and offered to try them themselves—a suggestion that the Allies accepted. Although the Leipzig War Crimes Trials were regarded as a failure—only twelve individuals were prosecuted and only seven were convicted—it did represent the first time that a European country “had agreed to try its own after a major war.”⁹⁹

Following the Second World War, the Allies succeeded in establishing two *ad hoc* courts to try the leaders of Germany and Japan. The International Military Tribunals for Nuremberg and for the Far East were concerned primarily with normative rather than sociological legitimacy.¹⁰⁰ It “is striking” that neither Tribunal contained local judges, but rather, like the proposed High Tribunal of the First World War, consisted entirely of representatives of the victorious powers.¹⁰¹ In Nuremberg, the Court was comprised of eight judges, all appointed

⁹⁸ Memorandum by the U.N. Secretary-General on the establishment of a Criminal Chamber of the ICJ, Historical Survey of the Question of International Criminal Jurisdiction, U.N. Doc. A/CN.4/7/Rev.1, 7 (1949).

⁹⁹ Mark Lewis, *Judicial Resistance? War Crime Trials After World War I*, OUPBLOG (Jan. 30, 2015), <http://blog.oup.com/2015/01/world-war-one-war-crimes-trials/#sthash.SvUVHAFc.dpuf>; see also MARK LEWIS, *THE BIRTH OF THE NEW JUSTICE: THE INTERNATIONALIZATION OF CRIME AND PUNISHMENT, 1919-1950* 59 (2015).

¹⁰⁰ In fact, Article 3 of the Nuremberg Statute prohibited the Prosecutor, the defendants, or their counsel from challenging the Tribunal or the Judges. See Charter of the International Military Tribunal at Nuremberg annex, *Nuremberg Rules, in Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, 82 U.N.T.S. 279, art. 3 (signed and entered into force Aug. 8, 1945). See Gordon Ireland, *Ex Post Facto from Rome to Tokyo*, 21 TEMP. L.Q. 27 (1948), for critical contemporary comments concerning the legality of each Tribunal.

¹⁰¹ Antonio Cassese, *The Legitimacy of International Criminal Tribunals and the Current Prospects of International Criminal Justice*, 25 LEIDEN J. INT'L L. 491, 495 (2012).

by the Allies.¹⁰² However, significantly, the situation was slightly different at the Tokyo Tribunal, which was comprised of eleven judges, nine from the signatories to the Instrument of Surrender, as well as one each from India and the Philippines.¹⁰³ Although neither India nor the Philippines was a great power, the U.S. State Department favored introducing judges from these two countries on the basis that “since the Tribunal will be trying Japanese war criminals, it is believed that it would strengthen the Tribunal, in the eyes of the peoples of South Asia, if at least one additional Asiatic nation is represented.”¹⁰⁴ It is trite to remark that international criminal law has developed significantly since Nuremberg, but the gradual yet unconscious development of the principle of fair reflection in international criminal law is particularly noteworthy.

A. The *Ad Hoc* Tribunals—No Local Judges

During the Cold War, concerns surrounding the normative legitimacy of the International Military Tribunals (“IMTs”) and realpolitik difficulties stymied the establishment of new international criminal tribunals.¹⁰⁵ It was not until the early 1990s, amid credible claims of war crimes and genocide committed in the former Yugoslavia and Rwanda, that the international community was moved to act. On February 22, 1993, the U.N. Security Council adopted Resolution 808 establishing a tribunal to “prosecute ‘persons responsible for violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.’”¹⁰⁶ On November 8, 1994, U.N. Security Council Resolution 955 established an international tribunal to prosecute persons responsible for “genocide and other serious violations of international humanitarian law committed in the territory of Rwanda.”¹⁰⁷

The ICTY and ICTR Statutes do not set out extensive prescriptive requirements concerning the composition of the court. Judges at the ICTY and ICTR “shall be persons of high moral character, impartiality and integrity.”¹⁰⁸

¹⁰² *Charter of the International Military Tribunal at Nuremberg*, art. 2 (Aug. 8, 1945). There were, however, really only four (primary) judges and four alternate judges. The US, the UK, France, and Russia appointed two judges each.

¹⁰³ *Charter of the International Military Tribunal for the Far East*, art. 2 (Jan. 19, 1946), as amended Apr. 25, 1946.

¹⁰⁴ Elizabeth S. Kopelman, *Ideology and International Law: The Dissent of the Indian Justice at the Tokyo War Crimes Trial*, 23 N.Y.U. J. INT'L L. & POL. 373, 390–91 (1991).

¹⁰⁵ For a review of a series of books chronicling the history of international criminal law, see Frédéric Mégret, *The Politics of International Criminal Justice*, 13 EUR. J. INT'L L. 1261, 1264–65 (2002).

¹⁰⁶ S.C. Res. 808 para. 1, U.N. Doc. S/RES/808 (Feb. 22, 1993).

¹⁰⁷ S.C. Res. 955 para. 1, U.N. Doc. S/RES/955 (Nov. 8, 1994).

¹⁰⁸ Statute of the Int'l Crim. Trib. for the Former Yugoslavia, art. 13(1) (May 25, 1993) [hereinafter ICTYSt]; Statute of the Int'l Crim. Trib. for Rwanda, art. 13(1) (Nov. 8, 1994) [hereinafter ICTRSt].

They are appointed from a list of fifty-four nominated candidates chosen by the Security Council, “taking due account of the adequate representation of the principal legal systems of the world and bearing in mind the importance of equitable geographical distribution.”¹⁰⁹ As with the Nuremberg and Tokyo IMTs, no judges of the affected states have sat on the bench.

Analysis of the Report of the Secretary-General on the proposed Yugoslav Tribunal and the verbatim record of the Security Council meeting that unanimously adopted the Statute, suggests that the composition of the Court was not seriously considered.¹¹⁰ The Report provides very little detail, simply stating that the Tribunal will be comprised of eleven judges “no 2 of whom may be nationals of the same State”¹¹¹ and “taking due account of the adequate representation of the principal legal systems of the world.”¹¹² Upon adopting the draft Statute, few members of the Security Council mentioned the makeup of judges who would compose the Court. Madeline Albright, the U.S. representative, was a notable exception, recording her government’s determination “to see that women jurists sit on the Tribunal.”¹¹³ Nevertheless, the closest that we get to a debate over the composition are indirect references to the Tribunal judging “on behalf of humanity in its entirety”¹¹⁴ or answering calls for “justice [to] be done by the international community.”¹¹⁵ These broad statements could perhaps be understood as requiring a bench of international rather than national judges, though it is more likely that the representatives were referring to a figurative moral basis for international action.

Debate leading to the establishment of the ICTR also ignored the composition of the court, focusing instead on the simple need to expeditiously establish a new tribunal or extend the jurisdiction of the ICTY to cover the alleged

¹⁰⁹ ICTYSt, *supra* note 108, at art. 13(2)(c); ICTRSt, *supra* note 108, at art. 12.3(c).

¹¹⁰ This is perhaps unsurprising: the Statute originally adopted was only 10 pages long. Nancy Amoury Combs, *Legitimizing International Criminal Justice: The Importance of Process Control*, 33 MICH. J. INT’L L. 321, 363 (2012).

¹¹¹ U.N. S.C., Rep. of the Secretary-General Pursuant to Paragraph 2 of S.C. Res. 808 (1993), U.N. Doc. S/25704, 18 at para. 72 (May 3, 1993).

¹¹² *Id.* at 19 [75].

¹¹³ U.N. S.C., Provisional Verbatim Record of the Three Thousand Two Hundred and Seventeenth Meeting, U.N. Doc. S/PV.3217, at 14 (May 25, 1993) (Ms. Albright, U.S.). The U.K. Representative, Sir David Hannay, was the only other representative who specifically mentioned the judges, though his comments were limited to noting the importance that all members of the Tribunal have “considerable practical experience in the field of criminal prosecution.” *Id.* at 18.

¹¹⁴ *Id.* at 11 (Mr. Mérimée, France).

¹¹⁵ *Id.* at 41 (Mr. Yañez Barnuevo, Spain).

atrocities in Rwanda.¹¹⁶ A Commission of Experts, tasked with investigating the situation and with responsibility to make recommendations to the Security Council, appears to have understood the value of sociological legitimacy but failed to comprehend its workable application. The Commission noted the value of a court “more responsive to the needs of the local community” and accepted that a court more “familiar to the local community” might produce judgments of “greater and more immediate symbolic force.”¹¹⁷ However, the Commission considered that “independence, objectivity and impartiality,” among other factors, necessitated that trials be conducted “a certain measure of distance” from the affected community.¹¹⁸ In reaching this conclusion, the Commission seems to have overlooked the possibility of a compromise position: local judges sitting on the court.

The absence of a detailed background examination of this potential proposal may explain why representatives on the Security Council in large part failed to discuss the composition of the proposed Tribunal. Following the adoption of Resolution 955, the U.K. representative reiterated the importance that judges on the Tribunal have “considerable practical experience in criminal law and procedure”¹¹⁹ and the representative from France expressed “in advance [his] full confidence in the judges.”¹²⁰ However, not all members of the Council spoke in such generalities. The comments of the representative from Argentina are particularly instructive, stating that “in the specific case of Rwanda, we believe that those to be appointed should, in the main, come from continental legal systems.”¹²¹ This is a point that will be addressed in Section V.

¹¹⁶ In reports delivered by the Secretary-General and the Special Rapporteur for Rwanda, no mention is made of the composition of the proposed tribunal. *See* U.N. S.C., Report of the Secretary-General on the Establishment of the Commission of Experts Pursuant to Paragraph 1 of Security Council Resolution 935 (1994) of 1 July 1994, U.N. Doc. S/1994/879 (July 26, 1994) and U.N. Secretary-General, Letter dated July 29, 1994 from the Secretary-General addressed to the President of the General Assembly, U.N. Doc. S/1994/906 (July 29, 1994); *see also* Special Rapporteur of the Commission on Human Rights, *Report on the Situation of Human Rights in Rwanda*, Comm’n on Human Rights, U.N. Doc. E/CN.4/1995/7 (June 28, 1994) (by Mr. R. Degni-Ségui); Note by the Secretary-General, *Situation of Human Rights in Rwanda*, U.N. Doc. S/1994/1157, annex I and annex II (Oct. 13, 1994).

¹¹⁷ U.N. Secretary General, Letter dated 1 October 1994 from the Secretary-General addressed to the President of the Security Council, Annex: Preliminary Report of the Independent Commission of Experts Established in Accordance with Security Council Resolution 935 (1994), U.N. Doc. S/1994/1125, ¶ 134 (Oct. 4, 1994).

¹¹⁸ *Id.* ¶ 137.

¹¹⁹ U.N. S.C., 3453d mtg. at 6, U.N. Doc. S/PV.3453 (Nov. 8, 1994) (Sir David Hannay, United Kingdom).

¹²⁰ *Id.* at 4 (Mr. Mérimée, France).

¹²¹ *Id.* at 8 (Ms. Cañas, Argentina). Note further that the representative from Rwanda expressed its concern that “certain countries, which . . . took a very active part in the civil war in Rwanda” may

The experience of the *ad hoc* Tribunals lends weight to the argument for including local judges on hybrid criminal courts. Recent empirical work by Jelena Subotić demonstrates that the ICTY has failed spectacularly to break down ethnic narratives concerning the conflict, such that it now appears impossible to do so.¹²² Subotić's study suggests that attitudes have not drastically changed from a 2008 Balkan Monitor survey. That survey reported that in Albania (69%) and Kosovo (68%) support for the Court is high. However, only 42% of Bosnians reported that the tribunal served the interests of the region, and in Macedonia (36%), Croatia (25%), and Serbia (19%) support was even lower.¹²³ Although Subotić acknowledges that the absence of a "broader transitional justice framework in the former Yugoslavia," and not the ICTY itself, is the primary cause of this failure,¹²⁴ one cannot help but wonder how the narrative may have been shaped by the presence of local judges. In addition to the benefits that come from a socially and culturally heterogeneous judiciary, the presence of local judges would likely have led to both the ICTY and ICTR's work being translated into local languages far earlier,¹²⁵ and therefore more effective communication with the affected states' citizens.¹²⁶

From the very beginning of the Tribunals, questions were raised about the lack of local representation. Muhamed Sacirbey, Bosnia's ambassador to the U.N., strenuously argued that "[i]t is absurd that most of the victims are Muslim, yet they have no representatives on the Tribunal."¹²⁷ Likewise, José Alvarez has questioned the absence of Rwandan judges on the ICTR on the basis of the principle of fair reflection, noting that "having judges who come from the local

"propose candidates for judges and participate in their election." *Id.* at 15 (Mr. Bakuramutsa, Rwanda).

¹²² Jelena Subotić, *Legitimacy, Scope, and Conflicting Claims on the ICTY: In the Aftermath of Gotovina, Haradinaj and Perišić*, 13 J. OF HUM. RTS. 170, 172 (2014); see also Janine Natalya Clark, *The ICTY and Reconciliation in Croatia: A Case Study of Vukovar*, 10 J. INT'L CRIM. JUST. 397 (2012).

¹²³ GALLUP BALKAN MONITOR, INSIGHTS AND PERCEPTIONS: VOICES OF THE BALKANS 47 (2008).

¹²⁴ Subotić, *supra* note 122, at 172, 175–77. Of course, there are myriad numbers of factors that have weakened the ICTY's ability to effectuate reconciliation in the former Yugoslavia; the absence of local judges is but one.

¹²⁵ The ICTY did not translate its judgments into languages spoken in the former Yugoslavia until 1999. See DIANE F. ORENTLICHER, OPEN SOCIETY JUSTICE INITIATIVE, SHRINKING THE SPACE FOR DENIAL: THE IMPACT OF THE ICTY IN SERBIA 22 (2008). Richard Goldstone, the Chief Prosecutor of the ICTY, argued that it would be too expensive to translate the Court's documents into local languages because there are too many of them. See Higonnet, *supra* note 18, at 365. The ICTR did not translate judgments into Kinyarwanda until 2000. Victor Peskin, *Courting Rwanda: The Promises and Pitfalls of the ICTR Outreach Programme*, 3 J. INT'L CRIM. JUST. 950, 956 (2005).

¹²⁶ David Tolbert, *The International Criminal Tribunal for the former Yugoslavia: Unforeseen Successes and Foreseeable Shortcomings*, 26 FLETCHER F. OF WORLD AFF. 7, 14 (2002).

¹²⁷ Nienke Grossman, *Sex on the Bench: Do Women Judges Matter to the Legitimacy of International Courts?*, 12 CHI. J. INT'L L. 647, 670 (2012).

community may itself be determinative of the legitimacy of these processes,”¹²⁸ and asked his readers to “[c]onsider the impact, on both perceptions and results, if the ICTR were to include a Hutu and a Tutsi judge.”¹²⁹ Indeed it is likely that the lack of Serbian judges on the ICTY has contributed to a feeling amongst Serbians that the court is biased.¹³⁰ A judiciary that reflected the ethnic and cultural background of the former Yugoslavia and Rwanda may have been a difficult practical exercise, but it is likely to have brought enhanced sociological legitimacy to the institution and may well have succeeded in breaking down contradictory ethnic narratives.

B. The International Criminal Court—Local Judges Not Guaranteed but Possible

The International Criminal Court was formally established on July 1, 2002 upon the 60th ratification of the Rome Statute of the International Criminal Court. This followed an extensive drafting and negotiating process, culminating in the Rome Conference of June 1998. Analysis of the records of this conference and the drafting history of the Statute indicates a mixed appreciation of the importance of sociological legitimacy to the Court.

Delegates at the Rome Conference agreed that the judges of the ICC must be “carefully selected”¹³¹ and “highly qualified.”¹³² The Court’s “moral authority would derive from its impartiality and credibility,”¹³³ and it was therefore “essential to ensure that the procedures for selecting members of the Court . . . had the confidence of the world community.”¹³⁴ Article 36 of the Rome Statute governs the qualification and appointment of ICC judges. It provides that judges must be “of high moral character, impartiality and integrity,”¹³⁵ and either have

¹²⁸ José E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT’L L. 365, 416 (1999).

¹²⁹ *Id.* at 451.

¹³⁰ Jelena Subotić, *Expanding the Scope of Post-Conflict Justice: Individual, State and Societal Responsibility For Mass Atrocity*, 48 J. PEACE RES. 157, 158 (2011).

¹³¹ U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Summary Records of the Plenary Meetings and of the Meetings of the Whole* (Rome, June 15–July 17, 1998), Official Records Vol. II, 3d plen. mtg., at ¶ 121, U.N. Doc. A/CONF.183/C.1/SR.3 (June 16, 1998) (Mr. Ferencz, Observer for Pace Peace Center) [hereinafter U.N. ICC Conference].

¹³² *Id.* 2d plen. mtg., at ¶ 35 (Mr. Lloyd, United Kingdom).

¹³³ *Id.* 14th plen. mtg., at ¶ 34 (Mr. Scheffer, U.S.).

¹³⁴ *Id.*, 10th plen. mtg., at ¶ 11 (Mr. Skibsted, Denmark).

¹³⁵ ICCSt, *supra* note 81, at art. 36(3)(a).

competence in criminal law and procedure or international law, as well as experience in legal practice.¹³⁶

However, Article 36(8) of the Rome Statute suggests that the legitimacy of the Court is not solely tied to the professional quality of its personnel:

- (a) The States Parties shall, in the selection of judges, take into account the need, within the membership of the Court, for:
 - (i) The representation of the principal legal systems of the world;
 - (ii) Equitable geographical representation; and
 - (iii) A fair representation of female and male judges
- (b) States Parties shall also take into account the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women and children.

This provision has received little attention in the commentaries on the Rome Statute,¹³⁷ but is critical in assessing how the principle of fair reflection can assist the composition of international criminal courts. Significantly, some delegates at the Rome Conference emphasized the link between equitable geographic representation (or distribution) and sociological legitimacy. The Ukrainian delegate, for example, argued that “equitable geographical distribution would have a direct impact on States’ trust in the judges.”¹³⁸ The Chinese delegate agreed, suggesting that the Court’s impartiality “would depend on” the representative nature of the Court.¹³⁹ The delegates from Burundi and Korea offered more instrumental justifications for equitable geographic distribution, suggesting that it was “essential in recruiting judges with a balance of viewpoints,”¹⁴⁰ presumably to enhance the quality of the judgments. However, all delegates stopped short of suggesting that a national of an affected state should sit on the particular case. This hesitation may have been due to the primacy of the *ad hoc* tribunals in the minds of the delegates.

¹³⁶ *Id.* at art. 36(3)(b).

¹³⁷ Otto Triffterer’s *Commentary* devotes two lines to article 36(8) simply noting that it is “very evident” that candidates will be sought from “from all regions and main legal systems of the world and to aim for a balanced representation of women and men.” See Zhu Wen-qi & Sureta Chana, *Article 36: Qualifications, Nomination and Election of Judges*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS’ NOTES, ARTICLE BY ARTICLE 941, 947 at para. 11 (Otto Triffterer ed., C.H.Beck, Hart & Nomos 2d ed., 2008) (1999). Antonio Cassese, Paola Gaeta & John Jones’s *Commentary* fares slightly better, devoting three paragraphs. John R.W.D. Jones, *Composition of the Court*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, Vol. I 235, 254–55 (Antonio Cassese, Paola Gaeta & John R.W.D. Jones eds., 2002).

¹³⁸ U.N. ICC Conference, *supra* note 131, 15th plen mtg., at para. 3 (Ms. Pavlikovska, Ukraine).

¹³⁹ U.N. ICC Conference, *supra* note 131, 14th plen. mtg., at ¶ 72 (Ms. Li Ting, China).

¹⁴⁰ U.N. ICC Conference, *supra* note 131, 15th plen. mtg., at ¶ 30 (Ms. Rwamo, Burundi); see also U.N. ICC Conference, *supra* note 131, 15th plen. mtg., at ¶ 4 (Mr. Chun Young-wook, Republic of Korea).

Many of the delegates at the Rome Conference emphasized that the operation of the ICTY and the ICTR could offer lessons for the establishment of the ICC.¹⁴¹ In particular, the Senegalese delegate argued that the lack of female judges on those courts “hampered” the Tribunals when dealing with crimes of sexual violence.¹⁴² It is noteworthy that no delegates are recorded as suggesting that the lack of a Rwandan or Serbian judge on the ICTR or ICTY, respectively, damaged the sociological legitimacy of those tribunals, such that the Rome Statute should guarantee that at least one national of an affected state should hear relevant cases.¹⁴³

The delegates’ lack of recognition of the importance of sociological and institutional legitimacy in this regard is perhaps understandable as they were working from a draft Statute that expressly precluded a national from an affected state to sit on the tribunal. Then-Article 42 provided that a Judge “shall be excluded from a case” if he or she “[is a national of a complainant State, [of the State on whose territory the offence is alleged to have been committed] or of a State of which the accused is a national].”¹⁴⁴ This exclusionary requirement, drawn from the Zutphen Draft,¹⁴⁵ had support from a number of delegates¹⁴⁶ but was removed in the final version of the Rome Statute.¹⁴⁷

This deletion has proven significant as judges elected by the ICC’s Assembly of State Parties have, in fact, sat on cases involving their fellow citizens. For example, in 2009, Judge Nsereko, a Ugandan, heard an appeal involving Joseph Kony and other members of the Ugandan Lord’s Resistance Army.¹⁴⁸ In 2012, two Sudanese defendants sought the disqualification of Judge Eboe-Osuji, a Nigerian, on the basis that the Judge “shares Nigerian nationality with sixteen of

¹⁴¹ See, for example, the Dutch delegate who suggested that the difficulties of the *ad hoc* Tribunals meant that in addition to professional qualifications, “actual trial experience was vital.” U.N. ICC Conference, *supra* note 131, 14th plen. mtg., at ¶ 40 (Mr. Verweij, Netherlands).

¹⁴² U.N. ICC Conference, *supra* note 131, at ¶ 92 (Ms. Diop, Senegal).

¹⁴³ Cf. *infra* notes 143–46 and accompanying text.

¹⁴⁴ Rep. of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute for the International Criminal Court, art. 42, U.N. Doc. A/CONF.183/2/Add.1, (Apr. 14, 1998).

¹⁴⁵ U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rep. of the Preparatory Committee on the Establishment of an International Criminal Court, June 15–July 17, 1998, U.N. Doc. A/AC.249/1998/L.13, at art. 35 (Feb. 4, 1998).

¹⁴⁶ See, for example, U.N. ICC Conference, *supra* note 131, 15th plen. mtg., at para. 74 (Japan), 91 (Israel), 100 (Argentina), 110 (Venezuela), 113 (Islamic Republic of Iran), 122 (Mozambique), 125 (Democratic Republic of the Congo), Cf. *id.* at ¶ 78 (Malawi).

¹⁴⁷ ICCSt, *supra* note 81, at art. 41.

¹⁴⁸ Prosecutor v. Kony et al., Case No. ICC-02/04 OA and ICC-02/04-01/05 OA2, Judgment on the appeals of the defence, (Int’l Crim. Ct. Appeals Chamber, Feb. 23, 2009). Judge Nsereko’s nationality appears not to have been raised during the proceedings.

the alleged victims in the case.”¹⁴⁹ Sitting in plenary session, eleven judges denied the request, holding that “the mere co-occurrence of shared nationality with some of the alleged victims did not provide a basis to reasonably doubt the impartiality of the respondent.”¹⁵⁰ While a minority of two judges would have recused Judge Eboe-Osuji, his nationality was seen as an “aggravating factor,” relevant only in light of his election campaign and statements made in a blog post.¹⁵¹ Assumptions about how a judge will react to a case that involves his or her fellow nationals are just that—assumptions.¹⁵²

Article 41 of the Rome Statute provides that a Judge “shall not” participate in cases in which “his or her impartiality might reasonably be doubted on any ground” and includes a list of examples where disqualification must occur.¹⁵³ Unlike earlier drafts, Article 41 does not automatically disqualify judges who are nationals of an affected state. Instead, the question of recusal or disqualification turns on actual or apprehended bias.¹⁵⁴ When assessing the appearance of bias in the eyes of a reasonable observer, there is a rebuttable presumption that judges are professional and will decide a case solely on the evidence before them.¹⁵⁵ In the words of the ICTY Trial Chamber, “the nationalities and religions of Judges of this Tribunal are, and must be, irrelevant to their ability to hear the cases before them impartially.”¹⁵⁶

Although few studies have examined the sociological legitimacy of the ICC, there is some support for guaranteeing that ICC panels include judges from the affected state in question. Jenia Turner has argued for an “ICC-as-mixed-court” model essentially on fair reflection grounds, contending that local judges “are

¹⁴⁹ Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Case No. ICC-02/05-03/09-344-Anx, Decision of the Plenary of the Judges on the “Defence Request for the Disqualification of a Judge” of April 2, 2012, 2 (Int’l Crim. Ct., Plenary, June 5, 2012).

¹⁵⁰ *Id.* at 5, ¶ 15.

¹⁵¹ *Id.* at 10, ¶ 29.

¹⁵² James Cockayne, *Special Court for Sierra Leone: Decisions on the Recusal of Judges Robertson and Winter*, 2 J. INT’L CRIM. JUST. 1154, 1162 (2004) (arguing that questions concerning judicial independence stem from the actions of judges themselves). *See also* Jones, *supra* note 137, at 256 (arguing that the “habitual intolerance or prejudice” of an individual judge is the most important consideration, rather than their nationality). *Cf.* Milan Markovic, *International Criminal Trials and the Disqualification of Judges on the Basis of Nationality*, 13 WASH. U. GLOBAL STUD. L. REV. 1, 24 (2014).

¹⁵³ ICCSt, *supra* note 81, at art. 41(2)(a).

¹⁵⁴ Prosecutor v. Delalic et al., Case No. IT-96-21-A, Judgment, ¶¶ 683, 707 (Int’l Crim. Trib. for the Former Yugoslavia, Appeals Chamber Feb. 20, 2001).

¹⁵⁵ Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, *supra* note 149, at 14.

¹⁵⁶ Prosecutor v. Seselj, Case No. IT-03-67-PT, Decision on Motion for Disqualification, ¶ 3 (Int’l Crim. Trib. for the former Yugoslavia, Trial Chamber June 10, 2003).

more likely to be attuned to the interests and preferences of local populations.”¹⁵⁷ This view accords with the most comprehensive survey of citizens of the DRC. A 2007 survey of citizens from eastern DRC found that a majority of respondents preferred national justice institutions, including the national court system (51%) and military courts (20%) to justice delivered by the ICC (26%).¹⁵⁸ Indeed, it is questionable whether Uhuru Kenyatta and William Ruto’s political attacks on the ICC as “the toy of declining imperial powers,”¹⁵⁹ or the push to establish the African Court of Justice and Human Rights as a regional criminal court,¹⁶⁰ would reach as receptive an audience if a number of Kenyan or Sudanese judges sat on relevant ICC cases.

C. The Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia—Guaranteed Local Judges

The ECCC and the SCSL are materially distinct from the courts examined thus far. Although judges at both tribunals are also to be persons of “high moral character, ([with] a spirit of) impartiality and integrity,”¹⁶¹ these courts are specifically intended to include local judges. The development of hybrid courts in general, and these two in particular, accords with the same theme underlying the principle of fair reflection: legitimacy. Hybrid courts are established with the support and agreement of the affected state rather than imposed by a Chapter VII Security Council Resolution, are situated in the affected state, include a combination of both local and international actors, and adjudicate substantive and procedural law drawn from both the affected state and international law.

The Special Court is composed of eleven primary and two alternate judges. Three judges serve on the Trial Chamber, one of whom is appointed by the government of Sierra Leone and two by the Secretary-General of the U.N. In the Appeals Chamber, the Sierra Leonean government appoints two judges and the

¹⁵⁷ Jenia Iontcheva, *Nationalizing International Criminal Law*, 41 STAN. J. INT’L L. 1, 24, 36 (2005).

¹⁵⁸ Patrick Vinck et al., *Living With Fear: A Population-Based Survey on Attitudes about Peace, Justice, and Social Reconstruction in Eastern Democratic Republic of Congo*, INT’L CENTER FOR TRANSNATIONAL JUSTICE, 46 (August 2008), <https://www.ictj.org/sites/default/files/ICTJ-DRC-Attitudes-Justice-2008-English.pdf>.

¹⁵⁹ *African Union Urges ICC to Defer Uhuru Kenyatta Case*, BBC NEWS (Oct. 12, 2013), <http://www.bbc.com/news/world-africa-24506006>.

¹⁶⁰ Assembly of the African Union, 12th Sess., Feb. 1–3, 2009, *Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction*, Assembly/AU/Dec. 213(XII), at 9; Assembly of the African Union, 13th Sess., July 1–3, 2009, *Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC)*, Assembly/AU/13(XIII), at 5.

¹⁶¹ SCSLSt, *supra* note 35; Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia, *supra* note 74, at art. 10.

Secretary-General appoints three.¹⁶² At the Extraordinary Chambers, a majority of Cambodian judges sits on the Pre-Trial (3-2), Trial (4-3), and Supreme Court Chambers (3-2).¹⁶³ Owing to concerns about potential political manipulation and judicial independence, however, decisions must be made by a super-majority of judges (in other words, one international judge must agree with her national counterparts).¹⁶⁴

The history of the establishment of both the ECCC and the Special Court illuminate the importance political actors placed on legitimacy. In a letter to the Security Council requesting the “setting up of a Special Court for Sierra Leone,” President Ahmad Kabbah sought a process rooted in Sierra Leone and “uniquely Sierra Leonean.”¹⁶⁵ However, it is interesting to note that despite President Kabbah’s suggestion that the Special Court could give “preference” to sitting in country and that the co-prosecutor could be the Attorney-General of Sierra Leone, at this stage he does not suggest that any judges of the court should be Sierra Leonean.¹⁶⁶ Nevertheless, President Kabbah understood the importance of contextual awareness and sociological legitimacy, suggesting that “[t]he judges could be drawn from West Africa and possibly other parts of the world.”¹⁶⁷

Unfortunately, the Secretary-General’s Report on the establishment of a Special Court for Sierra Leone is silent on the relevant negotiations that led to this shift.¹⁶⁸ The Report simply notes that for perceptions of independence, objectivity, and impartiality, the Prosecutor should be an international, though a Sierra Leonean deputy should also be appointed.¹⁶⁹ There is no discussion on the nationality of the judges, merely a draft Statute that provides for the appointment of judges by Sierra Leone and the Secretary-General upon nomination by the Economic Community of West African States (ECOWAS) and Commonwealth states.¹⁷⁰ Of course, in practice, this would likely result in a bench comprised in

¹⁶² SCSLSt, *supra* note 35, at art. 12.1. The additional judges come from a second Trial Chamber.

¹⁶³ Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia, *supra* note 74, at art. 9.

¹⁶⁴ *Id.* at art. 14.

¹⁶⁵ Permanent Rep. of Sierra Leone, Letter dated 9 August 2000 from the Permanent Representative of Sierra Leone to the U.N. addressed to the President of the Security Council, U.N. Doc. S/2000/786 (Aug. 10, 2000) Annex Letter from Alhaji Ahmad Tejan Kabbah, President of the Republic of Sierra Leone on the proposed special court for Sierra Leone at 2, and Enclosure: Framework for the special court of Sierra Leone, at 4 (June 12, 2000).

¹⁶⁶ *Id.* at 5.

¹⁶⁷ *Id.* at 5.

¹⁶⁸ U.N. S.C., Rep. of the Secretary-General on the Establishment of a Special Court for Sierra Leone, U.N. Doc. S/2000/915 (Oct. 4, 2000).

¹⁶⁹ *Id.* at 9, ¶ 47.

¹⁷⁰ *Id.* at art. 2.2–2.3.

line with President Kabbah's suggestions. Thus, this Report and the establishment of the SCSL are significant, though underappreciated, developments for sociological legitimacy: Sierra Leonean judges reflect the local community, while the international judges are particularized in order to ensure greater contextual awareness of Sierra Leone and thus enhanced legitimacy.

Negotiations over the establishment of the ECCC were more arduous but also centered on the issue of legitimacy. The Cambodian government preferred a wholly national court with international assistance, while the U.N. favored internationally-led proceedings. For Cambodian Prime Minister Hun Sen, the issue was clearly one of political and sociological legitimacy: "I do not wish a foreign woman to come to Cambodia and dress up in a Khmer dress. I want a Khmer woman to dress in a Khmer dress and for foreigners to come and help put on the make-up."¹⁷¹ The U.N. also spoke in the language of legitimacy, but in emphasizing their concerns surrounding judicial independence, the U.N. stressed normative rather than sociological legitimacy. Indeed, the U.N. Group of Experts tasked with exploring the feasibility of apprehending and bringing to justice surviving Khmer Rouge leaders initially proposed a tribunal composed solely of international judges.¹⁷²

Despite some justifiable criticism relating to structure and operation, the ECCC and the Special Court appear to have secured popular support amongst their respective local communities. A 2010 survey by the Human Rights Center at Berkeley indicates that attitudes amongst Cambodians towards the ECCC are positive, with 83% believing that the ECCC "should be involved in responding to what happened during the Khmer Rouge regime."¹⁷³ Compared to the 2008 survey, a higher proportion of Cambodians believed that the ECCC would "help rebuild trust" and "help promote national reconciliation."¹⁷⁴ Surveys in Sierra Leone suggest a similar pattern: that the Special Court's overall legitimacy is not questioned to the same extent as the ICTY's.¹⁷⁵ While causality may be hard to

¹⁷¹ Youk Chhang, *The Thief of History – Cambodia and the Special Court*, 1 INT'L J. OF TRANSITIONAL JUST. 157, 167 (2007).

¹⁷² Rep. of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution 52/135, 53rd Session, U.N. Doc. A/53/850, at 179 (Mar., 16 1999).

¹⁷³ Phuong Pham et al., *After the First Trial: A Population-Based Survey on Knowledge and Perceptions of Justice and the Extraordinary Chambers in the Courts of Cambodia*, Human Rights Center, UC BERKELEY SCHOOL OF LAW (June 2011) at 26, available at https://www.law.berkeley.edu/files/HRC/Publications_After-the-First-Trial_06-2011.pdf.

¹⁷⁴ *Id.* at 29. An 11% and 14% increase, respectively. However, this optimistic account should be taken with some skepticism, as the survey found that only 54% of respondents "were able to identify Duch as the person who was on trial last year." *Id.* at 27. On Duch: See: ECCC, *Kaing Guek Eav*, <http://www.eccc.gov.kh/en/indicted-person/kaing-guek-eav>.

¹⁷⁵ Donna E. Arzt, *Views on the Ground: The Local Perception of International Criminal Tribunals in the Former Yugoslavia and Sierra Leone*, 603 ANNALS AM. ACAD. POL. & SOC. SCI. 226, 233 (2006).

determine, it is likely that the presence of local judges on the ECCC and the Special Court has contributed to support, acceptance, and perceptions of legitimacy amongst each local community.

However, it is important to note a few words of caution. For one, the underlying nature of the conflicts in Cambodia and Sierra Leone are considerably distinct from the conflicts in Rwanda and the former Yugoslavia.¹⁷⁶ In Sierra Leone, “neither ethnic nor religious divisions played a central role” in the conflict.¹⁷⁷ In Cambodia, despite the Khmer Rouge’s virulent nationalism and xenophobia, the majority of victims were ethnically Khmer.¹⁷⁸ In Rwanda and Yugoslavia, on the other hand, ethnic and territorial motivations predominated, suggesting that the presence of local judges must be managed carefully. Moreover, even in situations more analogous to Cambodia and Sierra Leone, the presence of local judges and other actors may “bring the history and politics of local institutions”¹⁷⁹ to the hybrid court. While sociological legitimacy demands a fair reflection of the local society on the bench, other notions of legitimacy would temper that demand if it would necessarily lead to accusations of partisanship or political interest.

Additionally, in post-conflict settings where the judiciary has been decimated and/or very real questions revolve around the capacity and credibility of the legal sector, the independence and impartiality of local as well as international judges must be rigorously maintained. It is not clear that any hybrid tribunal has completely succeeded in this endeavor, and indeed, what success exactly entails is unclear. International lawyers might recognize with some modesty that international judges have their own “patrons”¹⁸⁰ and that all constitutional courts, including their own, are often critiqued for adopting normative and ideological

¹⁷⁶ *Id.* at 228.

¹⁷⁷ John Bellows & Edward Miguel, *War and Institutions: New Evidence from Sierra Leone*, 96 AM. ECON. REV. 394, 395 (2006).

¹⁷⁸ See U.N. Econ. and Soc. Council, Commission on Human rights, 52d Sess., *Rep. on the situation of human rights in Myanmar prepared by the Special Rapporteur of the Commission on Human Rights*, U.N. Doc. E/CN.4/1996/65 (Feb. 5, 1996); U.N. Econ. and Soc. Council, Comm’n on Human Rights, 38th Sess., *Revised and Updated Rep. on the Question of the Prevention and Punishment of the Crime of Genocide prepared by Mr. B. Whitaker*, U.N. Doc. E/CN.4/Sub.2/1985/6, at 16, para. 31 (July 2, 1985); see also BEN KIERNAN, *THE POL POT REGIME: RACE, POWER, AND GENOCIDE IN CAMBODIA UNDER THE KHMER ROUGE, 1976–79* (3d ed. 2008); WILLIAM A. SCHABAS, *GENOCIDE IN INTERNATIONAL LAW* 118 (1st ed. 2000). Though for cases involving the destruction of Cham Muslims, ethnic Vietnamese, Buddhist monks and tribal peoples, etc., issues similar to those in Rwanda and the former Yugoslavia will arise.

¹⁷⁹ James Cockayne, *The Fraying Shoestring: Rethinking Hybrid War Crimes Tribunals*, 28 FORDHAM INT’L L.J. 616, 649 (2005).

¹⁸⁰ Alvarez, *supra* note 128, at 422.

decisions.¹⁸¹ Whether or not this criticism is justified, it suggests that independence and impartiality are aspirational goals that can be placed on one end of a spectrum. Mechanisms designed to secure independence and impartiality, such as security of tenure and appropriate salary, can minimize the need for local judges to think beyond the life of the hybrid court and reduce their incentives to curry favor with the domestic government. They are not, however, foolproof.

Finally, and perhaps most importantly, the biggest concern with all hybrid courts is feasibility. Almost by definition, states where the establishment of hybrid courts is being considered are ones in which local expertise is unavailable. For example, in Cambodia, only six law school graduates survived the Khmer Rouge regime,¹⁸² and in Sierra Leone, the Secretary-General noted that local resources were either “non-existent or extremely scarce.”¹⁸³ However, in that report, the Secretary-General also noted that, while “not experienced in the relevant fields of international criminal law” with training, local lawyers “could render an important contribution to the work and success of the Special Court.”¹⁸⁴ This is a significant point: although local lawyers will rarely have experience in international criminal law, judicial training programs can enable them to make a valuable and valued contribution on the bench. The fact that the Special Criminal Court in the CAR is to be comprised of a majority of Central African judges suggests that it is a point that is increasingly well understood. However, where it is not possible (and it truly may not have been possible in East Timor),¹⁸⁵ then the principle of fair reflection should cede to other considerations. Sociological legitimacy is not gained by the presence of corrupt or inadequate judges who happen to have a connection to the community. Merit remains the overriding concern.

Nevertheless, these potential issues are problems of implementation rather than conception. If these issues can be resolved, the experience of international criminal tribunals suggests that including local judges can enhance sociological legitimacy and therefore should be a goal for all such tribunals—not just hybrid courts. The establishment of the Special Criminal Court in the CAR, with a majority of local judges, suggests that this lesson is being learned and applied.

¹⁸¹ In the U.S. context, see, for example, *Lochner v. New York*, 198 U.S. 45 (1905); Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987).

¹⁸² Harry Hobbs, *Foreign Correspondent*, 37 ALT. L.J. 122, 122 (2012); Kevin Boreham & Harry Hobbs, *Justice Denied for Cambodia*, EAST ASIA FORUM (Dec. 22, 2011), <http://www.eastasiaforum.org/2011/12/22/justice-denied-for-cambodia/>.

¹⁸³ U.N. S.C., Letter dated 6 March 2002 from the Secretary-General addressed to the President of the Security Council U.N. Doc. S/2002/246 (Mar. 8, 2002) annex Rep. of the Planning Mission on the Establishment of the Special Court for Sierra Leone, 3, ¶ 12.

¹⁸⁴ *Id.* at 4, ¶ 12.

¹⁸⁵ CAITLIN REIGER & MARIEKE WIERDA, INT'L CTR. FOR TRANSITIONAL JUST., THE SERIOUS CRIMES PROCESS IN TIMOR-LESTE: IN RETROSPECT, 11, 16 (2006), <https://www.ictj.org/sites/default/files/ICTJ-TimorLeste-Criminal-Process-2006-English.pdf>.

V. TOWARDS A GREATER PARTICULARIZATION OF THE INTERNATIONAL

The disputed sociological legitimacy of the ICTY and ICTR, particularly when compared to the ECCC and the SCSL, affirms the significance of local judges adjudicating international crimes. But the simple division between “local” and “international” ignores important distinctions. As international lawyers are all too well aware, there is no homogeneous international community. Once this is understood, it becomes clear that the “international” judge can—and must—be particularized. In some respects, all supranational courts understand this. The requirement under Article 36(8) of the Rome Statute to consider geographic diversity and representation of the principal legal systems of the world in the selection of judges serves as an appropriate example.

In reflecting the international community, it is important for international judges on international tribunals to be drawn from diverse backgrounds. However, the current approach to particularizing or “representing” the “international” in hybrid criminal tribunals is inadequate as it ignores the practical problems that arise when international judges are insufficiently aware or attuned to the contextual features of the local community. The failure of international judges and officials to educate themselves about the affected community they are supposed to assist has “been evident and deleterious” in many post-conflict situations.¹⁸⁶ It is well accepted that “the fate of institutions is determined by the people that work in them;”¹⁸⁷ if hybrid tribunals are to be perceived as legitimate by the local community, a key policy prescription in composing these courts must be to ensure that international judges are conscious and sensitive to local context.

Particularizing international judges may enhance a court’s awareness and understanding of local cultural practices and thereby increase its acceptance among the affected community. There are three main elements ripe for particularizing: geography, legal tradition, and language.¹⁸⁸ However, when appointing international judges, it is important to remember that a judge from the same geographic region and legal tradition of the affected state and who speaks a language of the affected state may be more likely to understand the local culture and history than a judge without this background, but this is not always true. Effective and reciprocal judicial training programs, as well as the particular characteristics of each judge as an individual, remain the most important elements in judicial appointment.

¹⁸⁶ ORENTLICHER, *supra* note 125, at 22 (referring to the ICTY in relation to the Balkans).

¹⁸⁷ ROMANO, *supra* note 20, at 235, 269.

¹⁸⁸ This can be understood as creating the potential for great “cultural proximity” between the court and the community. See Jessica Almqvist, *The Impact of Cultural Diversity on International Criminal Proceedings*, 4 J. INT’L CRIM. JUST. 745, 758 (2006).

A. Geography and Legal Tradition

International criminal tribunals generally include a requirement to consider geographic representation and representation of the world's different legal traditions when appointing judges. Although this practice aims to ensure an equitable reflection of the international community, it too readily jettisons the importance of contextual knowledge and misconstrues the requirements of fair reflection. A fair reflection of the international community does not require the presence of a judge from each continent, nor a judge from each principal legal system. And, in fact, ignoring the importance of context risks destabilizing sociological legitimacy.

Working in post-conflict or post-authoritarian states is often difficult for international judges and the tribunals' staff. Aside from potential culture shock, homesickness, absence of creature comforts,¹⁸⁹ and the intensity of the nature of the work, some staff may be concerned that they could be putting their domestic career on-hold.¹⁹⁰ This has two consequences. First, it may reduce the quality of candidates available for appointment,¹⁹¹ and second, it may solidify divisions between the international and the local. Carla Del Ponte, then-Chief Prosecutor of the ICTY and ICTR summed up the difficulty: "it is not easy to stay and live here. I could not stay one year working in Arusha. . . . If it is like that for me, can you imagine what it is like for others?"¹⁹² Unfortunately this is a recurrent issue. For example, in the War Crimes Chamber in Bosnia-Herzegovina, international judges "resided elsewhere and flew into Bosnia once a month for a week-long session."¹⁹³ In Timor Leste, many international staff resided on a floating hotel moored off Dili; Hotel Olympia's rates of \$160 per night dwarfed the \$3 a day salaries paid to the hotel's Timorese workers.¹⁹⁴ However much we may (or may

¹⁸⁹ Chief Judge of the Special Panels for Serious Crimes in East Timor Phillip Rapoza noted that "the courthouse had electricity, at most, three days a week, owing to the unreliability of the public electric supply to which the building was connected." See Phillip Rapoza, *Hybrid Criminal Trials and the Concept of Ownership: Who Owns the Process*, 21 AM. U. INT'L L. REV. 525, 531 (2006). The unreliability of electrical services was an issue at the ECCC as well.

¹⁹⁰ The growth of international criminal justice, however, is creating a new network of career opportunities. Elena Baylis, *Function and Dysfunction in Post-Conflict Justice Networks and Communities*, 47 VAND. J. TRANSNAT'L L. 625 (2014); Elena Baylis, *Tribunal-Hopping with the Post-Conflict Justice Junkies*, 10 OR. REV. INT'L L. 361 (2008).

¹⁹¹ PERRIELLO & WIERDA, *supra* note 54, at 15–16, noting that this has been the case in Kosovo

¹⁹² Higonnet, *supra* note 18, at 362 n.33.

¹⁹³ Bruch, *supra* note 23, at 12.

¹⁹⁴ CAROLINE HUGHES, *DEPENDENT COMMUNITIES: AID AND POLITICS IN CAMBODIA AND EAST TIMOR* 98 (2009). For broader (and more strident) criticism concerning U.N. involvement in Timor-Leste, see Tom Fawthrop, *Dili Dallying*, 29 INDEX ON CENSORSHIP 15 (2000). In Kosovo, the

not) sympathize with the plight of international judges living a lifestyle below their normal standard, attitudes and actions like this further entrench physical and symbolic barriers between internationals and locals, “which in turn discourages that population from identifying with the tribunal.”¹⁹⁵

A potential solution to this problem involves prioritizing the selection of judges from regional states and from within the same legal tradition. If chosen carefully, a pronounced focus on regional neighbors and countries within the same legal tradition in the selection of international judges does not necessarily infringe the principle of fair reflection. This can also offer the potential for enhanced awareness of the local *sui generis* situation, bringing added legitimacy benefits to the institution.¹⁹⁶ In addition to the problems canvassed already in this Article, some scholars have suggested that the absence of judges from nearby Arabic-speaking countries on the Special Tribunal for Lebanon has been a factor in its troubled quest for legitimacy.¹⁹⁷ The same could be said with respect to the Iraqi High Tribunal.¹⁹⁸ The SCSL suggests that this approach is neither radical nor infeasible. Nominations for appointment of international judges to the Court were made by ECOWAS and Commonwealth states.¹⁹⁹ While there may be significant cultural differences between a judge from Bermuda and a judge from Sierra Leone, this is a worthy attempt at balancing contextual understanding and sociological legitimacy without sacrificing either.

Further, despite the apparent commitment of international criminal courts to representing the principal legal traditions of the world, in practice the ICC, ICTY, and ICTR have tended to emphasize common law and civil law traditions to the exclusion of African customary law, Sharia law, and Hindu law.²⁰⁰ While potentially problematic, particularly in Rwanda where community-appropriate Gacaca courts were developed,²⁰¹ this is likely merely a natural consequence of the

international and national staff were situated in different buildings. PERRIELLO & WIERDA, *supra* note 54, at 17.

¹⁹⁵ James Cockayne, *Hybrids or Mongrels? Internationalized War Crimes Trials as Unsuccessful Degradation Ceremonies*, 4 J. HUM. RTS. 455, 458–59 (2005).

¹⁹⁶ The affected state (or states) may also be more willing to provide political and financial support to the court if it is staffed by judges from the region. Jonathan I. Charney, *Is International Law Threatened by Multiple International Tribunals?*, 271 RECUEIL DES COURS 101, 125 (1998).

¹⁹⁷ Marieke Wierda, Habib Nassar & Lynn Maalouf, *Early Reflections on Local Perceptions, Legitimacy and Legacy of the Special Tribunal for Lebanon*, 5 J. INT’L CRIM. JUST. 1065, 1076–77 (2007).

¹⁹⁸ M. Cherif Bassiouni, *Post-Conflict Justice in Iraq: An Appraisal of the Iraq Special Tribunal*, 38 CORNELL INT’L L.J. 327, 368 (2005).

¹⁹⁹ Agreement between the U.N. and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone arts. 2.2(a),(c), Jan. 16, 2002 (entered into force on Apr. 12, 2002). [hereinafter SCSL Agreement].

²⁰⁰ Jones, *supra* note 137, at 254–55.

²⁰¹ See generally William A. Schabas, *Genocide Trials and Gacaca Courts*, 3 J. INT’L CRIM. JUST. 879 (2005).

development of international law, situated as it is within the civil and common law traditions;²⁰² and the preponderance of civil and common law jurists on international tribunals. As such, hybrid courts have followed a similar pattern. That Commonwealth states may nominate a judge on the Special Court for Sierra Leone suggests that common legal tradition is an important characteristic for the success of hybrid tribunals. Both institutional legitimacy and pragmatism suggest that this is an appropriate step.

This may be more difficult in practice than in theory. Every legal system in the world is, to some degree, mixed²⁰³ and each national legal system has its idiosyncrasies. Determining whether a particular country operates under a, for example, common or civil law system may strike many as simply more of the same top-down legal imperialism.²⁰⁴ Nevertheless, though the U.S. and Australian legal systems diverge in terms of institutions, processes, and rules, they can both be classed as common law systems. The same can be said, albeit more broadly, of Japan, the CAR, and France. Significantly, this general grouping should demonstrate that “any division of the legal world into families or groups is a rough and ready device.”²⁰⁵ The focus on legal tradition is meant to simply guide policymakers into selecting judges with knowledge of local context. The same is true of the regional component. Rather than arbitrarily restrict “the geographic region” in the abstract, policymakers should use their best judgment when determining the borders of the most appropriate region. In some cases it may make sense to include judges from neighboring states who were “involved” in the conflict in a passive sense, such as through accepting refugees.²⁰⁶

Of course, the selection of judges from regional states and states of the same legal tradition is not an unqualified good. Even if a regional state was not involved in the particular conflict that culminated in a hybrid tribunal, “historical enmity and[/or] long-term competition over resources” may caution against appointment of a judge from a certain state.²⁰⁷ Conversely, the appointment of judges from regional states more interested in impunity than prosecution may weaken

²⁰² Colin B. Picker, *International Law's Mixed Heritage: A Common/Civil Law Jurisdiction*, 41 VAND. J. TRANSNAT'L L. 1083, 1104–06 (2008).

²⁰³ Esin Öricü, *Law as Transposition*, 51 INT'L & COMP. L.Q. 205, 212 (2002).

²⁰⁴ On the importance of a “bottom up” approach to transitional justice measures, see Patricia Lundy & Mark McGovern, *Whose Justice? Rethinking Transitional Justice from the Bottom Up*, 35 J. LAW & SOC'Y 265 (2008).

²⁰⁵ KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 72 (Tony Weir trans., Clarendon Press, 3d ed. 1998).

²⁰⁶ William W. Burke-White, *Regionalization of International Criminal Law Enforcement: A Preliminary Exploration*, 38 TEX. INT'L L.J. 729, 737–38, 749–50, 753–55 (2003).

²⁰⁷ Oona A. Hathaway et al., *Consent-Based Humanitarian Intervention: Giving Sovereign Responsibility Back to the Sovereign*, 46 CORNELL INT'L L.J. 499, 557–58 (2013).

international criminal law as an institution.²⁰⁸ Relatedly, the legacy of colonialism has meant that many states' legal systems were inherited from colonizing powers. Where violence and mass atrocity can be traced back to a colonizing power, either historically or contemporaneously, it may make practical sense to avoid, if possible, selecting judges from that country. Further, the presence of judges from varied legal traditions can spur constructive legal reasoning and enhance the developing jurisprudence of international criminal law. Thus, while there is both sociological legitimacy and efficiency value in appointing judges from the same legal tradition and geographic region as the affected state, this should not be considered an absolute rule; room for choice is always necessary.²⁰⁹

B. Common Language

That judges on hybrid courts should speak a common language may be thought of as simply a pragmatic consideration. Language barriers on hybrid courts limit opportunities for mutual learning and the exchange of ideas,²¹⁰ and the cost and delay associated with interpretation and translation places added strain on “shoestring” budgets.²¹¹ However, international law requires that an accused must be capable of understanding the charges against them,²¹² suggesting that interpretation and translation costs cannot be completely avoided. More broadly, it is important to remember that linguistic diversity can bring its own benefits in adjudication.²¹³

However, the principle of fair reflection may shed further light on the need for commonality of language. If the hybrid court is to adequately reflect the communities within its jurisdiction, it must be capable of being understood by those communities. Understood this way, the long running failure of the ICTY and ICTR to comprehend that their work should be translated into the local languages of the affected communities is particularly egregious.²¹⁴ Although it is

²⁰⁸ For example, consider the African Union's controversial decision to grant immunity from criminal prosecution for senior government officials before the proposed African Court of Justice and Human Rights. See generally Max du Plessis, *Shambolic, Shameful and Symbolic: Implications of the African Union's Immunity for African Leaders*, INSTITUTE FOR SECURITIES STUDIES PAPER 278, Nov. 2014.

²⁰⁹ PLATO, *THE STATESMAN* 59 (Julia Annas & Robin Waterfield trans., 1995).

²¹⁰ Jane E. Stromseth, *Pursuing Accountability for Atrocities After Conflict: What Impact on Building the Rule of Law?*, 38 *GEO. J. INT'L L.* 251, 290 (2007).

²¹¹ See generally Avril McDonald, *Sierra Leone's Shoestring Special Court*, 84 *INT'L REV. RED CROSS* 121 (2002).

²¹² ICCPR, *supra* note 83, at arts. 14(3)(a), (f); ICCSt, *supra* note 81, at arts. 55(1)(c), 67(1)(a),(f).

²¹³ See *supra* note 83 and surrounding text. See also MACKENZIE ET AL., *supra* note 19, at 170.

²¹⁴ See *supra* note 116 and surrounding text. The way that this attitude towards the local communities of the former Yugoslavia interacted with the failed push to establish a Truth and Reconciliation Commission in Bosnia and Herzegovina is examined in Neil J. Kritz, *Progress and Humility: The*

likely that this situation will not occur again, it may be beneficial for international judges to speak a language of the affected community.

Of course, international judges are “jurists, not linguists.”²¹⁵ Their appointment on an international criminal tribunal should be dependent on their skill and expertise in the law, rather than their ability to speak a language of the affected community—particularly given that international crimes do not discriminate by geography or language. In this respect, ensuring adequate resourcing of professional interpreters and translators may be thought to be more important. Expert interpretation and translation is certainly critical to ensuring efficient administration of the court and effective communication with relevant communities. The systemic failure of the Special Panels of the Dili District Court, which took four years to hire its first professional translator,²¹⁶ is a stark reminder of this fact. Nevertheless, where two candidates are equally qualified, preference should be given to the judge who can speak a language of the affected community. Such a policy would likely lead to better relationships within the hybrid court and between the hybrid court and the local community.²¹⁷

C. Judicial Training Programs

The particularized factors that I have noted are only part of the story. As every court, domestic or supranational, criminal or civil, recognizes, the characteristics of the particular individual is the most important element in appointing a judge.²¹⁸ However, beyond consideration of personal characteristics, there is room for specialized judicial training and continuing education programs for all judges on hybrid courts based on principles of respect and reciprocity.

A lack of knowledge and awareness surrounding local customs and culture can manifest itself in condescending and dismissive attitudes. In Timor-Leste,

Ongoing Search for Post-Conflict Justice, in POST-CONFLICT JUSTICE 55, 60–63 (M. Cherif Bassiouni ed., 2002).

²¹⁵ *Prosecutor v. Khieu Sambân*, Case No. 002/19-09-2007-ECCC/SC, Request to Urgently Direct the Administration to Reinforce the Capacity of the Translation Unit, ¶ 8 (Extraordinary Chambers in the Courts of Cambodia Oct. 8, 2014).

²¹⁶ David Cohen, “Hybrid” Justice in East Timor, Sierra Leone, and Cambodia: “Lessons Learned” and Prospects for the Future, 43 STAN. J. INT’L L. 1, 15 (2007). See also DAVID COHEN, EAST-WEST CENTER SPECIAL REPORTS NO. 9, INDIFFERENCE AND ACCOUNTABILITY: THE UNITED NATIONS AND THE POLITICS OF INTERNATIONAL JUSTICE IN EAST TIMOR 10 n.13 (2006) (“Until 2002 the Court of Appeal worked in English, Bahasa Indonesia[n], and Portuguese. At that time the judges had no effective common language and there was a lack of interpreters to aid them in communicating.”).

²¹⁷ REIGER & WIERDA, *supra* note 185, at 16 (citing a 2003 U.N. Report which noted that “international advisors’ reluctance to learn local languages contributed to the poor rate of skill transfer from internationals to nationals.”).

²¹⁸ For comments, see Sheldon Goldman, *Judicial Selection and the Qualities that Make a “Good” Judge*, 462 ANNALS AM. ACAD. POL. & SOC. SCI. 112–24 (1982).

independent observers witnessed international judges demonstrating “patronizing attitudes to their national colleagues”²¹⁹ and exhibiting a lack of cultural sensitivity when questioning witnesses.²²⁰ In Sierra Leone, researchers reported that at one point, a majority of the local judiciary refused to work with the Special Court because they “claim[ed] to have been patronized by the[ir] international counterparts.”²²¹ A condescending mindset may arise in part from the dominant vision of international criminal justice, which relies on an “international as expert” model. Hybrid courts may unconsciously reinforce this model by tacitly supporting an unstated assumption that the role of the international judge is to impart her wisdom on lesser local counterparts.²²² The bickering and infighting caused by the pretensions of the international judge directly results in lower public support for the hybrid tribunal as an institution.

If the problem was simply a lack of knowledge, the solution would be easy: provide judicial training. However, often, judicial training programs are neither reciprocal nor effective. In Timor-Leste, for example, judicial training generally focused only on educating national judges on substantive and procedural aspects of international criminal law, rather than emphasizing important elements of domestic jurisprudence to internationals.²²³ This is often an issue of attitude or posture, rather than a problem of conception. In 2000, the ICTY held a training session for judges and prosecutors involved in the United Nation Mission in Kosovo on humanitarian law, but “[t]he majority of international judges and prosecutors did not attend.”²²⁴ The absence of international judges reinforced the problematic “international as expert” model. Further difficulties may arise at an implementation rather than conceptual level. The seemingly intractable ethnic conflicts that arise in many post-conflict situations may be too complex to come to terms with for internationals during the limited life of international courts. This seems to have been the case in the War Crimes Chamber for Bosnia and Herzegovina. In interviews, Bogdan Ivanišević noted that a national judge observed that “the most difficult part is to explain [to my foreign counterpart] the

²¹⁹ REIGER & WIERDA, *supra* note 185, at 15.

²²⁰ *The Mixed Specialized Court as a Mechanism of Repression of International Crime in the Democratic Republic of the Congo: Lessons Learned from Cambodia, East Timor, Kosovo, and Bosnia*, RIGHTS LINK, 27 (Oct. 2011), <http://www.cad-congo.org/wp-content/uploads/2010/12/CAD-English.pdf>.

²²¹ Rachel Kerr & Jessica Lincoln, *War Crimes Research Group, King's College London, The Special Court for Sierra Leone: Outreach, Legacy and Impact* 29 (Feb. 2008), <http://www.rscsl.org/Documents/sfinalreport.pdf>.

²²² E-mail from Eric Witte, Open Society Justice Initiative, to author (Oct. 24, 2014).

²²³ REIGER & WIERDA, *supra* note 185, at 16.

²²⁴ David Marshall & Shelly Inglis, *The Disempowerment of Human Rights-Based Justice in the United Nations Mission in Kosovo*, 16 HARV. HUM. RTS. J. 95, 129 (2003).

mentalities, the way things are perceived here, the historical and religious context of this conglomerate called BiH.”²²⁵

An effective judicial training program based on the principles of mutuality and respect will be structured to educate all judges, both local and international, in three areas: international criminal law and humanitarian law, the jurisprudence of the affected state, and the culture and history of the affected state. It is crucial for the legitimacy and success of these hybrid courts that in their operation, and despite their individual characteristics and background, the judges adopt a “common judicial outlook”²²⁶ and that they are perceived as a “united front” rather than a “jumbled-up professional group with too many mismatched nationalities and backgrounds.”²²⁷ One option for breaking down symbolic barriers may be to have national judges hold training programs on domestic jurisprudence to their international counterparts. Eric Witte has noted that beyond the substantive merit in familiarizing internationals with the system in which they will be working, “it would establish at the outset that learning is expected to be mutual.”²²⁸ This option is certainly worthy of further consideration.

V. CONCLUDING REMARKS

The operation of international criminal tribunals “often entails serious legitimacy challenges.”²²⁹ An incompletely theorized conception of hybrid tribunal composition has contributed to these challenges. Scholars recognize that these courts offer “a promising framework,”²³⁰ but that the “transfer of knowledge and the strengthening of local capacities rarely happen automatically.”²³¹ While each court is a *sui generis* institution, global lessons can be learned. One of these is that it is important to ensure that international judges are not “over-valoriz[ed]” and unconsciously “neutralized as expert.”²³²

²²⁵ Bogdan Ivanišević, *The War Crimes Chamber in Bosnia and Herzegovina: From Hybrid to Domestic Court*, INT’L CTR. FOR TRANSITIONAL JUST., 40 (2006), <https://www.ictj.org/sites/default/files/ICTJ-FormerYugoslavia-Domestic-Court-2008-English.pdf>. “BiH” refers to the conglomerate of Bosnia and Herzegovina.

²²⁶ Mohamed Shahabuddeen, *Teething Phase of the ECCC*, 10 CHINESE J. INT’L L. 469, 472 (2011).

²²⁷ Swigart, *supra* note 20, at 241.

²²⁸ Witte, *supra* note 222.

²²⁹ Yuval Shany, *Seeking Domestic Help: The Role of Domestic Criminal Law in Legitimizing the Work of International Criminal Tribunals*, 11 J. INT’L CRIM. JUST. 5, 8 (2013).

²³⁰ Higonet, *supra* note 18, at 350.

²³¹ Christopher Sperfeldt, *From the Margins of Internationalized Criminal Justice: Lessons Learned at the Extraordinary Chambers in the Courts of Cambodia*, 11 J. INT’L CRIM. JUST. 1111, 1125 (2013).

²³² Bruch, *supra* note 23, at 35–36.

This Article has argued that the principle of fair reflection can offer a firmer normative basis for the composition of hybrid courts, potentially enhancing legitimacy. 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 starting point of international criminal justice,²³³ von Hagenbach was brought before an *ad hoc* tribunal composed of twenty-eight 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, Kenzingen, Neuburg am Rhein, and Freiburg im Breisgau], Berne, a member of the Swiss Confederation, and Solothurn, allied with Berne.²³⁴

As the affected state, Breisach nominated a plurality of “local” judges. The remaining “international” judges were particularized—nominated by regional states and states with a legal system common to Breisach.

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 distance—both physical and theoretical—from primary victims. For too long international justice has been “justice divorced from local realities.”²³⁵ International criminal law’s challenge is to make justice available on a personal level.²³⁶

The establishment of the Special Criminal Court in the CAR is promising. It is hoped that it will go some way to remedying the “serious and unabated violations of human rights and international humanitarian law” which have been “committed in a climate of total impunity.”²³⁷ This possibility is strengthened by the court’s structure. As this Article has argued, a majority of local judges offers a firmer normative basis for enhancing the legitimacy of the court among the

²³³ GEORG SCHWARZENBERGER, INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS, Vol. II, 462–66 (1949); Gregory S. Gordon, *The Trial of Peter von Hagenbach: Reconciling History, Historiography and International Criminal Law*, in THE HIDDEN HISTORIES OF WAR CRIMES TRIALS 13, 48–49 (Kevin Jon Heller & Gerry Simpson eds., 2013); M. Cherif Bassiouni, *The Perennial Conflict Between International Criminal Justice and Realpolitik*, 22 GA. ST. U. L. REV. 541, 551 (2006); WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 1 (3d ed. 2007); ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 115 (3d ed. 2014); MICHAEL P. SCHARF & WILLIAM A. SCHABAS, SLOBODAN MILOSEVIC ON TRIAL: A COMPANION 39 (2002).

²³⁴ SCHWARZENBERGER, *supra* note 233, at 463.

²³⁵ PIERRE HAZAN, LA JUSTICE FACE À LA GUERRE, DE NUREMBERG À LA HAYE (2007); cited in Mina Rauschenbach & Damien Scalia, *Victims and International Criminal Justice: A Vexed Question?*, 90 INT’L REV. RED CROSS 441, 455 (2008); Hobbs, *supra* note 62, at 33.

²³⁶ Harry Hobbs, *The Security Council and the Complementary Regime of the International Criminal Court: Lessons from Libya*, 9 EYES ON THE ICC 19, 49 (2013).

²³⁷ U.N. S.C. Rep. of the Secretary-General on the situation in the Central African Republic, U.N. Doc. S/2014/562, at 1 (Aug. 1, 2014).

affected community. If the international judges eventually appointed to the court have sufficient connection to the CAR; if they hail from central African and civil law states and/or speak Sangho or French, the court's sociological legitimacy will be further grounded. In turn, a sociologically legitimate court offers the best prospect of resolving the crises crippling the CAR. Kosovo, South Sudan, the DRC, and Sri Lanka will be watching with interest.