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INTERNATIONAL CRIMINAL TRIALS AND THE DISQUALIFICATION OF JUDGES ON THE BASIS OF NATIONALITY

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ABSTRACT

Judges who sit on the International Criminal Court ("ICC") and other international criminal tribunals ("ICTs") are nationals of particular states and are elected to serve largely on the basis of their nationality. Since the advent of the Nuremberg Tribunal, however, ICTs have *perpetuated the notion that national identity is irrelevant to a judge's* performance of his or her duties.

This Article will contend that judges at the ICC and other ICTs should not preside over trials concerning crimes allegedly committed by or against their fellow nationals. Judges should also consider recusing themselves from cases that strongly implicate the interests of their home nations. Other international tribunals prohibit judges from adjudicating cases involving their home nations or otherwise control for national bias in judging.

Judges at the ICC and other ICTs undoubtedly strive to be independent and impartial, but they cannot be expected to act as representatives of the international community and its values in cases where they will be under psychological and economic pressure to rule in accordance with domestic

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interests. The parties to a conflict are also likely to use a judge's nationality as a proxy for his or her capacity to be impartial.

INTRODUCTION

International criminal trials have changed significantly since Nuremberg. Individuals that appear before modern international criminal tribunals ("ICTs") such as the International Criminal Tribunal for the former Yugoslavia ("ICTY"), International Criminal Tribunal for Rwanda ("ICTR"), and International Criminal Court ("ICC") possess far more rights and protections than did the Nuremberg defendants.[1] As one prominent international judge has stated, "while the Nuremberg Tribunal was hardly a failure from the perspective of due process rights, its shortcomings inspired its heirs to do better, and the result is a rigorous commitment to due process across the international criminal courts."[2] ICTs are now generally perceived to provide defendants with rights that equal—or exceed—those provided by domestic courts.[3]

To ensure that defendants' rights are protected and to protect the credibility of international criminal trials, all modern ICTs also require judges to be independent and impartial.[4] Whereas the Charter of the International Military Tribunal did not address the qualifications of judges,

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1. See, e.g., Michael P. Scharf, A Critique of the Yugoslavia War Crimes Tribunal, 25 DEN. J. INT'L L. & POL'Y 305, 305–06 (1997) (comparing the Nuremberg Tribunal to the ICTY and concluding that "[i]n many respects, the Yugoslavia Tribunal is a vast improvement over its predecessor"); Michael Newton, Evolving Equality: The Development of the International Defense Bar, 47 STAN. J. INT'L L. 379, 385 (2011) ("The modern defense bar has . . . evolved to provide defendants with trial procedures and organizational support necessary to fully preserve their due process rights."). The Nuremberg Tribunal permitted trials in absentia, applied ex post facto laws, and did not afford defendants the right to appeal their convictions. See generally Kevin R. Chaney, Pitfalls and Imperatives: Applying the Lessons of Nuremberg to the Yugoslavia War Crimes Trials, 14 DICK. J. INT'L L. 57, 71–78 (1995) (identifying the main criticisms of the Nuremberg trials).

2. Theodor Meron, Reflections on the Prosecution of War Crimes by International Tribunals, 100 AM. J. INT'L L. 551, 571 (2006).

3. See, e.g., Darryl Robinson, The Identity Crisis of International Criminal Law, 21 LEIDEN J. INT'L L. 925, 927 (2008) ("[International criminal law] is scrupulously generous in the guarantee of procedural rights, and succeeds in upholding them even for the most unsavory accused."); Letter from Monroe Leigh, Partner, Steptoe & Johnson, to Henry Hyde, Chairman of the H. Comm. on Int'l Relations (Feb. 21, 2001) (suggesting that the protections of the ICC Statute are "at least as comprehensive as the American Bill of Rights—in certain cases even more detailed and specific"), reprinted in Philippe Kirsch, Applying the Principles of Nuremberg in the International Criminal Court, 6 WASH. U. GLOBAL STUD. L. REV. 501, 505–06 (2007).

4. See Ruth Mackenzie & Philippe Sands, International Courts and Tribunals and the Independence of the International Judge, 44 HARV. INT'L L.J. 271, 271–72 (2003); Tom Dannenbaum, Nationality and the International Judge: The Nationalist Presumption Governing the International Judiciary and Why It Must Be Reversed, 45 CORNELL INT'L L.J. 77, 107 (2012).

and prohibited any challenges to the composition of the Tribunal,[5] the statutes of the ICTY, ICTR, and ICC contain provisions concerning judicial independence and impartiality.[6] ICC judges are subject to a code of ethical conduct that further delineates their obligations of independence and impartiality.[7]

Despite the attention to defendants' rights and judicial independence and impartiality, defendants who seek to disqualify judges from international criminal trials face a high bar. The ICTY affords judges a "presumption of impartiality," and the defendant "must firmly establish a reasonable apprehension of bias."[8] ICTR defendants must make a similar showing to disqualify a judge.[9]

ICTs have been especially unreceptive to claims that a judge's nationality can provide a basis for his or her disqualification.[10] In responding to a motion to disqualify a German judge on the basis of "a long history of conflict between Germans and Serbs,"[11] the ICTY Appeals Chamber found that:

> The nationalities . . . of Judges of this Tribunal are, and must be, irrelevant to their ability to hear the cases before them impartially . . . . [J]udges' ability to . . . consider nothing but the evidence presented to them in deciding on an individual's guilt constitutes a touchstone of their role as judges.[12]

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5. See Charter of the International Military Tribunal art. 3, Aug. 8, 1945, 56 Stat. 1544, 82 U.N.T.S. 279 [hereinafter IMT Charter].

6. Rome Statute of the International Criminal Court art. 41(2)(a), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter ICC Statute]; Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res 827, art. 13, U.N. Doc. S/Res/827 (May 25, 1993) [hereinafter ICTY Statute]; Statute of the International Tribunal for Rwanda, S.C. Res. 955, art. 12, U.N. Doc. S/Res/955 (Nov. 8, 1994) [hereinafter ICTR Statute].

7. ICC, Code of Judicial Ethics, arts. 3 & 4, Res. ICC-BD/02-01-05 (Mar. 9, 2005), available at http://www.icc-cpi.int/NR/rdonlyres/A62EBC0F-D534-438F-A128-D3AC4CFDD644/140141/ICCBD020105_En.pdf.

8. Prosecutor v. Furundzija, Case No. IT-95-17/1-A, Judgment, ¶¶ 196–97 (Int'l Crim. Trib. for the Former Yugoslavia July 21, 2000).

9. François Karera v. Prosecutor, Case No. ICTR-01-74-A, Judgment, ¶ 254 (Feb. 2, 2009); Georges Anderson Nderubumwe Rutaganda v. Prosecutor, Case No. ICTR-96-3-A, Judgment, ¶ 42 (May 26, 2003); Prosecutor v. Nourain & Jamus, 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 2 April 2012.

10. See Prosecutor v. Seselj, Case No. IT-03-67-PT, Decision on Motion for Disqualification, ¶ 3 (Int'l Crim. Trib. for the Former Yugoslavia June 10, 2003) [hereinafter Seselj Disqualification Decision]; Prosecutor v. Martić, Case No. IT-95-11-A, A Report to the Vice-President Pursuant to Rule 15(b)(ii) Concerning Defence Motion to Disqualify Judge Schomburg from Sitting on Appeal, at 3 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 19, 2007).

11. Seselj Disqualification Decision, ¶ 2.

12. Id. ¶ 3; see also id. ¶ 4 ("The policies of the governments of the countries from which judges

Similarly, when the defense team of General Ratko Mladić sought to disqualify Judge Alfonse Orie on, among other grounds, the grounds that the indictment against Mladić predominately focused on the Srebrenica massacre, and Judge Orie "could not detach himself from his Dutch nationality, and the sentiments that may rise from such a charged proceeding on a matter that is of great interest to the Dutch State and people,"[13] its motion was dismissed in a three-page decision.[14] The decision was predicated on a memorandum filed in the matter by Judge Orie, in which he responded to the charge of national bias as follows:

> I am a national of the Netherlands. I was elected as a judge of this Tribunal by the General Assembly of the United Nations. I am remunerated for my work for this Tribunal by the United Nations. In no way do I feel or consider that I have any identification or partiality with the Netherlands, its Government, any of its officials, or any individual of Dutch nationality in the performance of my duties. What binds me is the solemn declaration that I made when I undertook to fulfill my duties "honourably, faithfully, impartially and conscientiously."[15]

The ICTY may be correct that a judge should not be disqualified from an international criminal trial because his or her nation has been a historical antagonist of the defendant's nation. A Dutch judge may also be capable of impartially presiding over a case involving the Srebrenica massacre, notwithstanding the impact that Dutch peacekeepers' failure to protect Srebrenica's civilians has had on the Netherlands and its people.[16]

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of the International Tribunal come are, and must be, irrelevant to the carrying out of their judicial responsibilities.").

13. Prosecutor v. Mladić, Case No. IT-09-92-PT, Defence Motion Pursuant to Rule 15(B) Seeking Disqualification of Presiding Judge Alphons Orie and for a Stay of Proceedings, ¶ 96 (Int'l Crim. Trib. for the Former Yugoslavia May 11, 2012).

14. See Prosecutor v. Mladić, Case No. IT-09-92-PT, Order Denying Defence Motion Pursuant to Rule 15(B) Seeking Disqualification of Presiding Judge Alphons Orie and for a Stay of Proceedings, at 3 (Int'l Crim. Trib. for the Former Yugoslavia May 15, 2012).

15. Id. at Annex, ¶ 60.

16. In 2002, the government of Prime Minister Wim Kok resigned after a report criticized it for failing to prevent the Srebrenica massacre. See, e.g., Dutch Government Quits Over Srebrenica, BBC NEWS (Apr. 16, 2002), http://news.bbc.co.uk/2/hi/europe/1933144.stm; Dutch Cabinet Resigns Over Srebrenica Report, TELEGRAPH (London) (Apr. 12, 2002), http://www.telegraph.co.uk/news/1391071/Dutch-cabinet-resigns-over-Srebrenica-report.html. Dutch courts have also recently found that the Netherlands bears responsibility for the massacre and must pay compensation to some of its victims. See Martin Banks, Dutch State to Blame for Srebrenica Deaths, Court Rules, TELEGRAPH (London) (July 5, 2011), http://www.telegraph.co.uk/news/worldnews/europe/netherlands/8618244/Dutch-state-to-blame-for-Srebrenica-deaths-court-rules.html.

It does not follow, however, that a judge's national identity is irrelevant in every case.

Judges possess numerous personal characteristics and background experiences that might affect the performance of their duties. National identity may not play a determinative or even significant role in the vast majority of international criminal trials. Nevertheless, because war crime trials are inherently political[17] and often implicate the policies of governments and rebel groups,[18] there will be some cases that directly implicate the interests of a judge's home nation. Legal scholars and political scientists have begun to document the extent to which judges on international tribunals are biased in favor of their home states,[19] and ICT judges are unlikely to be immune from this phenomenon.

National bias is not merely of theoretical concern for the ICC. ICC judges, unlike their counterparts at the ICTY and ICTR, will preside over cases involving their home nations, and a Ugandan judge, Judge Nsereko, has already participated in an appeal involving Joseph Kony and other prominent members of the Ugandan Lord's Resistance Army ("LRA").[20] Judge Nsereko's nationality was not addressed in the proceedings, but the ICC, by a majority vote of a plenary of its judges, recently denied the motion of two Sudanese rebels to disqualify a Nigerian judge on the basis that he shared the nationality of the majority of their alleged victims.[21] Are such actions in the best interests of a court that purports to speak for the "international community as a whole"?[22]

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17. Rosemary Byrne, The New Public International Lawyer and the Hidden Art of International Criminal Trial Practice, 25 CONN. J. INT'L L. 243, 253 (2010); see also Jenia Iontcheva Turner, Legal Ethics in International Criminal Defense, 10 CHI. J. INT'L L. 685, 686 (2010) ("The goals of international trials are broader and more political than those of ordinary domestic trials.").

18. See Allison Marston Danner, Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court, 97 AM. J. INT'L L. 510, 510 (2003).

19. See, e.g., Erik Voeten, The Impartiality of International Judges: Evidence from the European Court of Human Rights, 102 AM. POL. SCI. REV. 417, 425 (2008) (suggesting that ECHR judges display national bias); Eric A. Posner & Miguel F.P. de Figueiredo, Is the International Court of Justice Biased? 34 J. LEGAL STUD. 599, 604–05 (2005) (suggesting that ICJ judges display national bias).

20. See Prosecutor v. Kony et al., Case No. ICC-02/04OA, Judgment on the "Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06" of Pre-Trial Chamber II, ¶ 1 (Feb. 23, 2009).

21. See ICC, Decision of the Plenary of the Judges on the "Defence Request for the Disqualification of a Judge" of 2 April 2012, ICC-02/05-03/09-344-Anx, ¶ 33 (June 5, 2012). The judge in question also made statements that arguably appeared to be sympathetic to Sudanese President Al-Bashir, for whom there is an outstanding ICC warrant. See id. ¶ 26.

22. See ICC Statute, supra note 6, art. 5(1) (noting that the ICC's jurisdiction is limited to "the most serious crimes of concern to the international community as a whole"); see also Robert D.

This Article will contend that judges at the ICC and future ICTs should not preside over international criminal trials involving crimes allegedly committed by or against their fellow nationals. Judges should also voluntarily recuse themselves from other cases that strongly implicate the interests of their states.

These rules are needed because international criminal trials have different functions than domestic trials, and judges should act as representatives of the international community as opposed to their national communities.[23] ICT judges may strive to be impartial, but the notion that they can completely separate themselves from their national polities—especially in cases involving crimes allegedly committed by, or against, their fellow nationals—overlooks the psychology and motivations of judges at the ICC and other ICTs. The parties to a conflict will also inevitably view a judge's nationality as an indication of his or her impartiality.

Part I of this Article will address the unique goals and purposes of ICTs. As scholars have observed, ICTs such as the ICC are not proxies for domestic judicial mechanisms and should not be seen as such.[24] Rather, they derive their legitimacy insofar as they speak for the "international community as a whole"[25] and "the shared values of humanity and shared interests of states."[26] While there will be disagreement as to what these values and interests are, the ICC and other ICTs should not decide cases on the basis of domestic values and interests. Indeed, the fact that a given case is before the ICC or another ICT suggests that national justice has proven inadequate and legitimizes the exclusion of domestic norms from the adjudicative process.[27]

Sloane, The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law, 43 STAN. J. INT'L L. 39, 54 (2007) ("[T]he authority and legitimacy of international criminal tribunals derive from and rely on international rather than local laws and values.").

23. See Sloane, supra note 22, at 55 ("Just as national criminal law conceives of crime as an offense against the state as a collective . . . so [international criminal law] may be conceived analogously as concerned principally with the penal interests and values of the international community as a collective, not local political and social orders.").

24. See, e.g., id. at 52; Margaret M. de Guzman, Choosing to Prosecute: Expressive Selection at the International Criminal Court, 33 MICH. J. INT'L L. 265, 305 (2012); see also Philippe Kirsch, The Role of the International Criminal Court in Enforcing International Criminal Law, 22 AM. U. INT'L L. REV. 539, 543–44 (2007) (discussing the ICC's role as a "court of last resort").

25. ICC Statute, supra note 6, art. 5(1).

26. Sloane, supra note 22, at 53.

27. See ICC Statute, supra note 6, art. 17(1) (providing that a case is admissible where "[t]he case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution").

Part II will examine why a judge's nationality is likely to interfere with his or her ability to act as a representative of the international community in cases involving crimes allegedly committed by or against his or her fellow nationals. Unlike most other international tribunals, ICTs do not provide for nationality-based recusals, or the appointment of ad hoc judges who share the defendant's nationality. Empirical research on other international tribunals indicates that judges disproportionately rule in favor of their home states, while not being influenced by geopolitical considerations more generally.

Part II proceeds to describe the psychological, economic, and structural reasons that national bias is especially likely to exist in the adjudication of international criminal trials. The nature of fact-finding and legal analysis at the ICC and other ICTs also allows judges to give effect to their national biases. A dissent from a judgment in the Civilian Defense Forces case ("CDF case") before the Special Court for Sierra Leone ("SCSL") will be used to illustrate this argument.[28]

Part III will consider whether this Article's focus on nationality might be counterproductive to the advancement of international criminal justice and short-sighted given the increasing professionalization[29] and cosmopolitanism of ICT judges.[30] Part III will also seek to explain why removing judges from cases in which they will be perceived to have the most interest may actually help to legitimize international criminal trials. Although current ICT judges may be more professional and cosmopolitan than their predecessors, this does not assure that they will not exhibit national bias or that they will represent the international community and its values effectively. The Part concludes by addressing why automatic disqualification should be required in cases involving crimes committed by or against a judge's fellow nationals as opposed to other measures.

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28. Prosecutor v. Fofana & Kondewa, Case No. SCSL-04-14-T, Judgment, ¶ 1 (Aug. 2, 2007) [hereinafter CDF case]. As discussed infra Part II.B.3.b, the Special Court of Sierra Leone was designed with different goals in mind than institutions such as the ICC, and the service of domestic judges may have been crucial to the fulfillment of those goals. Nevertheless, the CDF case does suggest that it may be unrealistic to expect that judges will set aside their national interests even when they associate with international judges.

29. See generally Allison Danner & Erik Voeten, Who Is Running the International Criminal Justice System, in WHO GOVERNS THE GLOBE? 35, 46 (Deborah D. Avant ed., 2010) (noting creation of a transnational network of ICT judges).

30. Martha Nussbaum defines "cosmopolitanism" as an individual's tendency to see himself or herself as "a citizen of the world" and to "put[] right before country and universal reason before the symbols of belonging." Martha C. Nussbaum, Patriotism and Cosmopolitanism, in FOR LOVE OF COUNTRY? 6, 17 (Joshua Cohen & Martha Nussbaum eds., 2002); see also THOMAS M. FRANCK, THE EMPOWERED SELF: LAW AND SOCIETY IN THE AGE OF INDIVIDUALISM 1 (1999) (suggesting that national identities are being replaced with more individualistic identities).

International criminal justice is undermined when judges are consciously or unconsciously conflicted between their duties to the international community and their duties to their states. The ICC and other ICTs should recognize that national bias can have a significant impact on judging and act to protect the impartiality of international criminal trials.

I. THE DIFFERENT FUNCTIONS OF INTERNATIONAL AND DOMESTIC CRIMINAL TRIALS

To determine whether judges at the ICC and future ICTs should be permitted to hear cases that substantially involve their home nations, it is first necessary to understand the extent to which ICTs differ from domestic courts.

ICTs and domestic criminal courts both determine whether punishment is warranted for individuals who are alleged to have committed crimes that fall under their jurisdictions.[31] Under both systems, punishment is generally viewed as morally justifiable to the extent that it is either retributivist by reflecting what the perpetrator deserves or consequentialist by bringing about certain goals.[32] Punishment can also have social meaning and significance.[33]

ICTs and domestic criminal courts differ, however, with respect to the communities on whose behalf they act. The ICTY and ICTR were created by the Security Council,[34] and the ICC is a treaty-based court composed of 122 state parties.[35] These ICTs all purport to act on behalf of the

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31. See ICC Statute, supra note 6, pmbl. (noting that ICC jurisdiction is complementary to national criminal jurisdictions and that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.").

32. See Sloane, supra note 22, at 69 ("Conventional justifications for punishment fall into two broad categories: crime-control and retributive theories."). Some law scholars have suggested that international criminal law is heavily skewed towards retribution. See Andrew K. Woods, Moral Judgments & International Crimes: The Disutility of Dessert, 52 VA. J. INT'L L. 633, 634 (2012) ("The international criminal regime is deeply retributive."); Ralph Henham, Developing Contextualized Rationales for Sentencing in International Criminal Trials, 5 J. INT'L CRIM. JUST. 757, 757–58 (2007) (describing retributivism as a "pervading ideology" among ICTs).

33. Compare Dan M. Kahan, What Do Alternative Sanctions Mean?, 63 U. CHI. L. REV. 591, 593 (1996) (suggesting that in the domestic context "[p]unishment . . . is a special social convention that signifies moral condemnation") with Sloane, supra note 22, at 71 ("By punishing the perpetrators of serious international crimes . . . the international community attempts authoritatively to disavow the conduct, to indicate symbolically its refusal to acquiesce in the crimes.").

34. See S.C. Res. 827, supra note 6 (creating ICTY); S.C. Res. 935, supra note 6 (creating ICTR).

35. See List of State Parties, INT'L CRIM. COURT, http://www.icc-cpi.int/en_menus/asp/states%20parties/ Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (last visited Feb. 18, 2014).

international community,[36] whereas domestic criminal courts represent the community of a state's citizens.[37] Defendants at ICTs also stand trial for violating "global stability" and "global humanity" as opposed to domestic values and norms.[38]

Of course, many ICT defendants will have allegedly violated both domestic and international legal norms. Across legal cultures, there is a great deal of overlap in the concepts of right and wrong.[39] But notwithstanding this overlap, a particular defendant may have transgressed against the international community but not his or her national community.[40] An ICT defendant's conduct can constitute a threat to global stability and global humanity but appear entirely justifiable or even laudatory to his or her own community.[41]

Some scholars, perhaps wary that ICTs can effectively speak on behalf of an abstract international community, have suggested that ICTs should seek to act as proxies of national communities.[42] Support for such a view can be found in the statutes of the ICTY and ICTR, which require judges to consider national penalties in the former Yugoslavia and Rwanda when sentencing defendants.[43] Moreover, pursuant to the principle of complementarity, the ICC can assert jurisdiction only when national authorities are unwilling or unable to prosecute certain crimes.[44] Adherence to this principle may suggest that the ICC and future ICTs

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36. The ICC explicitly claims to speak on behalf of the international community. See, e.g., ICC Statute, supra note 6, pmbl. & art. 5(1). The ICTY and ICTR represent the international community because they were created by the Security Council pursuant to Chapter VII of the U.N. Charter. See Christian Tomuschat, International Criminal Prosecution: The Precedent of Nuremberg Confirmed, 5 CRIM. L.F. 237, 237 (1994) ("One may call it truly amazing that the international community, acting through the Security Council, has been able to set up two international criminal jurisdictions in the recent past.").

37. Sloane, supra note 22, at 48.

38. Id. at 54 (citing MICHAEL WALZER, The Politics of Rescue, in ARGUING AGAINST WAR 74 (2004)).

39. See generally Woods, supra note 32, at 648–50 (summarizing the sociological research of prominent punishment naturalists).

40. Id. at 655.

41. See id. at 651–52 (discussing Sierra Leoneans' views concerning Special Court of Sierra Leone defendant Issa Sesay).

42. See, e.g., Steven Glickman, Victim's Justice: Legitimizing the Sentencing Regime of the International Criminal Court, 43 COLUM. J. TRANSNAT'L L. 229, 257 (2004); Adam M. Smith, Book Note, 45 HARV. INT'L L.J. 563, 570 (2004) (reviewing FROM NUREMBERG TO THE HAGUE: THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE (P. Sands ed., 2003)); see also Jenia Iontcheva Turner, Nationalizing International Criminal Law, 41 STAN. J. INT'L L. 1, 22 (2005) (suggesting that the ICC should defer to local jurisprudential norms).

43. ICTY Statute, supra note 6, art. 24(1); ICTR Statute, supra note 6, art. 23(1). The ICC Statute contains no such reference to national practices. Sloane, supra note 22, at 43.

44. ICC Statute, supra note 6, art. 17(1)(a).

should strive to act on behalf of national communities that have been denied the opportunity to mete out justice themselves.

Although the ICC and other ICTs should certainly take into account the views and concerns of national communities, they were never intended to simulate national judicial mechanisms and should not seek to do so in any case.[45] The ICTR and ICTY prosecute international law violations in Tanzania and the Netherlands respectively—countries far removed from Rwanda and the former Yugoslavia.[46] While the ICTR and ICTY statutes reference domestic sentencing practice, ICTR and ICTY judges have not been bound by the penal practices of Rwanda and the former Yugoslavia.[47] Indeed, the disconnect between these ICTs and the people of Rwanda and the former Yugoslavia has been so great that the international community created so-called "hybrid" tribunals to address war crimes committed in other regions.[48]

For the ICC to seek to represent national communities would be particularly problematic because it has jurisdiction over cases involving "the most serious crimes of international concern,"[49] and, under the principle of complementarity, the ICC may assert jurisdiction over these crimes only if national authorities are either unable or unwilling to prosecute them domestically.[50] The fact that the ICC need not defer to domestic justice when domestic justice is ineffectual reflects the

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45. See Sloane, supra note 22, at 52 ("The drafters of the Rome Statute did not design the Court with a view to the satisfaction of local penal interests.").

46. See S.C. Res. 977, U.N. Doc. S/RES/977 (Feb. 22, 1995) (establishing Tanzania as the seat of the ICTR); S.C. Res. 827, ¶ 6, U.N. Doc. S/Res/827 (May 25, 1993) (establishing the Netherlands as the seat of the ICTY).

47. Sloane, supra note 22, at 49. The ICC Statute does not reference domestic practices. See id.

48. See, e.g., John Cerone, Enhancing the Legitimacy, Status, and Role of the International Criminal Court By Using Transitional and Restorative Justice Mechanisms, 6 INTERDISC. J. HUM. RTS. L. 83, 91 (2012); Frédéric Mégret, Beyond "Fairness": Understanding the Detriments of International Criminal Procedure, 14 UCLA J. INT'L L. & FOREIGN AFF. 37, 47 (2009). Whether hybrid tribunals such as the SCSL are better able to act as proxies of national communities is beyond the scope of this Article. Nevertheless, although hybrid tribunals are structured so as to better accommodate the views of national communities, scholars have expressed skepticism that they are truly reflective of the domestic will. See TIMOTHY KELSALL, CULTURE UNDER CROSS-EXAMINATION: INTERNATIONAL JUSTICE AND THE SPECIAL COURT FOR SIERRA LEONE 256 (2009) (criticizing the SCSL for delivering sentences that do not accord with national sentiments); see also Phuong Pham et al., After the First Trial: A Population-Based Survey on Knowledge and Perception of Justice and the Extraordinary Chambers in the Courts of Cambodia 3 (Oct. 1, 2011) (Human Rights Center, University of California Berkeley), http://www.escholarship.org/uc/item/0n22238c (suggesting that Cambodians would rather the country focus on economic problems than address crimes committed by the Khmer Rouge regime via the country's hybrid tribunal).

49. See ICC Statute, supra note 6, art. 1, 17(1)(a).

50. See id. art. 17(1)(a).

international community's longstanding skepticism that every state can be trusted to redress serious international crimes.

A crucial and often overlooked antecedent to the Nuremberg Tribunal was Germany's failure to prosecute those responsible for World War I.[51] Germany tried twelve individuals before the country's Supreme Court at Leipzig, and only six were convicted with sentences ranging from six months' to four years' imprisonment.[52] Based on this experience, the Allies were determined to not defer to national justice at Nuremberg.[53] The ICTR and ICTY followed this precedent by asserting primacy over national trials in Rwanda and Yugoslavia.[54]

The ICC is designed to work in tandem with domestic criminal courts to punish serious international crimes,[55] but the complementarity principle also incentivizes each state to demonstrate to the international community that it can abide by its duty to "exercise its criminal jurisdiction over those responsible for serious international crimes."[56] If a state cannot fulfill its duties, then the ICC is able to assume jurisdiction. To suggest that the ICC should dispense justice according to local sentiments disincentivizes states to meet their obligations to the international community.

Another significant difference between ICTs such as the ICC and domestic criminal courts is that the former generally have goals that the latter do not.[57] As one commentator has observed:

> Beside standard objectives of national criminal law enforcement, such as retribution for wrongdoing, general deterrence, incapacitation, and rehabilitation, international criminal courts

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51. See Mary Margaret Penrose, Lest We Fail: The Importance of Enforcement in International Criminal Law, 15 AM. U. INT'L L. REV. 321, 332–33 (1999).

52. Id. at 332.

53. Id. at 333.

54. ICTR Statute, supra note 6, art. 8(2); ICTY Statute, supra note 6, art. 9(2).

55. See, e.g., ICC Statute, supra note 6, pmbl. (noting that the effective prosecution of international crimes "must be ensured by taking measures at the national level and by enhancing international cooperation"); Turner, supra note 42, at 2 (suggesting that the ICC should engage with national prosecutors and judges to ensure the enforcement of international norms in post-conflict societies).

56. ICC Statute, supra note 6, pmbl.; see also ICC, Paper on Some Policy Issues Before the Office of the Prosecutor, ICC Doc. ICC-OTP 2003 (Sept. 2003), at 5, available at http://www.icc-cpi.int/library/organs/otp/030905_Policy_Paper.pdf ("[T]he principle underlying the concept of complementarity is that States remain responsible and accountable for investigating and prosecuting crimes committed under their jurisdiction and that national systems are expected to maintain and enforce adherence to international standards.").

57. See, e.g., Sloane, supra note 22, at 55; Turner, supra note 42, at 66; see also Milan Markovic, The ICC Prosecutor's Missing Code of Conduct, 47 TEX. INT'L L.J. 201, 210 (2011) (suggesting that ICC trials can and should have educative effects).

> profess to pursue numerous additional aims . . . . At various times, the courts have expressed their intention to produce a reliable historical record of the context of international crime, to provide a venue for giving voice to international crime's many victims, and to propagate human rights values. Courts have also expressed their aspiration to make advances in international criminal law, and to achieve objectives related to peace and security—such as stopping an ongoing conflict—that are far removed from the normal concerns of national criminal justice.[58]

Domestic criminal trials may occasionally implicate these goals. Some domestic trials can have a bearing on domestic (and even international) peace and security, and such trials may also create important records of significant historical events.[59] However, because international criminal trials involve "the most serious crimes of international concern,"[60] their importance and meaning will almost always transcend whether one particular individual should be punished for certain acts that he or she allegedly committed.[61] Although the ICC and future ICTs might benefit from less ambitious agendas,[62] this ambition arguably reflects that more is expected of international criminal trials.

Judges at the ICC and future ICTs will obviously play a central role in ensuring that their institutions represent international norms and values and achieve the distinct goals of international criminal law. Nevertheless, there has been little analysis as to whether these judges' national allegiances might interfere with their ability to as act impartial representatives of the international community and its values.[63] The next

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58. Mirjan Damaska, What is the Point of International Criminal Justice?, 83 CHI.-KENT L. REV. 329, 331 (2008).

59. Scholars have generally been skeptical that international criminal trials can create such a record. See, e.g., id. at 338; Woods, supra note 32, at 657 ("The use of retributive criminal trials to establish a historical record for grave crimes has been widely criticized."); see also Allison Marston Danner & Jenny S. Martinez, Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law, 93 CAL. L. REV. 75, 95 (2005) (claiming that courts cannot create a historical narrative and still address the individuation of guilt). But see Jenia Iontcheva Turner, Defense Perspectives on Law and Politics in International Criminal Trials, 48 VA. J. INT'L L. 529, 540 (2008) (noting that constructing a historical narrative has been central to the mission of ICTs since Nuremberg).

60. ICC Statute, supra note 6, art. 5(1).

61. See Turner, supra note 42, at 536.

62. See MARK A. DRUMBL, ATROCITY, PUNISHMENT AND INTERNATIONAL LAW 15–16 (2007); Damaska, supra note 58, at 331 ("Unlike Atlas, international criminal courts are not bodies of titanic strength, capable of carrying on their shoulders the burden of so many tasks.").

63. See generally Danner & Voeten, supra note 29, at 42–44 (distinguishing view that ICTs should dispense impartial justice from the view that judges should only be granted considerable

Part contends that judges at the ICC and future ICTs should be disqualified from adjudicating cases substantially involving crimes allegedly committed by or against their fellow nationals but need not be excluded from other cases.

II. NATIONAL BIAS AND ICT JUDGES

The international community consists of nations that are politically, culturally, and legally diverse. There is a growing sense that the ICC and other ICTs should reflect this diversity.[64] For example, the state parties to the ICC are required to take into account the following in electing judges:

> (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.[65]

The ICC's effort to establish a diverse judiciary ensures not only that the court will better reflect the international community than its predecessors,[66] but may also help to legitimize the ICC's actions.[67]

A necessary corollary to the question of who should serve on the ICC and other ICTs is the question of whether there are any circumstances in which the service of certain judges would be incompatible with the mandate to speak to the "shared values of humanity and shared interests of states."[68] The ICC Statute provides a partial answer by stipulating that judges who are nationals of the same state cannot simultaneously serve on the court.[69] However, while the ICC Statute appears to recognize the value of national diversity, it fails to appreciate that judges might be influenced by national allegiances in the performance of their duties.

Although any number of personal characteristics could theoretically have a bearing on a judge's decision-making, national identity is a

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agency on those issues that are of little concern to the great powers).

64. See, e.g., Jessica Almqvist, The Impact of Cultural Diversity on International Criminal Proceedings, 4 J. INT'L CRIM. JUST. 745, 746–47 (2006); see also Turner, supra note 42, at 23.

65. ICC Statute, supra note 6, art. 36(8)(a).

66. Analysis of data on judicial appointments at the ICTY and ICTR suggests that the ICTY has been dominated by Western judges and the ICTR by African judges, with judges from Latin American countries underrepresented on both courts. Danner & Voeten, supra note 29, at 49. Judges from civil law countries are also underrepresented. Id. at 21.

67. See Turner, supra note 42, at 23; Markovic, supra note 57, at 208.

68. Sloane, supra note 22, at 53.

69. ICC Statute, supra note 6, art. 36(7).

particularly powerful source of affiliation. The prominent sociologist Anthony Smith has claimed that no "serious rival to the nation . . . exists for the affections and loyalties of most human beings."[70] Even ardent critics of the concept of "a nation" acknowledge its psychological importance.[71]

The ICC and other ICTs should be particularly concerned about national bias in judging because a system predicated on international norms and values should be supported by individuals who are guided primarily by the "shared values of humanity and shared interests of states."[72] If the ICC and future ICTs apportion criminal responsibility for a particular conflict pursuant to the perspective of one party to that conflict, they risk compromising their role as neutral representatives of the international community. The recourse to international criminal justice also indicates that national justice mechanisms have proven inadequate and legitimizes the exclusion of domestic norms and values as valid bases for decision-making.

The remainder of this Part will substantiate the claim that national bias is likely to affect the adjudication of international criminal trials. Unlike ICTs, most other international tribunals recognize that national bias exists and seek to account for it. Empirical data from the International Court of Justice ("ICJ") and the European Court of Human Rights ("ECHR") also suggests that judges consistently rule in favor of their home nations while not being guided by geopolitical concerns more generally. This is consistent with this Article's contention that judges at the ICC and other ICTs should be excluded from only those cases involving crimes allegedly committed by or against their fellow nationals. The Part then suggests that national bias is especially likely to affect judging at the ICC and other ICTs on account of the following: (1) the psychological manifestations of the conflicts with which international criminal trials are concerned; (2) the motivations of judges; and (3) the nature of fact-finding and legal analysis with respect to international criminal trials.

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70. A.D. SMITH, NATIONALISM AND MODERNISM: A CRITICAL SURVEY OF RECENT THEORIES OF NATIONS AND NATIONALISM 195 (1998); see also Harold Chapman Brown, Social Psychology and the Problem of a Higher Nationalism, 28 INT'L J. ETHICS 19, 19 (1917) ("Many humanitarians seem to believe that the boundaries of the nations might be swept away and a federation of all mankind substituted without loss. But the psychologist can hardly concur in this opinion.").

71. See BENEDICT ANDERSON, IMAGINED COMMUNITIES 6 (1991) ("[M]embers of even the smallest nation will never know most of their fellow-members, meet them, or even hear of them, yet in the minds of each lives the image of their communion.").

72. Sloane, supra note 22, at 53.

A. Practice and Evidence from Other International Tribunals

In contrast to ICTs, many other international tribunals recognize that a judge's nationality is likely to have a bearing on his or her decision-making and employ measures to counteract this phenomenon.[73] The ICJ Statute provides that when one of the ICJ's judges shares the nationality of one of the parties, the other party is entitled to appoint an ad hoc judge to hear the case.[74] The International Tribunal for the Law of the Sea follows the same practice.[75] The ECHR also permits a state to appoint an ad hoc judge if it lacks a judge on the chamber hearing a complaint against it while not allowing a judge to sit as a single judge with respect to complaints made against his or her state.[76] The Inter-American Court for Human Rights ("IACHR") and the African Court on Human and People's Rights ("ACHPR") mandate that judges recuse themselves from cases involving their home states.[77]

Other prominent international bodies also account for national bias. To "promote impartiality in appearance as well as in substance," members of the Human Rights Committee do not consider either periodic reports filed by their own states or complaints filed against their states.[78] The Committee Against Torture similarly prohibits its members from examining complaints initiated against their states.[79]

One prominent exception is the European Court of Justice ("ECJ"), which does not allow nationality-based challenges to the composition of any chamber.[80] Given its role as a quasi-constitutional court for Europe,[81] it is understandable that the ECJ would seek to dismiss the notion that a

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73. See Dannenbaum, supra note 4, at 78.

74. Statute of the International Court of Justice art. 31(2), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993 [hereinafter ICJ Statute].

75. See United Nations Convention on the Law of the Sea, Annex XI art. 17(2), Dec. 10, 1982, 1833 U.N.T.S. 39.

76. See Dannenbaum, supra note 4, at 98 (citing Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol No. 14 Amending the Control System of the Convention, May 13, 2004, C.E.T.S. No. 194). Although states are not required to only nominate candidates of their own nationality to sit on the ECHR, that is the usual outcome. See id.

77. Id. at 92, 97.

78. See Office of the U.N. High Comm'r for Human Rights, Civil and Political Rights, The Human Rights Committee, Fact Sheet No. 15 (Rev. 1) 13 (May 2005), http://www.ohchr.org/Documents/Publications/FactSheet15rev.1en.pdf.

79. Rules of Procedure for the Committee Against Torture, Rule 109(c), U.N. Doc. CAT/C/3/Rev.5 (Feb. 2011).

80. Dannenbaum, supra note 4, at 100.

81. Geoffrey Garret et al., The European Court of Justice, National Governments, and Legal Integration in the European Union, 52 INT'L ORG. 149, 149 (1998) ("The [ECJ] interprets EU treaties as if they represent a de facto constitution for Europe.").

judge's nationality has any bearing on the adjudicative process. Furthermore, to ensure that the decision-making of individual judges is shielded from scrutiny, the ECJ "organizes its work with a degree of opacity that rivals that of the secret sessions of England's Fifteenth Century Star Chamber."[82] The ECJ issues opinions only by consensus, and prohibits dissenting opinions.[83] The means by which judges are assigned to a particular chamber is also a mystery.[84] Such opacity would be unacceptable at the ICC, where judges hear cases in the open, issue signed opinions, and can be held responsible for their rulings.

The World Trade Organization's Appellate Body ("WTO AB") is another exception. The WTO AB does not require recusal when one of its members shares the nationality of a party before the tribunal,[85] and members are assigned to a particular division "regardless of their national origin."[86] Interestingly, the panels from which the WTO AB hears appeals do require their members to recuse themselves from cases involving their home nations.[87] This dichotomy may simply reflect the limited jurisdiction of the WTO AB[88] and that its members are required to be technocrats who are unaffiliated with any particular government.[89] ICT judges conversely have far more adjudicative discretion[90] and are selected largely on the basis of nationality.[91]

All of the international tribunals that do explicitly account for national bias, either by requiring the recusal of judges as with the IACHR and ACHPR, or the appointment of ad hoc judges as with the ICJ and ECHR, address (often controversial) claims of state misconduct. The ICC and

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82. R. Daniel Kelemen, The Political Foundations of Judicial Independence in the European Union (Rutgers University Working Paper, Feb. 23, 2011) at 6, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1914516.

83. Id. at 9.

84. Id. at 11.

85. Dannenbaum, supra note 4, at 103–04.

86. Appellate Body, Working Procedures for Appellate Review, art. 6(2), WT/AB/WP/6 (Aug. 16, 2010), available at http://www.wto.org/english/tratop_e/dispu_e/ab_e.htm.

87. Dannenbaum, supra note 4, at 103.

88. Marrakesh Agreement Establishing the World Trade Organization, Annex 2: Understanding on Rules and Procedures Governing the Settlement of Disputes art. 17(6), Apr. 15, 1994, 1869 U.N.T.S. 401, available at http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm ("An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.").

89. Id. Annex 2, art. 17(3) ("The Appellate Body shall comprise persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally. They shall be unaffiliated with any government.").

90. See Byrne, supra note 17, at 248.

91. See ICC Statute, supra note 6, arts. 36(7)–(8); see also Erik Voeten, The Politics of International Judicial Appointments, 9 CHI. J. INT'L L. 387, 402 (2009) (noting that nationality is the most significant factor in determining whether a judicial candidate is elected to an ICT).

other ICTs consider claims against individuals, however, which might suggest that nations' interests are not as implicated in international criminal trials, obviating the need to control for national bias.

It is true that ICTs such as the ICC do not directly consider claims against states.[92] The ICC Statute specifically provides that "[n]o provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law."[93] Nevertheless, claims can still be brought against states based on individuals' violations of international criminal law. In the Bosnia Genocide case, for example, Bosnia and Herzegovina sought to hold Serbia responsible for genocide based on the actions of Bosnian forces in Srebrenica and other regions of Bosnia.[94] The ICJ ultimately dismissed most of the claims against Serbia but in so doing relied almost entirely on the ICTY's findings with respect to the Bosnian conflict.[95] Consequently, while the ICC does not consider claims against states, ICC judgments could form the basis of subsequent actions against states in other forums.[96]

Moreover, notwithstanding that a crime may be of concern to the "international community as a whole,"[97] it will almost always be of greatest concern to one or more states. The ICC's first defendant, rebel leader Thomas Lubanga, has been described as a "small fish,"[98] but the ICC found that Mr. Lubanga committed serious crimes in connection with the civil war in the Democratic Republic of Congo ("DRC").[99] An acquittal would have been damaging to the DRC government and may

92. It is possible, however, that a state might be entitled to the "specific proceeds, property or assets which have been derived directly or indirectly from the crime." See ICC, International Criminal Court Rules of Evidence and Procedure, Rule 147, ICC-ASP/1/3 (Sept. 9, 2002) [hereinafter ICC Rules of Procedure and Evidence], available at http://www.icc-cpi.int/NR/rdonlyres/F1E0AC1C-A3F3-4A3C-B9A7-B3E8B115E886/140164/Rules_ of_procedure_and_Evidence_English.pdf.

93. ICC Statute, supra note 6, art. 25(4).

94. See Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), 2007 I.C.J. 91, ¶ 64 (Feb. 26).

95. See id. ¶ 214.

96. This would include not only international tribunals such as the ICJ and ECHR but domestic courts as well.

97. ICC Statute, supra note 6, art. 5(1).

98. See, e.g., David Smith, Congo Warlord Thomas Lubanga Convicted of Using Child Soldiers, GUARDIAN (Mar. 14, 2012), http://www.guardian.co.uk/world/2012/mar/14/congo-thomas-lubanga-child-soldiers; see also Andrew Harding, Meeting Lubanga, BBC NEWS (Mar. 14, 2012), http://www.bbc.co.uk/news/world-africa-17368072 (noting perception of Lubanga as a "small fish").

99. Lubanga was convicted of conscripting and enlisting children under the age of fifteen and using them to participate actively in hostilities in the Ituri region of the Democratic Republic of the Congo from early September 2002 to August 13, 2003. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on Sentence Pursuant to Article 76 of Statute, ¶ 1 (July 12, 2012).

have fomented instability in the country.[100] Virtually every case before the ICC will involve a defendant who is alleged to have committed violations of international law against, or on behalf of, one or more states. These states will have a vested interest in the conviction or acquittal of that defendant.

Data from the ICJ and ECHR suggests that international tribunals' concerns about national bias in judging are well-founded. In a 2005 article, Posner and de Figueiredo examined the voting of ICJ judges who participated in the seventy-six cases that reached a substantive decision.[101] The authors hypothesized that, inter alia, judges would tend to vote in favor of their home states as well as countries that resembled their own in terms of region, wealth, and political structure.[102]

Posner and de Figueiredo found clear evidence that ICJ judges exhibit bias in favor of their home states. Ad hoc judges voted 90.5% in favor of their home states when the home state was an applicant and 90.2% of the time when the home state was a respondent.[103] While these results could be explained by the fact that ad hoc judges might conceive of themselves as advocates for their nations, the ICJ's permanent judges voted similarly. Permanent judges voted in favor of their home states 83.3% of the time when the home state was an applicant and 89.5% of the time when the home state was the respondent.[104] In all, ICJ judges ruled in favor of their home states nearly 90% of the time.[105] Posner and de Figueiredo also found some evidence for their hypothesis that ICJ judges vote for states that resemble their own in terms of wealth and political structure,[106] but did not find that judges were influenced by regional and military alignments.[107]

Similarly, Erik Voeten analyzed the dissents of ECHR judges in 1,024 Level 1 judgments to determine the bearing of a judge's nationality and

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100. When the Lubanga Trial was previously suspended, observers warned of instability in the Ituri region where Lubanga remains quite popular. See DRC: ICC Suspension a Risk for Ituri Stability, IRIN AFRICA (June 24, 2008), http://www.irinnews.org/Report.aspx?ReportId=78820 (quoting a human rights lawyer in Kinshasa).

101. Posner & de Figueiredo, supra note 19, at 604–05.

102. See id. at 609.

103. Id. at 615. A similar study by Adam M. Smith found that judges voted with their states 80% of the time. See Adam M. Smith, Judicial Nationalism in International Law: National Identity and Judicial Autonomy at the ICJ, 40 TEX. INT'L L.J. 197, 218 (2005).

104. Posner & de Figueiredo, supra note 19, at 615; see also Smith, supra note 103, at 218 (finding that permanent judges voted with their home states 70% of the time).

105. Posner & de Figueiredo, supra note 19, at 615.

106. See id. at 617.

107. See, e.g., id. at 622.

other factors on the ECHR's decision-making.[108] He found that when a ruling favored the respondent state, 100% of ad hoc judges and 95% of permanent judges from the respondent country voted with the majority.[109] When a ruling went against the respondent state, 33% of ad hoc judges and 16% of permanent judges from the respondent state dissented compared to only 8% of the other judges.[110] These findings were statistically significant and led Voeten to conclude that ECHR judges fail to be impartial when evaluating the conduct of their own national governments.[111]

Voeten also found that national bias is particularly prevalent in cases involving article 3 of the European Convention, which prohibits torture and inhumane treatment.[112] In such cases, judges were 25% more likely to vote in favor of their national governments than in other cases.[113] Voeten attributes this phenomenon to the political sensitivity of these cases and their potential bearing on national security.[114] There was no evidence, however, that other factors such as legal culture or geopolitics impacted the decision-making of ECHR judges.[115]

Lastly, in a 2005 study, Meernik, King, and Dancy analyzed the sentencing practices of the ICTY Trial Chamber.[116] Although ICTY defendants do not share the nationalities of the ICTY's judges, the study is nevertheless useful for its examination of whether national bias might lead judges to take into account their nations' foreign policy interests. The authors hypothesized that judges from certain NATO countries sentenced Serbian defendants more harshly than did other judges.[117] They found no significant differences in sentencing, however, and concluded more generally that "the characteristics of the nation and political system from which ICTY judges come do not predict the severity of the punishment in the manner expected."[118]

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108. Voeten, supra note 19, at 425. Level 1 judgments are those that the ECHR itself deems as most legally significant. Id.

109. Id.

110. Id.

111. Id. at 425–26.

112. Id. at 427–28.

113. Id. at 428.

114. Id. at 430.

115. Id. at 431.

116. James Meernik et al., Judicial Decision Making and International Tribunals: Assessing the Impact of Individual, National, and International Factors, 86 SOC. SCI. Q. 683, 695 (2005).

117. Id. at 690. Unfortunately, Meernik et al. focus only on the decision-making of judges from the United States, France, and Great Britain, and do not consider the decision-making of judges from other NATO countries such as Germany. Id.

118. Id. at 698.

Taken together, the results from the ICJ and ECHR clearly suggest that national bias impacts decision-making when a judge is asked to adjudicate the conduct (or misconduct) of his or her nation. Data from the ICJ, ECHR, and ICTY does not indicate, however, that national bias leads judges to vote according to their nations' geopolitical interests. These findings are consistent with this Article's proposal that judges should be disqualified from cases involving crimes allegedly committed by or against their nationals but not necessarily other cases.

Of course, none of the above studies specifically addresses whether an ICT judge is likely to rule on the basis of domestic norms and interests in a case involving crimes allegedly committed by or against his or her nationals. Moreover, there are obvious limitations to the utility of findings from other tribunals. The next section sets out the reasons why national bias is particularly likely to affect judges at the ICC and other ICTs.

B. National Bias in the Adjudication of International Criminal Trials

Although data from international tribunals such as the ICJ and ECHR suggests that a judge's nationality impacts his or her decision-making in cases pertaining to his or her home nation, national bias may not necessarily have a discernible impact on international criminal trials. The ICJ considers claims by states against other states and has been described as a product of "a Westphalian world in which states were the only legitimate transnational actors, and nationality, in turn, was a prime aspect of individual definition."[119] The ECHR and ICTs both address human rights violations committed against individuals, but the interests of states could be more directly implicated in ECHR proceedings, given that states are the respondents, than they are in international criminal trials.[120]

This Part will explain why ICT judges are especially likely to exhibit national bias. International criminal trials will usually address "intractable conflicts" that are characterized as "protracted, irreconcilable, violent, of a zero-sum nature, total, and central, with the parties involved having an interest in their continuation . . . [as well as being] costly both in human and material terms."[121] Judges cannot be expected to psychologically separate themselves from their national polities when assigning responsibility for crimes committed in intractable conflicts involving their

119. Smith, supra note 103, at 222.

120. But see discussion supra Part II.A.

121. Daniel Bar-Tal, From Intractable Conflict Through Conflict Resolution to Reconciliation: Psychological Analysis, 21 POL. PSYCH. 351, 353 (2000).

home nations. States are also able to nominate judges to the ICC and other ICTs who share their perspectives, and these judges will have strong incentives to rule in accordance with their states' interests. This creates the potential for actual bias as well as the reasonable apprehension of bias on the part of a conflict's participants. Lastly, ICT judges also possess a great deal of adjudicative discretion and are able to consciously or unconsciously give effect to their national biases.

1. Psychological Manifestations of Intractable Conflicts

International criminal trials involve horrific crimes committed against the citizens of one or more nations. The ICC Statute describes such crimes as "unimaginable" and "shocking [to the] conscience of humanity."[122] Judges at the ICC and other ICTs will inevitably be outraged by many of the acts that defendants appearing before them are alleged to have committed.[123] The source of this outrage will differ, however, depending on whether the crimes in question were committed against the judge's home nation. When a case does not involve a judge's home nation, the judge will react as a member of the international community to the defendant's alleged assault upon global stability and global humanity.[124] When a case does involve the judge's home nation, the judge will primarily react as a member of his or her national community to the defendant's alleged assault upon that particular community. A judge will also be inclined to react more as a member of his or her national community when the judge shares the nationality of the defendant, and the defendant allegedly committed war crimes in the context of defending their shared state from a significant internal or external threat.

A terrible crime, particularly if it is political in nature, might inspire feelings of nationalist outrage among judges in domestic courts as well. However, a domestic proceeding with full procedural safeguards is not made illegitimate if the judge views the crimes from the perspective of his or her fellow nationals. Indeed, domestic judges are representatives of their national communities and are expected to embody their communities' "shared valuations."[125] In most cases, a judge's view of the events at issue

122. ICC Statute, supra note 6, pmbl.

123. See Woods, supra note 32, at 662–63.

124. Sloane, supra note 22, at 54 (citing MICHAEL WALZER, The Politics of Rescue, in ARGUING AGAINST WAR 74 (2004)).

125. See J.C. Oleson, The Antigone Dilemma: When the Paths of Law and Morality Diverge, 29 CARDOZO L. REV. 669, 692–93 (2007) ("Adjudication is particularly laden with moral significance in criminal cases. Each time a judge sentences an offender to prison, or condemns an individual to death,

will not be out of step with his or her fellow citizens.[126]

Conversely, to represent "the international community as a whole" in a tribunal such as the ICC,[127] judges must be able to separate themselves from their national polities and look beyond merely domestic interests and norms. To the extent that international criminal trials involve intractable conflicts, however, such separation will be exceedingly difficult:

> During [an] intractable conflict, the socio-psychological infrastructure helps the society members to satisfy their basic needs to cope with stress and to successfully withstand the enemy. But at the same time, this infrastructure becomes a prism through which society members construe their reality, collect new information, interpret their experiences, and then make decisions. . . . [I]nvolvement in intractable conflicts tends to "close minds" and stimulate tunnel vision, which excludes incongruent information and alternative approaches to the conflict.[128]

The ICC, in light of its mandate to consider the "most serious crimes of concern to the international community as a whole"[129] can be expected to predominately have jurisdiction over intractable conflicts, as opposed to low-intensity conflicts of relatively short duration.[130]

Psychological studies involving intractable conflicts reveal the degree to which intractable conflicts cause dramatic distortions in the

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it should be a solemn, transformative ritual. The judge, representing the public, banishes the transgressor from civic society."); see also Dan M. Kahan, Social Influence, Social Meaning and Deterrence, 83 VA. L. REV. 349, 351 (1997) (claiming that the criminal law's purpose is to reflect "shared valuations").

126. This argument would have less force for societies that are deeply divided and where the judiciary is composed of only a small cross-section of society because judges would have less of a claim to speak for the society as a whole. Cf. Daniel Levin, Federalists in the Attic: Original Intent, the Heritage Movement, and Democratic Theory, 29 L. & SOC. INQUIRY 105, 107 (2004) ("Without a clear consensus [on values], judges must impose a particular set of values that may not reflect the larger public will and may be more representative of certain cultural or legal elites.").

127. ICC Statute, supra note 6, art. 5(1).

128. Daniel Bar-Tal, Sociopsychological Foundations of Intractable Conflicts, 50 AM. BEHAV. SCIENTIST 1430, 1446–47 (2007).

129. ICC Statute, supra note 6, art. 5(1).

130. The ICC's Kenya prosecutions are possible exceptions. See In re The Situation of the Republic of Kenya, Case No. ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on Authorization of an Investigation into the Situation in the Republic of Kenya, ¶¶ 8–10 (Mar. 31, 2010) (Kaul, J., dissenting) (suggesting that crimes committed within the Republic of Kenya were "common crimes," outside of the jurisdiction of the ICC). Even in such cases, however, the influence of their appointing nation may shape the judges' ability to view the case. See infra Part II.B.2; cf. Caperton v. A.T. Massey Coal. Co., 556 U.S. 868, 884 (2009) ("[T]here is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case.").

participants' ability to process information related to these conflicts.[131] For example, in one prominent study, psychologists provided Israeli Jews and Israeli Arabs with copies of Israeli and Palestinian interim peace proposals that had originally been distributed during bilateral Israeli-Palestinian peace talks in Washington, D.C. in May 1993.[132] The study's participants were asked to rate how favorable the proposals were to Israelis and Palestinians, with only half of the participants receiving correct information as to which side had authored the proposal.[133]

Not surprisingly, putative authorship significantly affected both groups' perceptions of the proposals.[134] Israeli Jews and Israeli Arabs believed that the Palestinian proposal was more favorable to Israelis and less favorable to Palestinians when they believed that it was an Israeli proposal than when the proposal was correctly identified as a Palestinian one.[135] More striking is that the actual contents of the proposal had less of an effect on the participants' perceptions of the proposal than putative authorship.[136] Israeli Jews generally responded more negatively to an Israeli proposal when they believed it to be a Palestinian proposal than they did to the actual Palestinian proposal when it was attributed to Israel.[137]

In another study, also involving Israeli Jews and Israeli Arabs, experimenters provided test subjects with three short vignettes involving a shooting.[138] The vignettes either involved Israeli Jews travelling by car through an Arab-dominated town or Israeli Arabs travelling by car through a Jewish-dominated town.[139] The subjects were told that the passengers faced the following threats before they fired guns from the car: (1) a demonstration of shouting women and children who did not threaten physical harm to the passengers; (2) a demonstration with stones thrown at the vehicle; and (3) a demonstration in which firearms were used against

131. See, e.g., Daniel Bar-Tal et al., The Influence of the Ethos of Conflict on Israeli *Jews'* Interpretation of Jewish-Palestinian Encounters, 53 J. CONFLICT RESOL. 94 (2009); Ifat Maoz et al., Reactive Devaluation of an *"Israeli"* v. *"Palestinian"* Peace Proposal, 46 J. CONFLICT RESOL. 515 (2002).

132. Maoz el al., supra note 131, at 528.

133. Id. at 529.

134. Id.

135. Id.

136. Id. at 532.

137. Id.

138. See Yohanan Eshel & Michael Moran, Jewish-Arab Violence: Perspectives of a Dominant Majority and a Subordinate Minority, 142 J. SOC. PSYCH. 549 (2002).

139. Id. at 553.

the vehicle.[140] Subjects were then asked to rate the justifiability of the shootings and explain why the shootings were (or were not) justified.[141]

According to the study's findings, both Israeli Jews and Israeli Arabs justified shootings by members of their own groups more readily than shootings committed by members of the other group, notwithstanding that all of the shooters faced the same basic threats.[142] Jewish and Arab participants also tended to offer different justifications for the shootings. Jewish participants predominately focused on the danger to the shooters and more often cited self-defense as a justification whereas Arab participants concentrated primarily on the motives of the shooters and demonstrators as well as the history of Jewish-Arab conflict.[143] The authors concluded that "in-group bias in judging intergroup violence should be expected when it is associated with issues of self- and national identity or with the image of the opposite group."[144]

The Israeli-Palestinian conflict is an especially intractable conflict, and it would be far too crude to assume that judges at the ICC and other ICTs will discredit information provided by "enemy" witnesses and overvalue information provided by their compatriots. Nor will judges necessarily reject defenses offered by "enemy" defendants that they would accept from other defendants. However, judges are presumably not immune to the same psychological pressures that affect their fellow nationals in an intractable conflict. They cannot just focus on the evidence before them as disinterested members of the international community because evidence will be analyzed through the prism of membership in a national polity locked in an intractable conflict.

It may be objected that judges, unlike laypeople, are required to be impartial. It is dubious, however, that judges' conscious efforts to maintain impartiality while serving on the ICC or another ICT can negate what are largely unconscious processes. Indeed, according to some studies,

140. Id. at 554–55.
141. Id. at 555.
142. Id. at 561.
143. Id. at 562.
144. Id. at 561–62 (internal citations omitted).

exhortations and directives to individuals to "be objective" actually exacerbate cognitive biases.[145] As Dan Kahan has observed:

> [O]bjectivity injunctions accentuate identity threat. Individuals naturally assume that beliefs they share with others in their defining group are "objective." Accordingly, those are the beliefs they are most likely to see as correct when prompted to be "rational" and "open-minded." Indeed, for them to change their minds in such a circumstance would require them to discern irrationality or bias within their group, an inference fraught with dissonance . . . .[146]

Even if judges are assumed to be less susceptible to cognitive dissonance than their fellow nationals, an international trial involving horrific crimes allegedly committed by or against members of a judge's national polity is an unlikely venue for professional detachment to triumph over the natural tendency to view a conflict and the crimes committed therein through the prism of national identity.

Of course, the idea that judges will be unconsciously motivated by national bias presupposes that a judge will identify with his or her national community and does not adequately account for the rich national backgrounds of many prominent international judges.[147] Nevertheless, the mere fact that a judge may be a citizen of more than one state is unlikely to insulate the judge from the psychological phenomena addressed in this section.[148] Immigrants can presumably integrate into their new societies and may be able to form as strong national allegiances as their native-born compatriots.[149] Even if a judge may have been a part of a different national polity at one time, he or she may still assess an intractable conflict involving his or her current home nation through the prism of domestic

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145. See Dan Kahan, Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law, 125 HARV. L. REV. 1, 23 (2011) (citing Geoffrey L. Cohen et al., Bridging the Partisan Divide: Self-Affirmation Reduces Ideological Closed-Mindedness and Inflexibility in Negotiation, 93 J. PERSONALITY & SOC. PSYCH. 415 (2007)).

146. Id.

147. The former President of the ICTY, Theodor Meron, for example, was born in Poland, immigrated to Israel, where he served in the country's foreign service, and moved to the United States in 1978. See Biographical Note: President Theodor Meron, ICTY (Mar. 1, 2012), http://www.icty.org/x/file/About/Chambers/pdt_meron_bio_news_1mar2012_en.pdf. He became a U.S. citizen in 1984. Id. See also Smith, supra note 103, at 223 (reviewing backgrounds of ICJ judges).

148. The ICC Statute suggests that citizenship should be determined by where a judge primarily exercises his or her civil rights. See ICC Statute, supra note 6, art. 36(7).

149. A full account of the mechanics of national integration is beyond the scope of this article. For an early analysis of the integration of immigrants and minority groups in United Kingdom, Canada, and Australia, see ANTHONY H. BIRCH, NATIONALISM AND NATIONAL INTEGRATION 3 (1989).

norms and values. Furthermore, as set out in the following Part, the nature of the nomination process at ICTs, like the ICC, by and large assures that judges will be attuned to the national self-interest.

2. Judges and Motivated Reasoning

Judges at the ICTY and ICTR serve four-year terms and are then eligible for reelection.[150] ICC judges, by way of contrast, generally serve nine-year terms and are ineligible for reelection.[151] However, regardless of whether a judge must stand for reelection, it will be in his or her self-interest to avoid alienating his or her home state. This Part will focus on the likely motivations of ICC judges, but the argument will apply equally to other ICTs, as long as states control the nomination process and largely determine judges' careers.

The ICC Statute allows for a judge to be removed upon a recommendation by a two-thirds majority of the ICC's judges and then a two-thirds majority vote by the Assembly of State Parties.[152] Consequently, absent egregious misconduct, ICC judges are likely to serve the entirety of their terms.[153] This provides a degree of protection from political pressure and allows them to make unpopular decisions.

Although ICC judges are not eligible for reelection and cannot easily be removed, they are still very likely to be concerned with how their judgments are perceived. Judges, whether they serve on domestic or international courts, are motivated to maintain and improve their standing.[154] ICC judges will undoubtedly wish to be well-regarded by the international community, but of equal or greater concern will be how they are regarded by their own states. Most judges will wish to at least have the opportunity to return to employment in their own countries after the

150. ICTY Statute, supra note 6, art. 13(3); ICTR Statute, supra note 6, art. 12(3).

151. ICC Statute, supra note 6, art. 36(9)(a). A judge can theoretically serve a longer term, however, if he or she is elected to complete another judge's term and less than three years is remaining on that term. See id. art. 37(2).

152. ICC Statute, supra note 6, art. 46(2)(a).

153. See id. art. 46(1) (setting out grounds for removal of ICC judges).

154. See, e.g., Robinson, supra note 3, at 929 (suggesting that, in the context of international criminal law, "the judge, practitioner, or scholar who espouses conviction-friendly interpretations can reliably expect to be applauded as progressive and compassionate by esteem-granting communities"); Frederick Schauer, Incentives, Reputation and the Inglorious Determinants of Judicial Behavior, 68 CINCINNATI L. REV. 615, 629–30 (2000) (suggesting that justices of the United States Supreme Court are motivated to rule in ways that are in substantive accordance with legal elites); Richard Posner, What Do Judges and Justices Maximize?, 3 SUP. CT. L. ECON. REV. 1, 15 (1993) (suggesting that for the extraordinary judge, such as the justices of the Supreme Court, reputation may be a "dominating objective").

conclusion of their nine-year terms. Some may also wish to secure appointments with other international tribunals, and "international judicial careers depend heavily on government recommendations."[155] To the extent that an ICC judge is concerned with his or her post-ICC career, the judge will have to carefully strike a balance between fulfilling his or her duties and not alienating his or her home government.

Of course, the outcomes of most ICC cases will be of relatively little interest to a judge's home state.[156] Moreover, even if a judge were to issue a decision that is arguably at odds with the foreign policy of his or her home state, the state may not take any action against the judge. ICC judges are required to be independent and impartial,[157] and respect for judicial impartiality and independence requires that states support judges' decisions even when they might disagree with them.[158] By allowing ICC judges to carry out their duties free from political interference, states also signal to the international community that they are credibly committed to international justice and are uninterested in victor's justice.[159]

However, the focus of this Article is not on cases that only tangentially concern a judge's home state, but rather those involving crimes allegedly committed by or against a judge's fellow nationals and other cases that strongly implicate the national self-interest. Such cases are bound to attract attention in the judge's home state and are likely to impact political conditions therein. A judge will be able to readily surmise whether it is in his or her self-interest to convict the defendants without interference from his or her state.

Judges need not even consciously consider their personal interests for these interests to affect their decision-making on account of the psychological phenomenon of motivated reasoning:

> Motivated reasoning refers to the tendency of people to unconsciously process information—including empirical data, oral and written arguments, and even their own brute sensory

155. Erik Voeten, International Judicial Independence, in INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 421, 442 (Jeffrey L. Dunoff & Mark A. Pollack eds., 2013).

156. See Danner & Voeten, supra note 29, at 44 ("Judges may have considerable agency on those issues that are of little concern to the great powers.").

157. ICC Statute, supra note 6, art. 40(1).

158. See Robert H. Jackson, The Rule of Law Among Nations, 31 A.B.A. J. 290, 294 (1945) ("It is futile to think that we can have international courts that will always render the decisions we want to promote our interests. We cannot successfully cooperate with the rest of the world in establishing a reign of law unless we are prepared to have that law sometimes operate against what would be our national advantage.").

159. See Voeten, supra note 91, at 392; Danner & Voeten, supra note 29, at 42.

> perceptions—to promote goals or interests extrinsic to the decision-making task at hand. When subject to it, individuals can be unwittingly disabled from making dispassionate, open-minded, and fair judgments.[160]

There is a growing literature assessing the impact of motivated reasoning on judging in a variety of legal fields.[161] The implication for the ICC is that judges may honestly wish to rule impartially in cases substantially involving their home states, but they will be motivated to take into account domestic political concerns and interests so as to not jeopardize their careers.[162] A judge does not even have to feel strong ties to his or her national polity to be highly motivated to analyze a case involving his or her home nation in accordance with the national self-interest.

Not all ICC judges will have the same motivations. Some judges will be less concerned with their long-term professional well being than others. For example, Voeten's research concerning the ECHR found that older judges were more likely to rule against their home nations.[163] ECHR judges whose careers were primarily in private practice, which presumably made them less dependent on their national governments for employment, were also more likely to rule against their home nations.[164]

States could theoretically nominate judges to the ICC who come from backgrounds that will allow them to exercise a great deal of independence. Recent research concerning the ICTY and ICTR reveals, however, that the typical elected judge is in his or her mid-fifties and has usually served as an appellate judge in his or her home state immediately prior to being elected.[165] This archetype would not seem to lend itself to a great degree of independence. Moreover, states can choose to nominate only judges who are highly sensitive to their domestic interests. Voeten notes that one

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160. Kahan, supra note 145, at 7.

161. See Michael Serota, Popular Constitutional Interpretation, 44 CONN. L. REV. 1637, 1671 (2012) (collecting scholarship on motivated reasoning and its effect on constitutional law); Donald Langevoort, Are Judges Motivated to Create Good Securities Doctrine?, EMORY L.J. 309, 317 (2002) (suggesting that motivated reasoning on the part of judges explains securities fraud doctrine). Stuart Ford has recently suggested that motivated reasoning affects perceptions of the legitimacy of ICTs. See Stuart Ford, A Social Psychology Model of the Perceived Legitimacy of International Criminal Courts: Implications for the Success of Transitional Justice Mechanisms, 45 VAND. J. TRANSNAT'L L. 405, 409 (2012).

162. See Kahan, supra note 145, at 20 (noting that conscious ends can be subverted by pecuniary and social interests).

163. See Voeten, supra note 19, at 427. Judges who were nearing the ECHR's retirement age of seventy were 12% more likely to vote against their national governments than other judges. Id.

164. See id. at 430.

165. See Danner & Voeten, supra note 29, at 54–55.

particularly effective strategy would be to nominate diplomats, who are far more inclined to rule in favor of their home states than judges from other backgrounds.[166] States that wish to reasonably assure themselves that their nominees will rule in accordance with the national self-interest could adopt such a strategy and may be able to work with other states to ensure that their nominees are elected to the ICC and other ICTs.

Even if ICT judges are not actually biased in favor of their nations, the fact that their nations play the central role in their election and have the ability to impact their careers at the conclusion of their terms allows for their impartiality to reasonably be questioned.[167] As the United States Supreme Court has emphasized, when a party with a personal stake in a proceeding before a judge has had a significant and disproportionate influence in securing his or election, the judge is reasonably perceived to be biased in that party's favor.[168] In the context of international criminal trials, it is virtually impossible for judges to be elected absent strong support from their states, and they will reasonably be perceived as biased in their states' favor in cases where their states' interests are strongly implicated.

Indeed, courts have found that relatively minor financial interests in a proceeding's outcome can create the reasonable apprehension of bias.[169] Lord Hewart originated the dictum that "[j]ustice must not only be done, but should manifestly and undoubtedly be seen to be done" to justify the disqualification of judges not on the basis of their own financial interests but those of their deputy clerk.[170] It is unclear why ICT judges' far more substantial financial interests in securing employment at the conclusion of

166. See Voeten, supra note 19, at 430. Four of the eighteen judges initially appointed to the ICC had spent most of their careers as diplomats. Danner & Voeten, supra note 29, at 59.

167. See ICC Statute, supra note 6, art. 41(2).

168. See Caperton v. A.T. Massey Coal, 556 U.S. 868, 882–86 (2009).

169. See, e.g., Tumey v. Ohio, 273 U.S. 510, 523 (1927) (overturning defendant's conviction for unlawful possession of liquor where the judge, the town's mayor, stood to earn twelve dollars from the conviction); Gibson v. Berryhill, 411 U.S. 564, 579 (1973) (overturning administrative board proceeding where a board of optometrists had presided over trial of possible competitors); Dimes v. Proprietors of Grand Junction Canal, [1852] 10 Eng. Rep. 301 (H.L.) 315 ("No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest that he had in this concern; but, my Lords, it is of the last importance that the maxim that no man is to be a judge in his own cause should be held sacred."); see also R. v. Bow Street Magistrates, [2000] 1 A.C. 119 (H.L.) 132 ("[If] a judge is in fact a party to the litigation or has a financial or proprietary interest in its outcome . . . the mere fact that he is a party to the action or has a financial or proprietary interest in its outcome is sufficient to cause his automatic disqualification.").

170. R. v. Sussex Justice, Ex Parte McCarthy, [1923] 1 K.B. 256 at 259.

their terms should not give rise to reasonable doubt about their impartiality.[171]

Although ICC judges may strive to be independent and impartial, they are likely to evaluate conflicts involving their own nations through the prism of national identity and have strong incentives to rule in accordance with the national will. States can also nominate judges who are highly attuned to domestic interests. These factors will naturally lead to doubts as to their impartiality even in the absence of actual bias. As set out in the next section, the nature of adjudication at ICTs is such that judges will rarely be constrained from giving effect to any existing national biases.

3. The Nature of Adjudication at ICTs

International judges, unlike their domestic counterparts, do not have a common history and legal tradition to draw upon in fulfilling their duties. Although the last twenty years have resulted in the establishment of a community of international criminal lawyers and judges, this community's norms and interpretive practices are only beginning to develop,[172] and the ICC system is sui generis. Consequently, judges at the ICC and other ICTs have more adjudicative discretion than their domestic counterparts.[173]

Some scholars have suggested that international judges will not be influenced by domestic interests and concerns because of monitoring from the international community.[174] This presupposes, however, that judges' breaches of the duties of independence and impartiality are relatively

171. It is not only the participants to a conflict who might seize upon the nationality of a judge to seek to undermine the integrity and impartiality of the proceedings. Judge Harhoff, a Danish judge serving on the ICTY, has alleged that President Meron exerted pressure on colleagues to restrict the ICTY's jurisprudence on aiding and abetting liability so as to make it less likely that American and Israeli military leaders could be charged with war crimes. See David Rhode, How International Justice is Being Gutted, ATLANTIC (July 14, 2013), http://www.theatlantic.com/international/archive/2013/07/how-international-justice-is-being-gutted/277767/. As of the date of this Article, Judge Harhoff has offered no evidence to support his allegations other than innuendo regarding President Meron's American and Israeli citizenship. See also supra note 147 (noting personal background of President Meron).

172. See Byrne, supra note 17, at 248; see also Nancy A. Combs, Legitimizing International Criminal Justice: The Importance of Process Control, 33 MICH. J. INT'L L. 321, 325 (2012) (suggesting that international criminal law had fallen into desuetude after the Nuremberg and Tokyo Tribunals only to be revived and reinvigorated by the establishment of the ICTY and other ICTs).

173. See, e.g., Damaska, supra note 58, at 335; Julian Cook, Plea Bargaining at the Hague, 30 YALE J. INT'L L. 473, 477 (claiming that ICTY rules afford judges "illimitable discretion").

174. See Dannenbaum, supra note 4, at 134; see also Cesare P. R. Romano, The United States and International Courts: Getting the Cost-Benefit Analysis Right, in THE SWORD AND THE SCALES: THE UNITED STATES AND INTERNATIONAL COURTS AND TRIBUNALS 419, 441–42 (Cesare P.R. Romano ed., 2009) ("If [international judges] . . . start applying law in a way that might be perceived as biased, or a cave-in to states' pressure, they undermine their own rationale.").

simple to detect. International criminal trials are long and fact-intensive, and judgments are notoriously verbose and dense, making effective monitoring difficult.[175] When ICT judgments are criticized, it is usually because a particular verdict does not match the international community's (or a particular national community's) sense of a defendant's guilt.[176] ICT judges are especially unlikely to be criticized when their judgments are slanted towards liability.[177]

More importantly, the nature of adjudication at the ICC and other ICTs is such that judges can often reasonably interpret the facts and law undergirding cases to consciously or unconsciously fit a preferred outcome. Although domestic adjudication has political dimensions as well,[178] this is an acute problem for the ICC and other ICTs because the facts and law will rarely compel one conclusion, allowing domestic politics and judges' personal interests to more regularly enter into the decision-making process.

a. Fact-Finding by ICTs

One significant challenge for ICTs such as the ICC is that fact-finding is far more difficult than for domestic courts. Investigations occur during, or in the immediate aftermath of, armed conflicts, and investigators are often unable to access war crimes sites.[179] Consequently, forensic and

175. For example, the ICC's first judgment in the Lubanga case was widely criticized for being over 600 pages. See, e.g., Dapo Akande, ICC Delivers Its First Judgment: The Lubanga Case and Classification of Conflicts in Situations of Occupation, EJIL TALK (Mar. 16, 2012), http://www.ejiltalk.org/icc-delivers-its-first-judgment-the-lubanga-case; Dov Jacobs, First Judgment at the ICC: Some Random Thoughts, SPREADING THE JAM (Mar. 14, 2012), http://dovjacobs.blogspot.com/2012/03/first-judgment-at-icc-some-random.html.

176. Cf. Ford, supra note 161, at 410 (suggesting that perceived legitimacy is largely a product of whom is indicted). The reaction to the ICC's recent acquittal of alleged Congolese warlord Mathieu Ngudjolo is instructive. See generally David Smith, ICC Acquits Congolese Militia Leader Over Atrocities, GUARDIAN (Dec. 18, 2012), http://www.guardian.co.uk/law/2012/dec/18/icc-acquits-congolese-militia-leader-atrocities (noting that prominent NGOs and international lawyers attributed Ngudjolo's acquittal to the poor quality of the ICC's prosecutions).

177. See Robinson, supra note 3, at 929; see generally NANCY A. COMBS, FACT-FINDING WITHOUT FACTS: THE UNCERTAIN EVIDENTIARY FOUNDATIONS OF INTERNATIONAL CRIMINAL CONVICTIONS 228–30 (2010) (describing reasons for ICTs' pro-conviction bias).

178. The United States Supreme Court has been described, for example, as a super-legislature. See, e.g., Paul D. Carrington & Roger C. Cramton, Judicial Independence in Excess: Reviving the Judicial Duty of the Supreme Court, 94 CORNELL L. REV. 587, 590 (2009); Richard A. Posner, The Supreme Court 2004 Term—Foreword: A Political Court, 119 HARV. L. REV. 31, 60 (2005).

179. See Markovic, supra note 57, at 216; see also Elena Baylis, Outsourcing Investigations, 14 UCLA J. INT'L L. & FOREIGN AFF. 121, 122 (2009) ("Lacking its own police force, the ICC depends on state cooperation to conduct its investigations, enforce arrest warrants, and carry out other basic functions.").

documentary evidence has not figured prominently in international criminal trials since Nuremberg, and prosecutors have been forced to depend primarily on eyewitness testimony.[180]

Eyewitness testimony is notoriously unreliable in domestic criminal trials[181] and could be even more unreliable in international criminal trials. One reason is the existence of significant cultural differences between witnesses and staff.[182] Western judges, for example, are known to expect trustworthy witnesses to maintain eye contact while witnesses from non-Western cultures tend to avert their eyes out of respect.[183] A particular issue for the ICTR has been that some witnesses who have appeared before it do not conceive of distance in arithmetic or geographic terms.[184] Even if one assumes that these cultural differences will be less salient when a judge and the majority of witnesses share the same nationality,[185] many of the witnesses will be unfamiliar with the procedures used by ICTs.[186] The fact that international criminal trials often occur years after the underlying events makes witness testimony all the more unreliable.[187]

Since eyewitness testimony can be highly unreliable but is nevertheless integral to modern war crimes trials, judges at the ICC and other ICTs will often have good cause to credit or discredit eyewitness testimony in cases involving crimes allegedly committed by or against their nationals, as well as other cases that strongly affect national interests. A number of

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180. See COMBS, supra note 177, at 6, 11–12; see also Patricia M. Wald, Dealing with Witnesses in War Crime Trials: Lessons from the Yugoslav Tribunal, 5 YALE HUM. RTS. & DEV. L.J. 217, 219 (2002) ("[I]n most cases [the ICTY] needed substantial numbers of eyewitnesses to prove crimes had occurred . . . ."). As Combs observes, the Nazi regime was atypical in its mania for recording its many crimes. See COMBS, supra note 177, at 11.

181. See, e.g., COMBS, supra note 177, at 6; Noah Clements, Flipping a Coin: A Solution for the Inherent Unreliability of Eyewitness Identification Testimony, 40 IND. L. REV. 271, 271 (2007); Richard A. Wise et al., A Tripartite Solution to Eyewitness Error, 97 J. CRIM. L. & CRIMINOLOGY 807, 811–12 (2007).

182. See COMBS, supra note 177, at 4; see also Joshua Karton, Lost in Translation: International Criminal Tribunals and the Legal Implications of Interpreted Testimony, 41 VAND. J. TRANSNAT'L L. 1, 5 (2008) (suggesting that inaccuracies introduced by interpretation process can impede ICTs' search for truth).

183. See COMBS, supra note 177, at 80 (summarizing research involving immigrant witnesses in the United States).

184. See id. at 81–82 (citations omitted).

185. There can be, of course, significant cultural differences within countries. See David M. Crane, *White Man's Justice: Applying International Justice After* Regional Third World Conflicts, 27 CARDOZO L. REV. 1683, 1686 (2012) (describing justice as "locally, culturally oriented" vis-à-vis Africa).

186. See COMBS, supra note 177, at 4.

187. See Ruth Wedgwood, War Crimes in the Former Yugoslavia: Comments on the International War Crimes Tribunal, 34 VA. J. INT'L L. 267, 269 (1994) (emphasizing the importance of fresh and immediate eyewitness testimony).

prominent international criminal trials have turned on differences of opinion concerning the credibility of key witnesses, but judges could question the reliability of testimony in virtually every international criminal trial. Nancy Combs's study of trial transcripts at the ICTR and SCSL reveals, for example, that more than fifty percent of prosecution witnesses testified in ways that were seriously inconsistent with their pretrial statements.[188]

The ICTY's handing of crucial testimony in Prosecutor v. Kupreskic offers a vivid illustration.[189] In this case, the ICTY Trial Chamber heard testimony from an eyewitness who had identified the defendants as having perpetrated an attack upon her village.[190] However, in her pre-trial statements she claimed that she had seen her father killed by gunfire and the defendants set fire to the upper floor of her family home.[191] These claims were repudiated during her testimony.[192] The Trial Chamber found the witness to be credible because she had never wavered in her identification of the defendants, whereas the Appeals Chamber held that reliance on the witness's testimony had been "wholly erroneous" based on the aforementioned inconsistencies.[193]

Kupreskic is somewhat anomalous because ICT judges rarely emphasize discrepancies in witness testimony.[194] For example, in the CDF case, the SCSL heard important testimony from an alleged comrade of the defendants who claimed that he had tortured and cut off the ear of a man named Joseph Lansana from Sorgia and killed his mother on orders from the defendants.[195] The defense called Mr. Lansana to testify.[196] He stated that his mother had died before the events in question and then dramatically displayed his intact ears to the court.[197] The Trial Chamber overlooked these conspicuous inconsistencies in what was the crucial testimony against the CDF defendants and convicted them.[198]

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188. COMBS, supra note 177, at 5.

189. See Prosecutor v. Kupreskic, Case No. IT-95-16-A, Appeals Judgment, ¶ 223 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 23, 2001).

190. See id.

191. Id. ¶¶ 223–24.

192. Id.

193. Id. ¶ 224.

194. COMBS, supra note 177, at 8.

195. Id. at 211.

196. Id.

197. Id.

198. See id. at 212–13. The judgment was sustained on appeal. See Prosecutor v. Fofana and Kondewa, Case No. SCSL-04-14-A, Judgment, ¶ 565 (May 28, 2008).

The judgments in Kupreskic and the CDF case tend to suggest that judges can, without fear of substantial criticism, either ignore discrepancies in the evidence so as to convict a defendant or emphasize these discrepancies to justify an acquittal. Most international criminal trials may not involve clear contradictions in testimony, but witness testimony will rarely be so convincing and incontrovertible that it will compel judges at the ICC and other ICTs to rule in a particular manner.[199] In most international criminal trials, the evidence will be sufficiently ambiguous such that it can be consciously or unconsciously interpreted to fit a preferred outcome.

b. Indeterminacy of Legal Analysis

Judges at the ICC and other ICTs also have a great deal of discretion in terms of legal analysis. This can be partly attributed to the relative newness of the international criminal law regime but also because international criminal law purports to punish human rights violators and vindicate the rights of victims while fully safeguarding the rights of defendants.[200] This inevitably leads to conflict because, as Mirjan Damaska has observed, "[w]hen the interests of the criminal defendant and victims both vie for judicial attention, a point is soon reached beyond which the desire to satisfy the victims' interests begins to impinge on considerations of fairness toward the defendants."[201] The ICTY has used the protection of victims' rights as one of its main rationales to justify the extrapolation of the Geneva Conventions' provisions concerning international armed conflicts to internal conflicts and to expand the scope of command responsibility.[202]

This jurisprudential conflict between the rights of victims and defendants was starkly exhibited in the ICC Appeals Chamber's decision concerning the participation of victims in ICC trial proceedings.[203]

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199. See also Prosecutor v. Tadić, Case No. IT-94-I-A, Appeals Judgment, ¶ 64 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999) ("[T]wo judges, both acting reasonably, can come to different conclusions on the basis of the same evidence.").

200. See generally Robinson, supra note 3, at 930–31 (postulating that there is an identity crisis in international criminal law because of its inability to reconcile the protection of human rights with the protection of the rights of criminal defendants).

201. Damaska, supra note 58, at 334.

202. Robinson, supra note 3, at 936–37; see also Damaska, supra note 58, at 356 (criticizing ICTs for applying tenuous doctrines of criminal participation and loosening evidentiary requirements).

203. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-1432, Judgment on the Appeals of the Prosecutor and the Defence Against the Trial Chamber I's Decision on Victims' Participation of 19 January 2008, ¶ 109 (July 11, 2008).

Although the ICC Statute does not explicitly grant victims the right to present evidence or challenge the admissibility of evidence, a majority of the Appeals Chamber held that:

> To give effect to the spirit and intention of . . . the Statute in the context of trial proceedings [the victim participation provisions] must be interpreted so as to make participation by victims meaningful . . . . If victims were generally and under all circumstances precluded from tendering evidence relating to the guilt or innocence of the accused and from challenging the admissibility or relevance of evidence, their right to participate in the trial would potentially become ineffectual.[204]

The dissents by Judges Pikis and Kirsch conversely focused on, inter alia, the imposition that such robust participation would have on the fair trial rights of the defendant.[205]

Judges at the ICC and other ICTs do not necessarily err when they interpret legal materials in such a way as to maximize the rights and interests of victims, particularly when deciding issues of first impression, but they might equally reasonably be focused on a defendant's entitlement to a fair trial.[206] A judge who is concerned with domestic political interests can reasonably prioritize one set of rights over another to consciously or unconsciously achieve a preferred outcome.

Even where the law seems relatively clear, a judge may offer a novel interpretation of the law based on the unique facts of a given case. A notable example is Justice Thompson's dissent in the CDF case.[207] The CDF case involved Sierra Leonean defendants who were alleged to have committed war crimes while fighting to restore the country's

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204. Id. ¶ 97.

205. See Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-1432, Partly Dissenting Opinion of Judge Pikis, ¶ 19 (July 11, 2008); Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-1432, Partly Dissenting Opinion of Judge Kirsch, ¶ 23 (July 12, 2008) ("[D]etermining that it is the parties that lead evidence on guilt or innocence, and not the victims, is consistent with the overall desire to ensure that proceedings at the ICC are both fair and expeditious.").

206. Presumably as international criminal law—including the ICC in particular—continues to develop and expand its jurisprudence, it will favor victims with respect to certain legal issues and favor defendants with respect to others. But even then, reasonable judges will disagree as to precise contours of each group's rights and how to apply the developed legal doctrine to the cases before them. See also Damaska, supra note 58, at 333–34 (suggesting that conflicts between victims' and defendants' rights implicate more fundamental questions concerning procedural justice versus substantive justice).

207. Prosecutor v. Fofana, Case No. SCSL-04-14-T, Separate Concurring and Partially Dissenting Opinion of Hon. Justice Bankole Thompson Filed Pursuant to Article 18 of the Statute, ¶ 1 (Aug. 2, 2007) [hereinafter Thompson Dissent].

democratically elected government.[208] The chief defendant, Sam Hinga Norman, had been a minister in the Sierra Leonean government prior to his indictment.[209]

Norman died before trial,[210] and the other CDF defendants were convicted by the SCSL.[211] Justice Thompson, a national of Sierra Leone, dissented from the Trial Chamber's judgment, however, on the basis that the defendants' crimes could be excused by the defenses of necessity and Salus Civis Suprema Lex Est.[212]

Justice Thompson's dissent is notable apart from the commonality between his nationality and that of the CDF defendants. Justice Thompson raised the defenses of necessity and Salus Civis Suprema Lex Est[213] sua sponte although neither defense is mentioned in the SCSL Statute. Moreover, no ICT has ever held that necessity or Salus Civis Suprema Lex Est could be used as a justification or excuse for war crimes, and precedents from Nuremberg would seem to prohibit, or at least greatly restrict, such defenses.[214]

The reliance on the Salus Civis Suprema Lex Est defense seems especially questionable. Justice Thompson addresses it in five short paragraphs without a citation to any authority that suggests that the doctrine is a recognized defense to war crimes.[215] The defense is also difficult to reconcile with the text of the SCSL Statute, which provides that "[t]he fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal

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208. See Jane Stromseth, Pursuing Accountability for Atrocities After Conflict: What Impact on Building the Rule of Law?, 38 GEO. J. INT'L L. 251, 302 (2007).

209. Id.

210. Id. at 303.

211. See Discussion Part II.B.3.a supra.

212. Thompson Dissent, supra note 207, ¶¶ 69, 93. Salus Civis Suprema Lex Est means "the safety of the state is the supreme law." Id. ¶ 93.

213. Id. ¶ 4.

214. See United States v. Wilhelm List et al., ("Hostage Case"), 11 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, 757, 1272 (1948), available at http://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-XI.pdf ("[T]he rules of international law must be followed even if it results in the loss of a battle or even a war."); see also U.N. War Crimes Comm'n, The Krupp Trial, 10 LAW REPORTS OF TRIALS OF WAR CRIMINALS 147, 149 (1948), available at http://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-10.pdf (suggesting that the necessity defense is only available when "the act charged was done to avoid an evil, severe and irreparable; that there was no other adequate means of escape; and that the remedy was not disproportionate to the evil.").

215. Thompson cites to Kant, Salmond, and a Supreme Court of Sierra Leone opinion that establishes only that the State has a monopoly on force within its territory. Thompson Dissent, supra note 207, ¶¶ 94–96.

responsibility."[216] If a specific government order to commit an act will not excuse the act, then it would seem to follow that the act should not be excused when the defendant commits the act to protect the state of his or her own accord. Justice Thompson did not address this problematic language in the SCSL Statute.

Justice Thompson's rationale for invoking the necessity defense is more convincing. He notes that the ICJ has recognized the defense and that many municipal systems similarly allow for it.[217] However, neither of the ICJ cases he cites relates to international criminal law nor addresses whether the necessity defense should be available in a prosecution for war crimes.[218] Justice Thompson also fails to explain why the defendants' commission of crimes against humanity and war crimes were necessary to restore Sierra Leone's government. In his view, because the defendants were "fighting for the restoration of democracy and constitutional legitimacy . . . [this compelled] disobedience to a supranational regime of proscriptive norms."[219] Under Justice Thompson's formulation of the defense, any war crime committed as part of a just war should be excused.

Although Justice Thompson's dissent may be unconvincing, it is not self-evidently specious. The SCSL Statute does not specifically prohibit either the necessity or Salus Civis Suprema Lex Est defense. The ICC Statute and municipal law in many nations do provide for a necessity defense.[220] In addition, the mere fact that the acceptance of these defenses may be novel in the context of a war crimes prosecution does not mean that they are inapplicable.[221] Defenses that originally apply in one context are sometimes recognized to extend to related contexts.[222]

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216. Statute of the Special Court for Sierra Leone art. 6(4), Aug. 14, 2000, 2178 U.N.T.S. 138 [hereinafter SCSL Statute], available at http://www.sc-sl.org/LinkClick.aspx?fileticket=uClnd1MJeEw%3d&tabid=176.

217. Thompson Dissent, supra note 207, ¶¶ 77, 79–80, 84.

218. ZOILA HINSON, SIERRA LEONE COURT MONITORING PROGRAMME, JUSTICE BANKOLE THOMPSON'S OPINION IN THE CDF CASE: A SUMMARY AND ANALYSIS 7 (2007), available at http://www.carl-sl.org/home/images/stories/essay/Essay_Series_I.pdf.

219. Thompson Dissent, supra note 207, ¶ 90.

220. See ICC Statute, supra note 6, art. 31(1)(c); Thompson Dissent, supra note 207, ¶¶ 80–81.

221. Indeed, in recognizing the necessity defense, see ICC Statute, supra note 6, art. 31(1)(d), the ICC Statute appears to contemplate that it will be raised in the context of a prosecution of crimes against humanity and war crimes because the ICC has jurisdiction only over such crimes. See id. art. 5.

222. Self-defense, for example, justifies the defense of others. See MODEL PENAL CODE § 3.05(1) (1962). The right of self-defense under customary international law has also been viewed as the basis for the humanitarian intervention doctrine. See David Rodin, The Liability of Ordinary Soldiers for Crimes of Aggression, 6 WASH. U. GLOBAL STUD. L. REV. 591, 592 (2007) ("If one interprets self-defense to include the defense of others, then it is also possible to view the emerging norm of humanitarian intervention as part of the extended right of self and other-defense.").

Even if one strongly disagrees with Justice Thompson's dissent, it is unclear that the legal analysis is so erroneous that it must have been motivated by a conscious or unconscious desire to acquit the CDF fighters. While Justice Thompson was unable to convince his international colleagues on the SCSL Trial Chamber to acquit the CDF defendants, the Chamber did use the fact that the CDF defendants had been fighting a just war as a mitigating factor at sentencing.[223] The Trial Chamber imposed sentences of six and eight years imprisonment compared to sentences of forty-five and fifty years that had previously been imposed upon rebel defendants.[224] The sentencing judgment was ultimately reversed by the SCSL Appeals Chamber, however, and the defendants' sentences were increased to fifteen and twenty years.[225] The Appeals Chamber's one Sierra Leonean justice would have maintained the lower sentences.[226]

Whether Justice Thompson was influenced by domestic considerations or self-interest is unknowable.[227] If he had been so influenced, this would not have necessarily undermined the work of the SCSL because hybrid tribunals seek to reflect local sentiment, and the service of nationals on such courts is intended to foster local ownership of the proceedings.[228] As an SCSL justice, Justice Thompson was not representing "the international community as a whole" as he would have been if he served on the ICC.[229] But rarely will the facts or law of a case be so clear that ICT judges will be unable to give effect to their national biases and even arguably specious opinions cannot necessarily be attributed to a judge's failure to maintain independence and impartiality.

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223. Prosecutor v. Fofana and Kondewa, Case No. SCSL-04-14-T, Judgment on the Sentencing of Moinina Fofana and Allieu Kondewa, ¶¶ 79–91 (Oct. 9, 2007).

224. Id., Disposition.

225. Prosecutor v. Fofana and Kondewa, Case No. SCSL-04-14-A, Judgment, ¶ 565 (May 28, 2008).

226. Prosecutor v. Fofana and Kondewa, Case No. SCSL-01-14-A, Partially Dissenting Opinion of Honourable Justice George Gebaga King, ¶¶ 26–31 (May 28, 2008).

227. Justice Thompson was nominated by Sierra Leone to the ICC in 2011, but he was not elected. See ICC Election of Judges, December 2011—Results of the First Round, INT'L CRIM. COURT (Dec. 15, 2011), http://www.icc-cpi.int/en_menus/asp/elections/judges/2011/results/Pages/1st%20round.aspx.

228. See 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, 2, 6 (2007). But see Elizabeth Burch, Hybrid Courts: Examining Hybridity Through a Post-Colonial Lens, 28 B.U. INT'L L. J. 1, 12 (2010) (describing local participation as a veneer to mask sharp differences between international and national justice).

229. ICC Statute, supra note 6, art. 5(1).

III. OBJECTIONS CONSIDERED

Thus far this Article has contended that judges at the ICC and future ICTs cannot be expected to separate themselves from their national identities in cases involving crimes allegedly committed by or against their nationals. Judges should also consider voluntarily recusing themselves in other cases that strongly implicate the interests of their nations. This Part will explore whether this Article's focus on national identity is counterproductive to the advancement of international criminal justice and fails to account for the increasing cosmopolitanism of judges at the ICC and other ICTs. This Part will also address whether recusal should be automatic in cases involving crimes committed by or against a judge's fellow nationals.

A. The Legitimacy of International Criminal Trials

For the ICC and future ICTs to fulfill their goals, they must be perceived to mete out justice fairly and impartially.[230] In particular, to promote "truth and reconciliation," the individuals and nations most affected by the crimes at issue must accept international criminal trials as legitimate.[231]

One of the main challenges facing the ICC and future ICTs is that there will often be a "mismatch" between domestic narratives surrounding a conflict and what actually transpired.[232] This mismatch will make it difficult for the parties to a conflict to accept international criminal trials as legitimate.[233] In the long term, however, ICTs may be able break down the erroneous narratives perpetrated by the conflict's participants and force them to take responsibility for their actions.[234] For example, opinion of the Nuremberg Tribunal was overwhelmingly negative in West Germany in the 1950s.[235] In the 1970s and 1980s, however, West Germans began to acknowledge the enormity of their nation's crimes in World War II based

230. See Kirsch, supra note 3, at 506.

231. See, e.g., Jaya Ramji-Nogales, Designing Bespoke Transitional Justice: A Pluralist Process Approach, 32 MICH. J. INT'L L. 1, 3–4 (2010); William W. Burke-White, Regionalization of International Criminal Law Enforcement: A Preliminary Exploration, 38 TEX. INT'L L.J. 729, 736–37 (2003).

232. See Ford, supra note 161, at 411.

233. Id.

234. Id.

235. See id. at 469 (citing Christoph Burchard, The Nuremberg Trial and Its Impact on Germany, 4 J. INT'L CRIM. JUST. 800, 812–13 (2006)).

in part on evidence collected by the Nuremberg Tribunal.[236] The ICTY has also had some success in convincing Serbs of the occurrence of crimes such as the shelling of Sarajevo and the Srebrenica massacre after years of disbelief and resistance.[237]

One potential objection to this Article's proposal that judges at the ICC and other ICTs be disqualified from certain trials on the basis of nationality is that it risks undermining international criminal justice by deflecting attention away from the crimes committed by the parties to a conflict. To dismiss inconvenient legal conclusions from the ICC and other ICTs, the parties can claim that the judges are biased because of national allegiances or other personal traits. Such claims are difficult to disprove.

If the main purpose of international criminal trials is to combat "mass denial"[238] on the part of a conflict's participants, then any criticism of ICTs could be seen as counterproductive to the fulfillment of this goal. However, acknowledging and accounting for national bias in certain cases can help to legitimize the work of ICTs by making charges of "victor's justice" appear less credible.[239] Indeed, perhaps part of the reason for the slow acceptance of the Nuremberg Tribunal and the ICTY by the people of Germany and Serbia respectively is because these tribunals were staffed in ways that inevitably raised concerns about their impartiality. As noted, only judges from the major Allied Powers were permitted to sit on the Nuremberg Tribunal,[240] and judges from the major NATO countries have been de facto guaranteed ICTY judgeships if they desired them by virtue of their membership on the United Nations Security Council.[241]

Although no judge may be fully disinterested when adjudicating crimes that "deeply shock the conscience of humanity,"[242] some judges can more credibly claim to be disinterested than others. For example, judges from democratic South American countries—that had little at stake in the Yugoslavia conflict—would have presumably been ideal appointees to the

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236. Id.

237. See id. at 470–71 (internal citations omitted).

238. Jean Galbraith, The Pace of International Criminal Justice, 31 MICH. J. INT'L L. 79, 88 (2010).

239. See generally Michael P. Scharf, The Legacy of the Milosevic Trial, 37 NEW ENG. L. REV. 915, 921–23 (2003) (noting that claims regarding the ICTY as "victor's justice" resonated in Serbia because the Security Council created the ICTY, and it was not a neutral party to the Yugoslavia conflict).

240. IMT Charter, supra note 5, art. 2.

241. Danner & Voeten, supra note 29, at 48; Scharf, supra note 239, at 921.

242. ICC Statute, supra note 6, pmbl.

ICTY.[243] Research suggests that these judges were underrepresented at the expense of Western judges who had a far greater interest in the conflict.[244] In fact, if the primary goal of the ICTY was to break down erroneous domestic narratives about the Yugoslavia conflict, the ICTY should have been staffed with judges from nations in which the participants to the Yugoslavia conflict placed trust.[245] The ICTY's first judicial election, however, saw the defeat of Russia's nominee because a majority of the Security Council apparently feared that he would be partial to Serbia.[246]

The mere recognition that national bias may impact some international criminal trials does not mean that it is a factor in all trials. Cases involving crimes allegedly committed by or against a judge's fellow nationals are unique because a judge cannot reasonably be expected to psychologically separate himself or herself from his or her national community. In such cases there will be more pressure to rule in accordance with the national will. This Article does not claim that judges cannot act as representatives of the "international community as a whole"[247] in trials that do not implicate these concerns.

This Article has also proposed that judges at the ICC and other ICTs consider whether their nations' involvement in a particular conflict might raise concerns about their impartiality in other cases that do not involve crimes allegedly committed by or against their fellow nationals.[248] An example would be a case related to a conflict in which a judge's nation has been arming one side. In such a situation, the judge may not have a psychological connection to either of the warring parties, but it may nevertheless be in his or her self-interest to sympathize with the side supported by his or her home state. The judge would also very likely be viewed as partial to that side. For these reasons, the judge should consider recusing himself or herself but need not do so because support for one side of a conflict is not necessarily incompatible with seeking to ensure that no

243. Danner & Voeten, supra note 29, at 49.

244. Id.

245. See CASS R. SUNSTEIN, GOING TO EXTREMES: HOW LIKE MINDS UNITE AND DIVIDE US 54–55 (2009) ("An attempted refutation by an untrustworthy source can be taken as additional evidence in favor of [false] beliefs. . . . If people . . . have a degree of trust in those who are providing the correction, then false beliefs will dissipate.").

246. See Danner & Voeten, supra note 29, at 49. This is not to say that the Security Council was wrong to consider whether the Russian judge might be partial to Serbia, but it should have also considered whether NATO judges might be partial (or be seen to be partial) to other participants in the Yugoslavia conflict.

247. ICC Statute, supra note 6, art. 5(1).

248. See, e.g., 28 U.S.C. § 455 (2011) (requiring U.S. federal judges to disqualify themselves in any proceeding in which their impartiality might reasonably be questioned).

crimes committed in that conflict go unpunished.[249] Any recusal decision would, of course, be subject to review by his or her colleagues.[250] To appear as neutral as possible, however, ICTs would ideally try defendants before chambers that consist of judges from nations that have little vested interested in the conflict.

B. Cosmopolitan Judges

This Article's focus on nationality as a salient personal characteristic could also be seen as outdated. Although the state has historically been the chief source in the shaping of personal identity,[251] identity has become more complex and subjective with globalization and the increasing movement of individuals across borders.[252] Thomas Franck has claimed that "[N]ationalism is in retreat. . . . [I]ndividualism has emerged . . . as an increasingly preferred alternative to self-definition imposed by nationalism's genetic and territorial imperatives."[253] The philosopher Martha Nussbaum has referred to nationality as a "morally irrelevant characteristic" and has suggested that national citizenship should give way to "cosmopolitanism," whereby each person is first and foremost "a citizen of the world" and "puts right before country and universal reason before the symbols of belonging."[254]

Such ideas are not new, of course. Cosmopolitanism originated with the Greek stoic philosopher Diogenes Laertius.[255] However, in an increasingly globalized world, it is conceivable that national citizenship has begun to give way to a more universal citizenship.[256] The European Union ("EU") originally began as an organization devoted to economic integration but is increasingly legislating in other areas in order "to construct an identity for the Union that goes beyond economic issues and

249. This would particularly be the case if the judge's home nation consistently condemned war crimes committed by all sides of the conflict.

250. Potential problems with judicial review of disqualification motions are acknowledged infra Part III.C.

251. See FRANCK, supra note 30, at 6.

252. See id. at 9–10.

253. Id. at 1.

254. Nussbaum, supra note 30, at 5, 6, 17.

255. See id. at 6.

256. See Smith, supra note 103, at 224. But see Denis Sindic, National Identities: Are They Declining?, BEYOND CURRENT HORIZONS 6 (Dec. 2008), http://www.beyondcurrenthorizons.org.uk/wp-content/uploads/final_sindic_nationalidentities_20081201.pdf (reviewing studies that indicate that internet use strengthens nationalist identities).

can therefore claim deeper bonds of allegiance over time."[257] Future generations of Europeans might view themselves primarily as "European" or even "citizens of the world" as opposed to nationals of specific states.

Even if cosmopolitan identities do not become ascendant, international judges would seem to be far more cosmopolitan than their fellow nationals. The proliferation of international tribunals has created a global community of international judges who see one another "'not only as servants and representatives of a particular polity, but also as fellow professionals in a common judicial enterprise that transcends national borders.'"[258] International judges tend to share similar educational and professional experiences and are increasingly exhibiting a shared understanding of the judicial function.[259]

With respect to ICT judges in particular, their expected qualifications are becoming standardized,[260] and groups such as the Independent Panel on ICC Judicial Elections press state parties to nominate only the most highly qualified candidates to the ICC.[261] ICT judges network and many will end up serving on more than one ICT.[262] Disqualifying judges from international criminal trials on the basis of nationality might seem unnecessary at a time when states are able to draw on a highly professional community of ICT judges devoted to the development of shared norms and practices.[263]

Although globalization and other such forces have undoubtedly changed the way individuals conceptualize their national identities, there is little data to support the view that national identities are growing weaker, let alone being replaced by cosmopolitan identities.[264] Eurobarometer data shows that only a small percentage of Europeans reject all sense of national pride, and national pride has actually increased in most European

257. Jenia Iontcheva Turner, The Expressive Dimensions of EU Criminal Law, 60 AM. J. COMP. L. 555, 573 (2012); see also Kathleen R. McNamara, Constructing Authority in the European Union, in WHO GOVERNS THE GLOBE?, supra note 29, at 166–73 (describing various mechanisms used by the EU to construct "an image of a bounded political and social space").

258. Daniel Terris et al., Toward a Community of International Judges, 30 LOY. L.A. INT'L & COMP. L. REV. 419, 420 (2008) (quoting Anne-Marie Slaughter, A Global Community of Courts, 44 HARV. INT'L L.J. 191, 193 (2003)).

259. Id. at 419; see also Smith, supra note 103, at 224 (suggesting that international judges form a homogeneous epistemic community).

260. See Danner & Voeten, supra note 29, at 58.

261. See INDEPENDENT PANEL ON ICC JUDICIAL ELECTIONS, http://www.iccindependentpanel.org/about (last visited Feb. 13, 2013).

262. Danner & Voeten, supra note 29, at 46.

263. Id.

264. See Denis Sindic, Psychological Citizenship and National Identity, 21 J. COMM. APPL. SOC. PSYCH. 202, 209 (2011).

countries since the founding of the EU.[265] Attachments to Europe are in fact significantly weaker than national attachments.[266] Prominent EU supporters have suggested that EU membership may actually foster stronger national allegiances.[267] There is no reason to believe that a commitment to cosmopolitanism is incompatible with a strong sense of national identity.[268]

It is also possible that when individuals identify as "European" or "citizens of the world," they are primarily seeking to disassociate themselves from some of the negative connotations associated with a surfeit of national pride.[269] Many aspects of national identity are banal and taken for granted until one's national identity is threatened.[270] National identity is highly likely, however, to assume far more importance at a time of crisis such as a war.[271]

Judges are nominated to serve on the ICC and other ICTs by states, and judges will be at least somewhat beholden to their states' views and interests. But even if nomination practices were to change and ICT judges were to embrace cosmopolitanism, ICT judges might still fail to represent international norms and values in all cases.

This is because cosmopolitan judges will be prone to underestimate their own latent national biases. The psychological phenomenon of discrediting views of oneself that threaten one's membership in a group is known as identity-protective cognition.[272] A cosmopolitan judge would be disinclined to consider that his or her view of a case might be affected by his or her national identity, even if his or her nation's interests were very much implicated in the case.[273] Identity-protective cognition might also lead judges at the ICC and other ICTs to take for granted that they are disseminating international legal norms and values, notwithstanding

265. See id. at 207.

266. See Sindic, supra note 256, at 7.

267. Id. at 8.

268. See also Hilary Putnam, Must We Choose, in FOR LOVE OF COUNTRY?, supra note 30, at 97 ("We all have to live and judge from within our particular inheritances . . . . [W]e do not have to choose between patriotism and universal reason; critical intelligence and loyalty to what is best in our traditions, including our national and ethnic traditions, are interdependent.").

269. See Sindic, supra note 264, at 209.

270. Id. at 206; Sindic, supra note 256, at 3.

271. Sindic, supra note 256, at 3.

272. See Kahan, supra note 145, at 20–21.

273. See Terris, supra note 258, at 421 ("[A]n overdeveloped sense of community among judges has the potential to lead to a form of 'corporate solidarity' that could deflect constructive criticism and stifle new thinking."); see also SUNSTEIN, supra note 245, at 89 (noting that insulated groups tend to suppress dissent and exhibit worse decision-making).

longstanding concerns that ICTs are dominated by Anglo-Saxon legal norms and values.[274]

This is not to say that judges at the ICC and other ICTs should eschew cosmopolitanism. However, regardless of a judge's sense of self, national bias is likely to impact his or her decision-making in cases that are of most interest to his or her nation. Nor will cosmopolitan judges necessarily reflect the international community and its interests better than judges who understand that they are connected to the international community largely through their relationships to their own states.[275]

C. Are Automatic Recusals Necessary?

This Article has proposed that judges be automatically disqualified from hearing cases involving crimes committed by or against their fellow nationals but not in other cases that might implicate their nations' interests. ICTs have procedures to adjudicate disqualification motions, however, and do not rely on individual judges to assess their own biases.[276] If a judge is in the position to hear a case in which his or her nationality is highly relevant and he or she does not recuse himself or herself, the judge can presumably be disqualified by his or her colleagues, rendering automatic disqualifications unnecessary.

The prospect that judges at the ICC and other ICTs will disqualify colleagues on nationality-based grounds is highly remote. In the first place, for a judge's role to be scrutinized in a given case, a party must move for the judge's disqualification. However, defense counsel may fear that a failed disqualification motion will cause the judge to be negatively predisposed towards the accused. Conversely, defense counsel may believe that national bias will augur in the accused's favor. Prosecutors

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274. See Danner & Voeten, supra note 29, at 46 (noting perception that ICTs are dominated by Anglo-Saxon norms and practices); see also Makau Mutua, Never Again: Questioning the Yugoslav and Rwanda Tribunals, 11 TEMP. INT'L & COMP. L.J. 167, 168 (1997) (claiming that the Nuremberg Tribunal marked the beginning of the ascendancy of Anglo-Saxon legal hegemony).

275. Michael Walzer has suggested in response to Nussbaum that allegiances should be understood as forming a series of concentric circles and that "we begin by understanding what it means to have fellow citizens and neighbors; without that understanding, we are morally lost. Then we extend the sense of moral fellowship . . . to new groups of people, and ultimately to all people." Michael Walzer, Spheres of Affection, in FOR LOVE OF COUNTRY?, supra note 30, at 126.

276. The ICTY's Bureau, which consists of the President, the Vice-President, and the Presiding Judges of the Trial Chambers, decides disqualification motions at the ICTY. See Int'l Crim. Trib. for the Former Yugoslavia, R. P. Evid. 2 & 15(b), U.N. Doc. IT/32/Rev. 46 (2011), available at http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/it032rev46e.pdf. The ICC resolves disqualification motions in a plenary session of all of its judges. ICC Rules of Procedure and Evidence, supra note 92, Rule 4(2).

may be reluctant to make disqualification motions altogether since they appear before the same judges in different cases.[277] An ICT's legitimacy may also be undermined by the time the disqualification motion is made.[278]

When parties have moved to disqualify ICT judges on nationality-based grounds, their motions have been rejected.[279] This is not entirely surprising because judges tend to be reluctant to question the independence and impartiality of fellow judges,[280] and in past cases where defendants have sought to disqualify judges on nationality-based grounds, the impugned judges have stridently proclaimed their independence and impartiality.[281] To grant disqualification motions under such circumstances would require rebuking colleagues. By acknowledging that a judge's nationality can impact his or her decision-making, ICT judges would also legitimize nationality-based challenges to their own independence and impartiality in future cases. All ICT judges are nationals of certain states and would not have been elected without support from their states.

Even assuming that ICTs were prepared to recognize the existence of national bias, they cannot discern either its effect on specific judges or in which cases it will appear. There are no reliable indicia of a judge's identification with his or her national polity or whether he or she is under

277. See also Richard E. Flamm, History and Problems With the Federal Disqualification Framework, 58 DRAKE L. REV. 751, 762 (2010) ("Although a litigant is unlikely to appear before a particular judge again, and therefore may feel that she has little to lose in seeking that judge's removal, an attorney who frequently handles litigation in federal court is likely to be less than eager to make or endorse a recusal motion for one client if she perceives that doing so may prejudice her ability to effectively litigate before that judge in future cases.").

278. See Dmitry Bam, Making Appearances Matter: Recusal and the Appearance of Bias, 2011 B.Y.U. L. REV. 943, 973 ("[B]y the time the recusal decision is ultimately made and publicized, the public has already observed the conduct and the events that negatively affect its perception of the judiciary and formed its own, often negative, opinions about judicial impartiality."). This effect is likely amplified in the international realm because most citizens will only begin to closely follow the work of an ICT such as the ICC when it adjudicates cases involving their countries, and initial impressions of bias may be difficult to overcome. See also id. at 974 (suggesting that recusal does not fully restore faith in the impartiality of the proceedings) (citations omitted).

279. See discussion supra Introduction.

280. See generally Charles Gardner Geyh, Why Judicial Disqualification Matters Again, 30 REV. LITIG. 671, 728–29 (2011) (discussing judges' ambivalence towards disqualification motions and tendency to err on the side of non-disqualification); see also Patricia M. Wald, Judging War Crimes, 1 CHI. J. INT'L L. 189, 196 (2000) (suggesting that the ICTY is more collegial than domestic courts).

281. See Prosecutor v. Mladić, Case No. IT-09-92-PT, Order Denying Defence Motion Pursuant to Rule 15(B) Seeking Disqualification of Presiding Judge Alphons Orie and for a Stay of Proceedings, annex, ¶ 60 (Int'l Crim. Trib. for the Former Yugoslavia May 15, 2012); Prosecutor v. Nourain & 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 2 April 2012, ¶ 8 (June 5, 2012) (noting that "a number of judges expressed concerns about the length and tone of [Judge Chile Eboe-Osuji's] submission" on his recusal).

conscious or subconscious pressure to rule in a particular manner.[282] The lack of clear judiciable standards in assessing nationality-based disqualification necessitates a prophylactic rule for those cases where national bias is most likely to have an effect. Not every judge will be incapable of maintaining impartiality and independence in cases involving crimes committed by or against his or her fellow nationals, but national bias is likely to be more prevalent and significant in such cases.

CONCLUSION

Although international criminal trials since Nuremberg have been perceived to be fair and impartial,[283] a growing literature has begun to question core assumptions concerning ICTs, including whether their proceedings are substantively biased against defendants.[284] This Article has sought to challenge another core assumption, that an ICT judge's nationality has no bearing on his or her decision-making.

The ICTR and ICTY have held that national identity is irrelevant to how a judge performs his or her duties, while the ICC has permitted a Ugandan judge to hear an appeal involving the LRA[285] and a Nigerian judge to adjudicate attacks on Nigerian peacekeepers.[286] ICTs are anomalous among international tribunals in failing to control for national bias even though nominations to ICTs are controlled by states, and few tribunals hear cases as sensitive and controversial as ICTs.

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282. This is illustrated by the summary nature of ICTs' analysis of nationality-based disqualification motions. For example, the ICC disposed of the claim that Nigerian Judge Chile Eboe-Osuji should be disqualified from a case where the alleged victims were predominately Nigerians in a single paragraph. See Prosecutor v. Nourain & 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 2 April 2012, ¶ 15 (June 5, 2012); see also Introduction, supra (discussing disqualification motion filed by Mladić defense team).

283. See Ford, supra note 161, at 415; Stromseth, supra note 208, at 319–20; Antonio Cassese, The ICTY: A Living and Vital Reality, 2 J. INT'L CRIM. JUST. 585, 586 (2004) ("[T]he ICTY not only got off the ground but has since proved to be a superb judicial enterprise, capable of dispensing justice in a fair manner . . ."); see also Turner, supra note 59, at 582 (noting that a majority of ICTY and ICTR defense attorneys believed the proceedings to be apolitical).

284. See supra note 177.

285. See Prosecutor v. Kony et al., Case No.ICC-02/04OA, Judgment on the "Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06" of Pre-Trial Chamber II, ¶ 1 (Feb. 23, 2009).

286. See Prosecutor v. Nourain & 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 2 April 2012, ¶¶ 9 & 33 (June 5, 2012).

This Article does not contend that national bias will affect judging in all cases. However, judges are unlikely to act as true representatives of the international community in cases involving crimes allegedly committed by or against their fellow nationals, and judges will be under direct or indirect pressure to rule in accordance with domestic considerations in other cases that strongly implicate the interests of their states. ICTs should also recognize that the parties to a conflict will be less likely to challenge the legitimacy of international criminal trials if judges do not participate in trials in which their nations have a substantial stake.

The ICTR and ICTY were perceived to be political courts from their inception and may not have been in a position to acknowledge nationality-based challenges to the impartiality of their judges.[287] However, international criminal justice has advanced such that recourse to the ICC is no longer considered especially controversial.[288] The ICC and future ICTs, unlike the ad hoc tribunals, can acknowledge that judges are not always impervious to the interests of their states.

The ICC and future ICTs should not place judges in the position of having to represent the international community in cases involving crimes allegedly committed by or against their fellow nationals. Judges should also consider recusing themselves in other cases that substantially implicate the interests of their states. A belief in international criminal justice is not incompatible with the recognition that judges' national allegiances do not entirely dissipate once they assume the robes of office.

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287. This is because the ICTY and ICTR were created by the Security Council to prosecute specific crimes. See Jose E. Alvarez, Accounting for Accountability, 37 COLUM. J. TRANSNAT'L L. 1003, 1014 (1999) ("[W]hile the ad hoc tribunals do not represent 'victor's justice,' the circumstances of their creation, as well as the limits to their jurisdiction, have undermined their claim to apolitical neutrality."); see also Mikas Kalinauskas, Comment, The Use of International Military Force in Arresting War Criminals: The Lessons of the International Criminal Tribunal for the Former Yugoslavia, 50 U. KAN. L. REV. 383, 425 (2002) (noting that the ICTY established an outreach office in Serbia to explain the apolitical nature of its work).

288. The fact that the ICC was created by treaty also makes it less susceptible to claims that it is a political court. See Alvarez, supra note 287, at 1014. But see Alexander K. A. Greenawalt, Justice Without Politics? Prosecutorial Discretion and the International Criminal Court, 39 N.Y.U. J. INT'L L. & POL. 583, 612–13 (2007) (suggesting that the ICC can never be completely apolitical).