# EXTREME CASES IN HYBRID COURTS

*Elena Baylis*[*]

*Justice in Extreme Cases* focuses our attention on core principles in international criminal law.[1] While Darryl Robinson bases his argument in the context of the early ad hoc international criminal tribunals and the International Criminal Court,[2] his inquiry into deontic values is particularly apropos as it relates to hybrid and internationalized courts and chambers, which I will refer to collectively as "hybrid courts" or "hybrid tribunals."[3] Hybrid courts differ from purely international courts in ways that are significant for Robinson's analysis. These tribunals typically combine national and international law and personnel, thereby bringing domestic criminal laws, procedures, and practitioners into immediate engagement with the "extreme cases" of international criminal law.[4]

Hybrid courts are also particularly significant at this moment because the ad hoc international criminal tribunals have completed their work, and so hybrid criminal tribunals are the only newly emerging courts in the international criminal law system.[5] In recent years, three hybrid courts have been created for Kosovo, Chad, and the Central African Republic, and hybrid tribunals have been proposed for Colombia, Syria, South Sudan, and other states.[6] In this essay, I examine two ways that hybrid courts might assess and deploy deontic values. In Part I, I consider whether hybrid courts represent a particularly valuable venue for considering the deontic issues that Robinson raises. In Part II, I evaluate the implications of

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[*] Professor of Law, University of Pittsburgh School of Law. Many thanks to Darryl Robinson for sharing his thoughtful manuscript, to Margaret deGuzman for organizing the book roundtable and this symposium issue, and to all of the participants for their insights.

1. DARRYL ROBINSON, JUSTICE IN EXTREME CASES: CRIMINAL LAW THEORY MEETS INTERNATIONAL CRIMINAL LAW 3–16 (2020).

2. *Id.* at 205.

3. While some scholars divide these courts into separate categories based on the extent of their internationalization, that distinction is most relevant if the question of the court's international or domestic character is itself being assessed. *Cf.* SARAH WILLIAMS, HYBRID AND INTERNATIONALISED TRIBUNALS: SELECTED JURISDICTIONAL ISSUES, 249–50 (2012) ("[I]t is possible to categorize the various international and national mechanisms for international criminal justice on a sliding scale by looking at the extent and degree of international involvement.").

4. Sarah M.H. Nouwen, *'Hybrid Courts': The Hybrid Category of a New Type of International Crimes Courts*, 2 UTRECHT L. REV. 190 (2006). However, as discussed below, the new Kosovo Specialist Chambers does not employ domestic personnel, although it is formally placed within the Kosovo judicial system and makes use of some domestic law. *See* Sarah Williams, *The Specialist Chambers of Kosovo: The Limits of Internationalization?*, 14 J. INT'L CRIM. JUST. 25, 35–37 (2016) [hereinafter *Specialist Chambers*] ("This is the first internationalized criminal tribunal that does not feature national personnel.").

5. *See* Beth Van Schaack, *The Building Blocks of Hybrid Justice*, 44 DENV. J. INT'L L. & POL'Y 169, 170–74 (2016) (discussing growth of hybrid tribunals).

6. *Id.* at 170, 195–96.

Robinson's analysis for hybrid tribunals' legitimacy.

## I. HYBRID COURTS AS VENUES FOR DEONTIC ANALYSIS

Since their inception, hybrid tribunals have made determinations regarding the deontic principles on which *Justice in Extreme Cases* focuses; they have done so in part by contextualizing and adapting international criminal law doctrines to domestic criminal law norms and modes of reasoning. Thus, hybrid courts represent a venue for cross-fertilization of domestic and international deontic values and analysis. Since one of Robinson's primary aspirations is for international criminal law principles and criminal law theory to inform each other,[7] and to the extent that criminal law theory is primarily based on domestic law and ordinary crimes,[8] hybrid courts' jurisprudence could function as sites of innovation and as rich resources for developing theory.

Robinson endorses a particular mechanism of engagement among theories and systems, coherentism, which "seeks to advance understanding by reconciling all of the available clues as far as possible, without demanding demonstration of ultimate bedrock justification, epistemically privileged basic beliefs, or a comprehensive first-order theory."[9] A closer model for the operation of hybrid courts, which are driven by the immediacy of colliding legal systems, may be cosmopolitan pluralism. Whereas Robinson's coherentism calls for broadly evaluating all information from any system or source in assessing deontic values,[10] cosmopolitan pluralism focuses more specifically on ensuring engagement between the values and interests of affected communities when multiple concerned communities have overlapping claims to authority.[11]

### *A. An Example: Analysis of JCE in Hybrid Courts*

The treatment of Joint Criminal Enterprise (JCE) in the hybrid tribunals serves as a useful touchstone for their consideration of deontic principles and for the significance of hybrid courts as a venue. As Robinson notes, JCE, in its various forms, presents challenges to at least two of the core principles that he has

7. *See* ROBINSON, *supra* note 1, at 3 ("This book is about the encounter between criminal law theory and international criminal law . . . . I argue that the encounter can be illuminating in both directions. Criminal law theory can challenge and improve ICL, and in turn ICL can challenge and improve criminal law theory.").

8. *See id.* at 3–4 ("[T]he study of ICL's novel problems can advance criminal law theory by revealing that many commonplace assumptions are predicated on the 'normal' context.").

9. *See id.* at 101–02 ("Coherentism seeks to advance understanding by reconciling all of the available clues as far as possible, without demanding demonstration of ultimate bedrock justification, epistemically privileged basic beliefs, or a comprehensive first-order theory . . . .The coherentist approach is not linear, but *holistic*: it aims to refine a *system* of beliefs, rooted on observations and experiences. Our confidence increases the more our beliefs reconcile experiences and inputs.").

10. *Id.*

11. *See generally* PAUL SCHIFF BERMAN, GLOBAL LEGAL PLURALISM: A JURISPRUDENCE OF LAW BEYOND BORDERS (2012); *see generally* Elena Baylis, *Cosmopolitan Pluralist Hybrid Tribunals*, *in* OXFORD HANDBOOK OF GLOBAL LEGAL PLURALISM 595 (2020).

articulated: legality and culpability.[12] In brief, because JCE is a court-created doctrine articulated by the International Criminal Tribunal for the former Yugoslavia (ICTY), its legality with regard to crimes committed before that jurisprudence has been questioned. This is a particular concern for JCE III, as JCE I and II are derived from modes of liability applied at Nuremberg, but JCE III appears to be novel. Also, because JCE extends liability to actors with attenuated intent to commit or knowledge of the concerned criminal acts, JCE has been criticized as violating the principle of culpability. This concern is again particularly acute with regard to JCE III, which requires mere foreseeability.[13]

The handling of the international criminal law doctrine of JCE in the Extraordinary Chambers for the Courts of Cambodia and the Extraordinary African Chambers offers examples of these courts' engagement with the principles of legality and culpability. These courts' decisions also illustrate the role that domestic laws and norms can play in assessing international criminal law standards against those principles.

The Extraordinary Chambers for the Courts of Cambodia rejected JCE III as unfounded in Cambodian domestic law or customary international law.[14] In Case 002, the Pre-Trial Chamber reviewed the applicability of JCE to the crimes in question, which occurred during the 1970s, long before the relevant international jurisprudence.[15] In assessing whether JCE satisfied the legality principle, the Pre-Trial Chamber considered the precedent set by the Nuremberg Tribunal and searched Cambodian domestic law for "any provision that could have given notice to the Charged Persons that such extended form of responsibility was punishable . . . ."[16] It found that JCE I and II were supported by analogous provisions in the Cambodian criminal law applicable at the time,[17] as well as by the modes of liability applied at the Nuremberg Tribunal. In contrast, JCE III had no support either in Cambodian law or from Nuremberg, and thus the Pre-Trial Chamber found that "the principle of

12. ROBINSON, *supra* note 1, at 35. For an explanation of the forms of JCE, see Patricia Hobbs, *The Interaction Between Domestic Law and International Humanitarian Law at the Extraordinary Chambers in the Courts of Cambodia*, *in* APPLYING INTERNATIONAL HUMANITARIAN LAW IN JUDICIAL AND QUASI-JUDICIAL BODIES 289, 301 (2014) ("It was however the *Tadić* case that reformulated a new, and much criticised, JCE model, whereby three different stages of responsibility were established: according to JCE I, responsibility will arise for acts committed in pursuit of a common design; in JCE II, responsibility will arise for acts committed by individuals enforcing a repression regime. It is, however, JCE III that extends liability beyond what was initially envisaged by the Nuremberg Tribunal, as acts committed outside the common design framework can be considered as a natural and foreseeable consequence.").

13. ROBINSON, *supra* note 1, at 34–35, 212; Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Common Responsibility, and the Development of International Criminal Law*, 93 CALIF. L. REV. 75, 108–09, 112 (2005).

14. Hobbs, *supra* note 12, at 300–02.

15. *Id.*

16. *Id.* at 302 (quoting Prosecutor v. Thirith, Case No. 002/19-09-2007-ECCC/OCIJ, Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), ¶ 87 (May 20, 2010)).

17. *Id.*

legality requires the ECCC to refrain from relying on the extended form of JCE."[18]

Concerning the example of the Extraordinary African Chambers, Kerstin Bree Carlson contends that the way the court framed JCE in its trial judgment was informed by domestic norms.[19] While the investigating judges considered only command responsibility and JCE in assessing Habré's role in the concerned crimes,[20] the trial judgment pivoted to find Habré guilty, not only indirectly through command responsibility and JCE, but also directly.[21] According to Carlson, the trial chambers added findings of direct commission to ensure that the culpability principle was satisfied:

> It appears that the factual uncertainties of Habré's direct commission were added to help shore up the legal uncertainties of the ICL doctrine under which the crimes he orchestrated through his repressive state apparatus occurred . . . . For a civil law, Senegalese audience, JCE as a theory of liability may stretch credulity, requiring more concrete forms of culpability (such as Habré's direct commission) for a finding of guilt to pass the *conviction intime* of the trial judge.[22]

Of course, hybrid courts do not always test JCE and other international criminal law doctrines against domestic understandings of culpability and legality, and when they do, that domestic benchmark is not always determinative. For example, the Special Tribunal for Lebanon did consult domestic law in evaluating JCE III and found that there is a mode of liability in Lebanese law that is analogous to JCE III. The Appeals Chamber nonetheless determined that the tribunal should not apply JCE III, because terrorism is a special intent crime and JCE III sets a recklessness standard.[23] In contrast, the Special Court for Sierra Leone extensively applied JCE I and JCE III as modes of liability, seemingly without consulting domestic law or norms to inform the scope of the JCE doctrine.[24]

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18. *Id.*

19. Kerstin Bree Carlson, *Trying Hissène Habré 'On Behalf of Africa': Remaking Hybrid International Criminal Justice at the* Chambres Africaines Extraordinaires, *in* STRENGTHENING THE VALIDITY OF INTERNATIONAL CRIMINAL TRIBUNALS 342, 364 (2018).

20. *Id.* at 361–62.

21. *Id.* at 362.

22. *Id.* at 364.

23. Michael P. Scharf, *Special Tribunal for Lebanon Issues Landmark Ruling on Definition of Terrorism and Modes of Participation*, 15 AM. SOC'Y INT'L L. INSIGHTS (Mar. 4, 2011), https://www.asil.org/insights/volume/15/issue/6/special-tribunal-lebanon-issues-landmark-ruling-definition-terrorism-and?destination=node/101#_edn24 (citing Prosecutor v. Ayyash, Case No. STL-11-01/I, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging (Feb. 16, 2011)).

24. The Special Court for Sierra Leone's JCE judgements have been strongly criticized for failing to adhere to the culpability principle. *See generally* Simon M. Meisenberg, *Joint Criminal Enterprise at the Special Court for Sierra Leone*, *in* THE SIERRA LEONE SPECIAL COURT AND ITS LEGACY: THE IMPACT FOR AFRICA AND INTERNATIONAL CRIMINAL LAW 69 (2013); Wayne Jordash & Scott Martin, *How the Approach to JCE in Taylor and the RUF Case Undermined the Demands of Justice at the Special Court for Sierra Leone*, *in* THE SIERRA LEONE SPECIAL COURT AND ITS LEGACY: THE IMPACT FOR AFRICA AND INTERNATIONAL CRIMINAL LAW, 96 (2013).

### *B. Implications for Deontic Aims*

These JCE decisions by hybrid courts have several implications that are significant to Robinson's thesis. First, they suggest that the conversation about deontic principles that Robinson endorses is happening in hybrid courts, at least in some instances. The resulting analysis is not as all-encompassing as his coherentist approach, which would consider all possible values. Instead, it represents cosmopolitan pluralist engagement between members of the concerned domestic and international legal communities over the meaning and validity of JCE when there are multiple relevant legal authorities informing the content of the legal standard.[25]

Furthermore, hybrid courts may be not merely a *possible* venue for the consideration of international criminal law doctrine against the principles of legality and culpability, but a *particularly well-suited* venue for this endeavor. The hybrid structure of the tribunals frames a particular intersection of international and national law and thus, brings into high relief any contrasts between implementation of the legality and culpability principles in international and national law. The hybrid structure also places international and national attorneys and judges into dialogue with each other to decide the question, thus placing potential champions for each perspective into advocacy and decision-making positions. Concerning the appropriate analytic process in such situations, Cassandra Steer argues:

> A judge at [a] domestic or an international level who is faced with a question on defences or modes of participation in ICL may choose a certain direction influenced by a specific accessible or authoritative legal tradition. But she should do this with full awareness of the choices available to her, and harmonize her interpretation with some universal guiding principles.[26]

Due to its hybrid national-international structure, a hybrid court tends to raise judges' awareness of the available choices and relevant principles.

Finally, and ideally for Robinson's aspirations, hybrid courts' assessments of international criminal law norms through the lens of domestic understandings of deontic values can be readily reintegrated into international criminal law norms and jurisprudence. This is enabled by the ongoing development of an iterative, dialectical engagement with jurisprudence throughout the heterarchical network of international, hybrid, and domestic courts hearing international criminal law cases.[27] As Carlson notes:

> Where hybrid tribunals typically imagine an informational flow from the international to the local, with international actors, legal content, and practices being locally transplanted . . . the CAE [Extraordinary African Chambers] turned this dynamic on its head. Staffed almost entirely by local judicial professionals, the CAE is locally produced ICL content; it generated ICL and sent it "up and out", rather than receiving ICL for local

25. BERMAN, *supra* note 11, at 152–54.

26. Cassandra Steer, *Legal Transplants or Legal Patchworking? The Creation of International Criminal Law as a Pluralistic Body of Law*, *in* PLURALISM IN INTERNATIONAL CRIMINAL LAW 39, 62 (2014).

27. *Id.* at 61–62.

application or training.[28]

Due to hybrid tribunals' participation in this networked information flow, all courts hearing international criminal law cases can benefit from considering the domestic values identified by particular hybrid courts.

However, this model is not uncontroversial or uncomplicated. First, this touches on the debate concerning fragmentation of international criminal law norms.[29] Also, the second wave of hybrid courts is evincing a substantially reduced structural commitment to localization and transnational collaboration by incorporating significantly diminished traditionally domestic components. As an example, the Kosovo Specialist Chambers is strongly international in nature; while it does have jurisdiction over domestic law, it has an entirely international roster of judges, attorneys, and other staff, among other international features.[30] As such, it is uncertain whether the Kosovo Specialist Chambers, or other future hybrids without domestic personnel, will be likely to consider domestic law and norms as a counterpoint to international law when deontic concerns arise.

## II. DEONTIC VALUES AND HYBRID COURTS' LEGITIMACY

Future hybrid courts will undoubtedly continue to develop analysis that implicates deontic values. However, of late, much attention has been focused on identifying lessons learned from the first wave of hybrid courts created between 2000-2007 and using these lessons to inform the fundamental design choices for the second wave of courts now being established.[31] Much of this guidance relates not to deontic values but to consequentialist concerns about the legitimacy and effectiveness of these courts within the context of the affected states. While legitimacy and effectiveness are, of course, concerns for all courts, they are of particular relevance to future hybrid courts as ad hoc courts that have the opportunity to make formative decisions about structure, resources, and, of course, legal norms.

Thus, while *Justice in Extreme Cases* focuses entirely on deontic analysis, I will now extend my own inquiry to a subject that seems to be a point of intersection between Robinson's deontological interests and these consequentialist issues: legitimacy. Here, Robinson's analysis offers an insight that may be useful to future

28. Carlson, *supra* note 19, at 344–45.

29. *See generally* PLURALISM IN INTERNATIONAL CRIMINAL LAW (2014); THE DIVERSIFICATION AND FRAGMENTATION OF INTERNATIONAL CRIMINAL LAW (2012); Alexander K. A. Greenawalt, *The Pluralism of International Criminal Law*, 86 IND. L.J. 1063 (2011); MARK A. DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW (2007).

30. *Specialist Chambers, supra* note 4; Robert Muharremi, *The Concept of Hybrid Courts Revisited: The Case of the Kosovo Specialist Chambers,* 18 INT'L CRIM. L. REV. 623, 640–44 (2018).

31. *See generally* KIRSTEN AINLEY & MARK KERSTEN, DAKAR GUIDELINES ON THE ESTABLISHMENT OF HYBRID COURTS (2019), https://hybridjustice.files.wordpress.com/2019/08/dakar-guidelines_digital-version.pdf; *see generally* ELENA NAUGHTON, COMMITTING TO JUSTICE FOR SERIOUS HUMAN RIGHTS VIOLATIONS: LESSONS FROM HYBRID COURTS (2018), https://www.ictj.org/sites/default/files/ICTJ_Report_Hybrid_Tribunals.pdf; *see generally* OPTIONS FOR JUSTICE: A HANDBOOK FOR DESIGNING ACCOUNTABILITY MECHANISMS FOR GRAVE CRIMES, OPEN SOCIETY FOUNDATIONS (2018), https://www.justiceinitiative.org/uploads/89c53e2e-1454-45ef-b4dc-3ed668cdc188/options-for-justice-20180918.pdf.

hybrid courts in bolstering their legitimacy with domestic audiences.

Before embarking on this line of discussion, it may be helpful to note that Robinson specifically identifies reassessing our concepts of legitimacy as one of the challenges that international criminal law's extreme cases present to existing criminal law theory.[32] Further, while consequentialism is outside the scope of Robinson's inquiry in *Justice in Extreme Cases,* he repeatedly affirms its importance.[33] Indeed, Robinson cites Hart to suggest that, while his book focuses predominantly on deontic principles, in general, there is and should be an interplay between deontological and consequentialist analysis of criminal justice systems.[34]

There are two understandings of legitimacy that present a point of intersection between the deontological analysis promoted by *Justice in Extreme Cases* and the consequentialist analysis of hybrid courts' effectiveness. The objective or normative legitimacy of a court refers to the justifications for its authority, while the sociological or perceived legitimacy of the court refers to its acceptance by the concerned communities.

### *A. Normative Legitimacy*

Normative or objective legitimacy is the type of legitimacy that is implicated by Robinson's analysis. Normative legitimacy assesses whether an institution has sufficient justification for the authority it wields.[35] This can be understood, in a narrow sense, strictly in terms of having the appropriate source for its authority, that is, as having been legally established by another authoritative institution or as having been democratically approved.[36] In this sense, an international or hybrid criminal court would be deemed objectively legitimate based on its origin as an entity created with state consent or under the authority of the United Nations, the African Union, or some similar institution.

But a more robust understanding of normative legitimacy is concerned with the nature of the institution and of its claims to power. As Albert Buchanan and Robert Keohane put it, for normative legitimacy to exist, there must be "moral reasons, as distinct from purely strategic or exclusively self-interested reasons" for actors to recognize the institution's authority.[37] Similarly, Dan Bodansky focuses on "whether a[n institution's] claim of authority is well founded—whether it is justified in some objective sense": that is, "if there are good reasons in support of its claim to authority."[38] Of course, it is critically important to this analysis to ascertain what

32. ROBINSON, *supra* note 1, at 284 ("[I]CL problems require us to clarify assumptions about law-making, fair notice, authority, citizenship, community, legitimacy, and many other concepts.").

33. *Id.* at 94, 244.

34. *See id.* at 7–8 (citing H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 3–12 , 74–82 (2d ed. 2008) (suggesting that deontological analysis relates primarily to fairness to each defendant, while consequentialist analysis relates primarily to the effects of the justice system as a whole)).

35. Albert Buchanan & Robert O. Keohane, *The Legitimacy of Global Governance Institutions*, 20 ETHICS & INT'L AFF. 405, 405 (2006).

36. *Id.* at 412–17.

37. *Id.* at 409.

38. Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, 93 AM. J. INT'L L. 596, 601 (1999).

kind of reasons will suffice to establish an institution's normative legitimacy. Buchanan and Keohane suggest what they call a "complex standard of legitimacy" that incorporates democratic, substantive, and epistemic components,[39] while Bodansky identifies categories of "source-based, procedural and substantive" criteria.[40]

What is most important for purposes of this argument is that, while Robinson does not himself characterize his endorsement of deontic values as an argument about legitimacy, normative legitimacy provides a useful framework for his claims. In essence, Robinson characterizes respect for the principles of legality and culpability as necessary for the normative legitimacy of any criminal justice system. Although he does not use the word "legitimacy," that concept is embodied in his rationale for identifying deontic principles as fundamental:

> The third and most important reason to comply with principles is *deontic* – that is, we accept that there is something about people (personhood, dignity, moral agency) that warrants respect and recognition; as a result, we can punish persons only in accordance with what they *deserve*. A system that neglects the constraint of desert is arguably not a system of "justice" and, in some sense, might not even be a system of "criminal law," but rather an exercise of "police" power.[41]

Within the normative legitimacy framework, Robinson's argument does not concern the formalities or source of the court's authority, that is, whether it has been properly constituted by an appropriate political body. Rather, it concerns the substantive justifications for the court's authority. One could think of this argument as identifying one of the moral reasons that is a necessary precondition for a court to have authority; because it is a legal decisionmaker, a court gains authority in part from its commitment to core legal principles. One could also characterize Robinson's argument as being about the scope of the court's authority. That is, if a court has been granted authority to act as a legal institution, its authority is necessarily limited to actions that are legal in nature. Actions that depart from core principles of justice are not legal and are therefore unauthorized.[42]

Thus understood as an argument about normative legitimacy, Robinson's position has obvious implications for all courts hearing international criminal law cases. As discussed below, his argument may have particular salience for hybrid courts seeking to improve their domestic perceived legitimacy.

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39. Buchanan & Keohane, *supra* note 35, at 417–435.

40. Bodansky, *supra* note 38, at 612.

41. ROBINSON, *supra* note 1, at 66 (footnotes omitted).

42. Robinson's argument is not solely about legitimacy, of course. As Bodansky notes, legitimacy analysis is conducted on a systemic basis, not a case by case basis, whereas Robinson seems to be concerned with deontic analysis and values both on a systemic level and in the context of individual cases. *See* Bodansky, *supra* note 38, at 602 ("Legitimacy does not depend on whether a rule or a decision is substantively correct (judged by whatever standard); rather, it reflects more general support for a regime, which makes subjects willing to substitute the regime's decisions for their own evaluation of a situation. Accordingly, definitions of legitimacy typically focus on ongoing systems of governance—on the institutions that issue directives and the processes by which they do so—rather than on the legitimacy of particular directives.").

### *B. Perceived Legitimacy*

Perceived, popular, or sociological legitimacy signifies whether the concerned society perceives the court as being legitimate. According to Buchanan and Keohane, "[a]n institution is legitimate in the sociological sense when it is widely believed to have the right to rule."[43] Similarly, Bodansky contends that "[a]uthority has popular legitimacy if the subjects to whom it is addressed accept it as justified."[44]

Many scholars have discussed the vital importance of sociological legitimacy to international criminal law institutions.[45] Of course, in general, "the more an institution is perceived as legitimate, the more stable and effective it is likely to be."[46] But beyond this broad prescription, hybrid tribunals have to muster a significant degree of perceived legitimacy within the concerned state in order to effectively promote their transitional justice goals. These transitional justice aims are sweeping. They comprise not only the criminal law objectives that *Justice in Extreme Cases* emphasizes—justice for victims, punishment for wrongdoers, deterrence of future crimes, and fair trials[47]—but also the socio-political goals of fostering reconciliation, creating a historical record of the conflict and the harms, and promoting monetary reparations, education, and support for rule of law in the affected state.[48] These socio-political goals are dependent on the tribunal's work being positively received, or at least accepted, by the constituent communities of the concerned state.[49]

This is a particularly acute issue for hybrid courts, because one of the justifications proffered for their hybrid design is their anticipated domestic perceived legitimacy and effects.[50] Initially, the domestic components of hybrid courts were expected to automatically ensure their domestic perceived legitimacy and promote transitional justice aims by connecting the courts to domestic communities in a variety of ways, including the involvement of domestic lawyers and judges, application of domestic law, domestic location, and, often, their placement within

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43. Buchanan & Keohane, *supra* note 35, at 405 (emphasis omitted).

44. Bodansky, *supra* note 38, at 601 (emphasis omitted).

45. THE LEGITIMACY OF INTERNATIONAL CRIMINAL TRIBUNALS 113 (2017); Yvonne Dutton, *Bridging the Legitimacy Divide: The International Criminal Court's Domestic Perception Challenge*, 56 COLUM. J. TRANSNAT'L L. 71, 84–86 (2017); Harry Hobbs, *Hybrid Tribunals and the Composition of the Court: In Search of Sociological Legitimacy*, 16 CHI. J. INT'L L. 482, 482 (2016); 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, 407 (2012).

46. Bodansky, *supra* note 38, at 603.

47. ROBINSON, *supra* note 1, at 10–12 (outlining Robinson's objectives and approach to applying criminal law concepts to analysis).

48. *See* Baylis, *supra* note 11, at 605.

49. *See id.*

50. *See* Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. INT'L L. 295, 295–300 (2003) (describing impact design on perceived domestic legitimacy of hybrid courts in Kosovo, East Timor, and Sierra Leone); Hobbs, *supra* note 45, at 492; Padraig McAuliffe, *Hybrid Tribunals at Ten: How International Criminal Justice's Golden Child Became an Orphan*, 7 J. INT'L L. & INT'L REL. 1, 10–15 (2011).

the domestic court system.[51] While it is difficult to measure whether and why domestic communities view a tribunal as legitimate, studies of states that have established hybrid tribunals indicate that some hybrid tribunals have enjoyed strong domestic perceived legitimacy while others have not.[52] Hybrid courts do not automatically generate such a perception simply by virtue of their partially domestic character.

In an effort to improve their domestic perceived legitimacy and thus, their domestic impact, hybrid courts have undertaken a variety of ambitious initiatives. They have dramatically increased their efforts at directed outreach to the general public and legal communities as well as their opportunities for victims to participate or apply for reparations.[53] In addition, scholars have proposed alternative mechanisms for promoting the domestic perceived legitimacy of hybrid courts, such as more carefully targeting international judicial appointments to focus on regional judges[54] or ensuring that a diversity of social groups are represented in appointments of domestic judges.[55] Nonetheless, ensuring domestic perceived legitimacy remains a fundamental and unresolved concern for hybrid tribunals.

### *C. Interdependent Legitimacy*

While hybrid tribunals have focused primarily on questions of representation and connection to improve their domestic perceived legitimacy, might hybrid courts' domestic perceived legitimacy depend in part on their normative legitimacy, and, in particular, on their commitment to deontic values? This may be one place where deontological and consequentialist concerns not only intersect but also interrelate. Certainly, theoretical perspectives on legitimacy suggest a link between normative and perceived legitimacy. Bodansky argues that claims of normative legitimacy tend to promote perceived legitimacy: "Since persuasion is one of legitimacy's functions

51. *See* Dickinson, *supra* note 50, at 295–300 (illustrating involvement of domestic lawyers, judges, law, etc. in the hybrid courts in Kosovo, East Timor, and Sierra Leone).

52. *See, e.g.*, Hobbs, *supra* note 45, at 508–12 (perceived domestic legitimacy of hybrid courts in Sierra Leone and Cambodia); McAuliffe, *supra* note 50, at 40–46 (perceived domestic legitimacy of hybrid courts in Kosovo, East Timor, Sierra Leone, Cambodia, and Bosnia).

53. *See, e.g.*, TOM PERRIELLO & MARIEKE WIERDA, INT'L CTR. FOR TRANSNATIONAL JUSTICE, THE SPECIAL COURT FOR SIERRA LEONE UNDER SCRUTINY 35–38 (2006), https://www.ictj.org/sites/default/files/ICTJ-SierraLeone-Special-Court-2006-English.pdf (describing outreach efforts in Sierra Leone); L. ALLISON A. SMITH & SARA MELI, NO PEACE WITHOUT JUSTICE, MAKING JUSTICE COUNT: ASSESSING THE IMPACT AND LEGACY OF THE SPECIAL COURT FOR SIERRA LEONE IN SIERRA LEONE AND LIBERIA 24–25 (2012), http://www.npwj.org/content/Making-Justice-Count-Assessing-impact-and-legacy-Special-Court-Sierra-Leone-Sierra-Leone-and (describing reparations efforts); Eva Ottendoerfer, *Outreach, In-Reach or Beyond Reach? Lessons Learned from Hybrid Courts*, JUSTICE IN CONFLICT (Mar. 15, 2018), https://justiceinconflict.org/2018/03/15/outreach-in-reach-or-beyond-reach-lessons-learned-from-hybrid-courts/ (describing outreach efforts by hybrid courts).

54. *See* Hobbs, *supra* note 45, at 485–86 (outlining his position on process for judicial selection).

55. *See* Erica Bussey, *Striking the Right Balance – Blending International and National Components in Hybrid Courts*, JUSTICE IN CONFLICT (Mar. 14, 2018), https://justiceinconflict.org/2018/03/14/striking-the-right-balance-blending-international-and-national-components-in-hybrid-courts/ (describing different hybrid courts' varied policies toward use of national judges).

(perhaps, even, its primary function), the two aspects of legitimacy are closely related. We call a regime 'legitimate' in order to persuade people (or states) to accept it, and we criticize it as 'illegitimate' in the hope of undermining its authority."[56] Similarly, Buchanan and Keohane suggest that genuine normative legitimacy enhances the stability of perceived legitimacy:

> [I]f our support for an institution is based on reasons other than self-interest or the fear of coercion, it may be more stable. What is in our self-interest may change as circumstances change and the threat of coercion may not always be credible, and moral commitments can preserve support for valuable institutions in such circumstances.[57]

Specifically, on the issue of deontic values, Robinson himself suggests: "As Paul Robinson and John Darley have sought to demonstrate, 'desert' may have 'utility': Conforming to broadly shared notions of justice . . . . may also strengthen the legal system's legitimacy and support (and hence its effectiveness)."[58] Thus contextualized, there is a potential link between Robinson's deontic values argument and hybrid tribunals' domestic perceived legitimacy. By their nature, hybrid tribunals are more likely to gain support among victims and their communities than among defendants or potential defendants and their communities.[59] Indeed, at least one study has suggested that a community's sense of the legitimacy of a court depends predominantly on that community's social affiliation with either the defendants or the victims.[60] However, transitional justice aims to extend more broadly than victims alone to encompass the entire affected society.[61] To be successful in achieving their transitional justice objectives, hybrid tribunals must gain legitimacy with defendants' communities as well as others.[62] This need is particularly acute if there are sharp social dividing lines between victims' and defendants' communities.[63]

Using doctrines such as JCE may enhance perceived legitimacy among victims' communities if it enables courts to hold responsible high-level leaders who would otherwise go free. But among defendants' communities, doctrines such as JCE III that strain the principles of culpability or legality may create a perception that the tribunal is unfairly blaming members of those communities or may create a fear of arbitrary prosecution even among those at a significant remove from the concerned crimes. This could undermine the perceived legitimacy of the tribunal and thereby

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56. Bodansky, *supra* note 38, at 601.

57. Buchanan & Keohane, *supra* note 35, at 410.

58. ROBINSON, *supra* note 1, at 66 (footnote omitted).

59. *See* Ford, *supra* note 45, at 468–75 (describing how a community's ties affect its perception of court's legitimacy).

60. *See id.* at 409–11 (describing the interplay between a community's internal narrative of events and its perception of a court's legitimacy).

61. *See id.* at 411 (describing the goal of transitional justice as changing the affected community's perception of events).

62. *See id.* at 468–75 (describing the effect of a community's internal narrative on its acceptance of a court's legitimacy).

63. *See id.* at 473–75 (describing the division among cultural groups in Serbia and its impact on the perceived legitimacy of hybrid courts).

its effectiveness in promoting transitional justice aims such as reconciliation and confidence in rule of law.

Thus, a visible commitment to high standards for legality and culpability in modes of liability might not only serve Robinson's deontic concerns but also promote hybrid tribunals' consequentialist interests in legitimacy and effectiveness. However, of course, there are many other intersecting factors affecting such perceptions.[64] These factors include the selectivity of prosecutions, which tends to raise the stakes for the results of each individual prosecution, since only a handful of the many perpetrators will ever be prosecuted.[65] Further, the activities of hybrid tribunals have valuable signaling effects to many audiences, including international as well as domestic actors, and any limiting effects on the scope of prosecutions or convictions stemming from such determinations might well be perceived differently by these other audiences.[66]

## III. CONCLUSION

This essay has focused on hybrid courts as a particularly appropriate venue for deontic analysis. Hybrid courts do seem to offer a structural advantage over international courts, in that their design promotes consideration of domestic norms, including deontic values. Deontic values' role as a basis for normative legitimacy also suggests that they may be a relevant consideration for hybrid tribunals concerned with domestic perceived legitimacy. Finally, hybrid courts are still proliferating, unlike international tribunals.

Looking beyond hybrid tribunals, if it is useful to take domestic deontic values into account in international criminal law trials, domestic courts may be an even more important venue than hybrid courts. Domestic atrocity trials are occurring with increasing regularity, and so the domestic law and processes of particular states could be of increasing importance for the evolution of doctrines and deontic values in international criminal law.[67] This has many implications, including the likelihood of divergence among courts in their preferred norms, modes of analysis, and outcomes, heightening the fragmentation concerns noted above. With a turn toward a greater degree of domestic influence on norms and legal standards, the analysis in future judgments may well be driven by concerns and methods of reasoning that are

64. *See, e.g.*, Margaret M. deGuzman, *Choosing to Prosecute: Expressive Selection at the International Criminal Court*, 33 MICH. J. INT'L L. 265, 267–69 (2012) (discussing factors affecting a court's perceived legitimacy).

65. *See id.* at 268–69 (outlining strategies for selective prosecution).

66. For example, Kosovo agreed to establish the Kosovo Specialist Chambers under significant pressure from the European Union as a means of signaling its acceptance of European Union values. *See, e.g.*, Muharremi, *supra* note 30, at 623–24 (describing the establishment of the Kosovo Specialist Chambers); Van Schaack, *supra* note 5, at 202–03 (describing European pressures that led to the creation of the Kosovo Specialist Chambers); GËZIM VISOKA, ASSESSING THE POTENTIAL IMPACT OF THE KOSOVO SPECIALIST COURT 19 (2017) (highlighting the positive impact of the Kosovo Specialist Court).

67. *See, e.g.*, Steer, *supra* note 26, at 39–42 (discussing the relationship between domestic law and international law).

closely tied to the involved domestic systems. Further, without the international platform that hybrid courts enjoy or the active engagement of international actors, domestic courts' jurisprudence may be less likely to be considered by other international, hybrid, or foreign courts or to be reintegrated into international criminal law norms. In addition to looking to hybrid courts, it would be well worth considering what role domestic courts might play in applying deontic values to international criminal law's extreme cases.