Transnational Networks and International Criminal Justice

Jenia Iontcheva Turner

SMU Dedman School of Law

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TRANSNATIONAL NETWORKS AND INTERNATIONAL CRIMINAL JUSTICE

Jenia Iontcheva Turner*

The theory of transgovernmental networks describes how government officials make law and policy on issues of global concern by coordinating informally across borders, without legal or official sanction. Scholars have argued that this sort of coordination is useful in many different areas of cross-border regulation, including banking, antitrust, environmental protection, and securities law. One area to which the theory has not yet been applied is international criminal law. For a number of reasons, until recently, international criminal law had not generated the same transgovernmental networks that have emerged in other fields. With few exceptions, international criminal law had been enforced at either the purely domestic or the international level. That picture appears to be changing. Investigators, prosecutors, and judges dealing with international crimes are beginning to collaborate, both with their peers across borders and with their counterparts at international criminal tribunals. This Article describes and evaluates these developments and provides a conceptual defense of why networks could be useful in international criminal law. It then suggests what future forms this sort of cooperation might take and draws implications from the emergence of international criminal law networks for the study of networks more generally.

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The theory of transgovernmental networks describes how elements within the governments of various nations make and affect policy by coordinating with each other informally, without official or formal legal sanction.1 Anne-Marie Slaughter and others have argued that this sort of coordination is useful in many different areas of cross-border regulation, including banking, antitrust, environmental protection, and securities law.2

One area to which the theory has not yet been applied is international criminal law. By its nature, international criminal law transcends national boundaries. But at least until recently, it had not generated the kinds of informal transgovernmental networks that have emerged in other fields. Except for a few recent collaborations among international and national prosecutors and judges serving on hybrid courts, international criminal law has largely been enforced at either the purely domestic or the international level.

The picture appears to be changing, however. Investigators, prosecutors, and judges dealing with international crimes are beginning to collaborate, both in horizontal networks across borders and in vertical networks with their counterparts at the international criminal tribunals. This Article describes and evaluates these developments and concludes that they are likely to transform the way international criminal law is implemented. These new mechanisms of interpreting, developing, and enforcing international criminal law ought to be welcomed, as they are likely to be more inclusive, more acceptable to domestic populations, and ultimately more effective.

When I use the term “international criminal law,” I am referring to the handful of actions that the international community has seen fit to “criminalize” at the international level—war crimes, crimes against humanity, and genocide. These areas have become the subject of an international criminal law first because of their scale, severity, and gravity—in other words, the degree to which they shock the conscience of the entire world. Second, they


often share the characteristic of being crimes that implicate governments themselves (or other groups that exercise political power), leading to the concern that the pertinent national authorities will be unwilling or unable to address the crimes at the national level.

International crimes are, unfortunately, still common around the globe. In the 1990s alone, almost one million people were murdered during the genocide in Rwanda, and hundreds of thousands more were killed or abused in conflicts in the former Yugoslavia, Sudan, Uganda, East Timor, Sierra Leone, and the Congo, among others. Serious human rights violations that could be classified as international crimes still occur frequently in dozens of countries around the world.

Enforcement of international criminal law has normally taken one of two courses. The first is prosecution and adjudication by an international tribunal, such as the Nuremberg tribunal, the International Criminal Tribunals for Rwanda and the former Yugoslavia, and the International Criminal Court. The second method has been prosecution and adjudication in a national court, whether under theories of universal jurisdiction or by the states directly affected by the crimes.

What had not occurred until recently—at least not to a significant degree—is the appearance of networks of elements in national governments working together informally to enforce, interpret, and develop international criminal law. Over the last two decades, the development and interpretation of international criminal law has been occurring primarily in a centralized fashion at international tribunals, and its enforcement has proceeded largely through diplomatic channels.

But the reliance on international tribunals raises obvious concerns about infringements on national sovereignty. It presents a particularly acute example of what Slaughter calls the "globalization paradox"—needing government at an international level, but fearing it at the same time. This paradox is reflected in current debates about the International Criminal Court. On the one hand, the International Criminal Court lacks support among key countries that have the power to make the court truly effective, especially the United States. As a result, the enforcement of the court’s orders, which depends entirely on cooperation by state authorities, will likely be slow and often ineffective. On the other hand, some of the most serious human rights violations will remain unaddressed unless some action is taken at the international level.

Transgovernmental networks could offer an effective response to the "globalization paradox" in international criminal law. These networks would involve national and supranational judges, prosecutors, and investigators who would coordinate and cooperate with each other in more flexible and

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3. An exception is the recent creation of several hybrid courts, in which national and international investigators, prosecutors, and judges have collaborated in interpreting and enforcing international criminal law. In Section IV.B, I discuss the ways in which these courts operate as an international criminal law network.

4. Slaughter, supra note 1, at 8.
informal ways than they currently do in international criminal tribunals. The cooperation could occur in hybrid courts, through ad hoc agreements, and through different kinds of international and regional associations. Their mission could be supported by non-governmental organizations ("NGOs"), which are already very active in international criminal law.

Such transnational networks could serve a two-fold purpose. They could remedy national authorities’ lack of capacity to enforce international criminal law by contributing some of the combined resources and expertise of network participants. At the same time, because of their flexible and decentralized form, networks could better accommodate local political preferences and enable nations most directly affected by atrocities to play a more central role in prosecuting them.

Transgovernmental networks are less likely to be effective in situations in which local authorities are reluctant to prosecute. But even in these cases, networks could gradually nudge governments toward action. They could provide the necessary support to make prosecutions more cost-effective. In addition, they could subtly influence domestic norms by connecting with individual investigators, prosecutors, and judges, who could advocate internally for war crimes prosecutions consistent with network standards.

While networks might have various beneficial effects, the strategic structure of international criminal law does not, at first sight, seem conducive to their creation or ultimate success. Violations of international criminal law do not commonly produce externalities that would spur states unaffected by the crimes to cooperate in redressing them. For instance, American officials are more likely to provide international assistance for the enforcement of antitrust law than of war crimes law. This is because the lack of antitrust enforcement in another country may directly harm American commercial interests, whereas crimes such as genocide and crimes against humanity, as grave as they are, may not have significant effects beyond one country’s borders. And while international crimes usually occur in sporadic crises, other violations that networks address tend to be ongoing problems.

Collaboration is also difficult because views on important international criminal law questions diverge. While states may agree that core international crimes like genocide should be punished and prevented, they often disagree about the scope of international criminal law and about the procedures by which it should be implemented. These disagreements are sometimes based on fundamentally different moral judgments—about, for example, the applicability of the death penalty to international crimes or the prosecution of juvenile offenders. At other times, they result from diverging national security priorities. Neither of these types of disagreements could easily be settled through the informal exchanges that occur in transgovernmental networks. Nor could they be resolved through appeals to expertise, as can sometimes be done in conflicts about regulatory issues, which tend to be more technical and less political in nature.

Another factor pushing against the establishment of networks in international criminal law is rooted in the domestic politics of many of the countries where international crimes have occurred. Government officials in
these countries often lack the autonomy needed to forge direct relationships with their foreign counterparts. Prosecutors' actions in war crimes cases, for example, may be tightly controlled by the central government. But if they lack the discretion to apply new methods of prosecuting war crimes law, these prosecutors could not effectively participate in cross-border networks that commonly act without the blessing or intervention of chief government officials.\(^5\)

These features of international criminal law explain why relatively few transgovernmental networks have developed so far. But this paper shows that such networks are emerging slowly, and it identifies several forces that are increasingly pushing for transgovernmental cooperation in international criminal law.

The first force is rhetorical. While international crimes often do not create externalities for powerful states, the argument that the international community must act to prevent and punish international crimes has deep moral resonance. The moral force of the argument for intervention distinguishes international crimes from less poignant regulatory issues, such as antitrust and securities regulation, and helps propel international cooperation even in the absence of cross-border effects.

The second force—which builds on the first—is the active involvement of NGOs in international criminal law. These organizations work to keep international crimes in the public consciousness and on the agenda of national governments, even in states not directly affected by international crimes. Indeed, NGOs do more than lobbying and awareness-raising campaigns. They actively help coordinate transgovernmental efforts in international criminal law by providing information, expertise, and logistical help in setting up war crimes tribunals, drafting domestic legislation to implement international criminal law, and spreading best practices through face-to-face contacts, written manuals, and training programs.\(^6\) By promoting domestic legal reform, NGOs empower prosecutors, investigators, and judges in post-conflict countries to apply international criminal law without undue intervention by the central government and thus to be effective participants in the emerging transnational networks.

Also important to developing international criminal law networks is the existence of several international and hybrid war crimes tribunals. The interaction between investigators, prosecutors, and judges at these tribunals is likely to have spillover effects and spur greater cooperation at the transgovernmental level. For example, we can expect that prosecutors, judges, and defense attorneys who have worked on a war crimes tribunal at the international level will be eager to apply their expertise elsewhere after their term


at the international court ends. They are thus likely to become active participants in transgovernmental networks.

The International Criminal Court ("ICC") can be expected to play an even more central role in promoting such networks. The court's regime of "complementarity"—under which the court takes up cases only when states are unwilling or unable to prosecute—has already prompted national authorities to pass implementing legislation and create judicial structures to deal with international crimes domestically. As such structures become established, they are likely to begin cooperating with their counterparts from other states. The ICC has an incentive to promote such cooperation. The court depends on national authorities to obtain evidence and custody of suspects and to enforce its judgments, so it will want to ensure that the authorities are well equipped and committed to provide such assistance. Moreover, the court is unable to shoulder the full load of international crimes prosecution, so it has to rely on national courts to handle many of the trials. For these reasons, the court has an interest in promoting effective pathways of transnational cooperation. As later Sections discuss in more detail, it has already sponsored some initiatives toward that end.

Finally, cooperation in international criminal law will be advanced by already-existing networks in other areas of criminal law. Transgovernmental networks have begun developing to address "transnational" crimes such as terrorism, drug-trafficking, and money laundering; it would be easy and logical for some of these networks to take on responsibilities related to war crimes and crimes against humanity. The skills required for investigating and prosecuting transnational and international crimes are similar, and increasingly, there are connections between the two types of crimes. These connections make international crimes more strategically relevant for the countries that are already cooperating in the fight against terrorism and drug- and human-trafficking. A concentration of efforts to fight both types of crimes is already occurring in Europe, where special prosecutors' offices have been created to address cross-border organized crime, war crimes, and crimes against humanity.

As a result of these forces and others, transgovernmental networks in international criminal law are beginning to emerge. The primary goal of this Article is to describe what these are and to suggest what future forms this sort of cooperation might take. In doing so, it also aims to draw implications for transgovernmental networks more generally. After reviewing in Part I the role of networks in international law generally, I will provide in Part II a conceptual defense of why networks could be useful in international criminal law. In Part III, I will explain what forces may bring into being and then

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7. The Chief Prosecutor for the Special Court for Sierra Leone, for example, has asserted that the armed groups led by Charles Taylor during the Sierra Leonean conflict, which had committed some of the worst atrocities, had dealings with international terrorist groups, including Al-Qaeda. See infra notes 88-89 and accompanying text. More recently, the Prosecutor of the ICC has pointed to the links between international war crimes and financial crimes. See infra note 90 and accompanying text.

8. See infra note 84 and accompanying text.
sustain international criminal law networks. Thereafter, in Part IV, I will review emerging networks and discuss what future forms international criminal law networks might take, using examples from networks in related areas, and reviewing recent developments in the enforcement of international criminal law through "hybrid" courts. In Part V, I will examine some of the likely objections to the practical effects of the networks that may emerge. Last, I will draw implications from the emergence of international criminal networks for the study of transgovernmental networks more generally.

I. A NEW WORLD ORDER OF TRANSNATIONAL NETWORKS

Political scientists first pointed to the rise of "transgovernmental" networks in the 1970s. Robert Keohane and Joseph Nye argued that foreign affairs were increasingly shaped by "sets of direct interactions among sub-units of different governments that are not controlled or closely guided by the policies of the cabinets or chief executives of those governments." More recently, Anne-Marie Slaughter has analyzed the proliferation of networks of government actors and their role in cross-border regulation and international law.

According to Slaughter, our "new world order" is increasingly shaped by alliances of government actors across countries, who are working together to create and enforce international rules. Such alliances are typically formed among lower-level government officials charged with implementing regulatory policy that has cross-border effects. To the extent that these officials have a certain amount of discretion in implementing the policy, they can participate in transgovernmental networks without involving central state authorities. Instead of relaying transnational matters through the State Department or a foreign affairs ministry, they may interact directly with their foreign or supranational counterparts.

Some networks are not purely "transgovernmental." They may be embedded within an international organization, such as the European Union, and some of their participants may be supranational officials. In the European Union, administrative networks between the European Commission and its national counterparts have developed to enforce antitrust and information-privacy laws. Networks may also have inter-governmental elements. Heads of state may sign an agreement creating the framework within which a network operates, and they may continually set broad priorities for the network’s
operations. Cooperation among antitrust authorities, for example, is often sanctioned by an agreement among heads of state of the participating countries. Alternatively, elements of domestic executive, judicial, or legislative branches may exercise ongoing oversight over the network's functions—for example, by requiring reports, calling hearings to examine the network's operations, or reviewing the legality of a particular network action in a judicial proceeding.

One of the main advantages of interaction among government officials is the access it gives them to new sources of specialized knowledge. For this reason, networks are most likely to arise in response to cross-border problems whose solutions depend largely on technical expertise rather than on political judgment. These are the areas in which officials derive the greatest benefits from sharing knowledge. Coordination is easier for another reason as well: The less politicized the issue, the more likely participants are to agree on the policies to be pursued through transgovernmental cooperation.

Areas of cross-border regulation that arguably fit that profile, to a greater or lesser degree, include banking, securities, telecommunications, and antitrust. While political disagreement exists even in these areas, it is less frequent, and many disputes can be resolved through appeals to technical expertise. Unsurprisingly, networks have been very active in these fields. By contrast, areas such as human rights, international criminal justice, and national security are much more politically sensitive and therefore less likely to engender transgovernmental cooperation.

Yet even when there is no pre-existing agreement on regulatory priorities, networks may arise if some of the participating states stand to benefit from adopting the regulatory approach of other states. These benefits may include attracting foreign investment, receiving trade concessions, or being admitted to an international organization. An example of this is the rise of networks in the antitrust area, where lower-level officials from less developed countries openly cooperate with their counterparts from the European Union or the United States by adopting rules that would help them attract investment and aid from these wealthier partners.


13. See Zaring, supra note 2, at 598–600.


15. See Bignami, supra note 11, at 845.

16. See supra note 2.

17. SLAUGHTER, supra note 1, at 208; Bignami, supra note 11, at 867.

18. Bignami, supra note 11, at 845.

19. Id. (providing the example of foreign investment as a benefit).

20. See Devuyst, supra note 2, at 133; Raustiala, supra note 2, at 40–41, 60–61.
Transgovernmental cooperation is also more likely to occur where regulators have already begun interacting with one another in international organizations.\textsuperscript{21} International organizations provide forums for regular exchanges among state and agency officials, thus increasing trust and understanding among them. In this way, they offer a starting point and a supporting structure for the subsequent, less formal exchanges in networks.

Finally, networks are more likely to develop where the potential participants have a degree of autonomy from their central governments to act within their spheres of competence. Studies of cooperation within the European Union have found that transgovernmental cooperation is more likely to occur in areas where “regulators on each side of the Atlantic enjoy considerable de facto or de jure independence from their political masters . . . .”\textsuperscript{22} This is hardly surprising, because the key to networks’ success is their ability to provide fast and flexible responses to global regulatory problems, which in turn depends on their independence.

Networks may exercise a number of functions that have traditionally been left to international organizations or to intergovernmental cooperation through treaties and executive agreements. They may, for example, work to harmonize rules to address cross-border problems or coordinate strategies to enforce already-existing international rules. Good examples of the effort to create common standards are the Basel Committee on Banking Supervision and the International Organization of Securities Commissioners, which have issued codes of best practices on regulating banking and securities and on combating money laundering.\textsuperscript{23} Networks not only create guidelines for action, but also provide forums for longer-term dialogue on issues of global concern. Intelligence agencies exchange ideas on the fight against terrorism; legislators from different countries discuss strategies to address common environmental and public health threats; judges debate the best interpretation of trade rules or human rights through legal opinions and at international conferences. In this way, networks help develop international rules through a decentralized, deliberative process.

Networks promote not only the development, but also the enforcement of international law. They help strengthen domestic compliance in two principal ways. As mentioned earlier, they serve as a conduit for the exchange of valuable information, as their participants share experiences, create “best practices” guidelines, and help develop alternative solutions to common problems. Furthermore, they provide technical assistance to help individual states realize shared objectives. Environmental law has been an area in which networks have been successful in promoting domestic compliance with international rules.\textsuperscript{24} For example, working groups, joint training sessions, and dispute resolution mechanisms created under NAFTA allowed

\begin{itemize}
  \item \textsuperscript{21} Whytock, supra note 2, at 32.
  \item \textsuperscript{22} Pollack & Shaffer, supra note 5, at 298; see also Whytock, supra note 2, at 31.
  \item \textsuperscript{23} Zaring, supra note 2, at 555-69.
  \item \textsuperscript{24} Raustiala, supra note 2, at 48–49.
\end{itemize}
regulators from the United States, Mexico, and Canada to pool efforts in enforcing international environmental rules.\textsuperscript{25} Other networks, sponsored by the United Nations, have relied heavily on technical assistance, regular meetings, and exchanges of information to promote domestic compliance with environmental law.\textsuperscript{26}

Whether they work to harmonize rules or promote compliance, networks are successful in large part because they establish ongoing relationships among individual government agencies or officials. The repeated interactions build trust and produce stable patterns of cooperation.\textsuperscript{27} "Aid, pressure, socialization, and education" influence individuals within the network, making them more likely to cooperate with peers from other states.\textsuperscript{28}

At the same time, transgovernmental networks are looser, more flexible formations than typical international organizations.\textsuperscript{29} They generally do not set rules through the typical process of formal treaty negotiations, but instead rely primarily on "soft-law" mechanisms—that is, standards, guidelines, and memoranda of understanding.\textsuperscript{30} Their organization consists largely of peer-to-peer ties among people who work for their respective national governments, but are not part of a separate international bureaucracy.\textsuperscript{31} Because networks typically lack overarching bureaucratic structures, they can adapt and respond more quickly to changes in the environment. Their flexibility also allows them to provide context-sensitive solutions to global problems. Finally, the soft law of networks, while not binding, is often at least as effective as traditional "hard-law" mechanisms such as treaties.\textsuperscript{32} It is especially valuable when problems are technically complex or politically sensitive. For complex technical problems, standards promulgated by a well-respected network of experts offer easily accessible and credible blueprints to follow.\textsuperscript{33} Politically, too, it is much easier for a government official to agree to a memorandum of understanding than for a government to enter into a formal treaty.\textsuperscript{34}

Though networks' ambit is transnational, the primary political allegiance of their participants rests with national constituencies. And ultimately, the power to enforce policies and implement strategies remains with national

\begin{itemize}
\item \textsuperscript{25} SLAUGHTER, supra note 1, at 53, 57–58, 189–90; Daniel C. Esty, Good Governance at the Supranational Scale: Globalizing Administrative Law, 115 YALE L.J. 1490, 1558, 1560 (2006).
\item \textsuperscript{26} See SLAUGHTER, supra note 1, at 66.
\item \textsuperscript{27} Id. at 3.
\item \textsuperscript{28} Id. at 35.
\item \textsuperscript{29} Id. at 11.
\item \textsuperscript{31} Raustiala, supra note 2, at 22.
\item \textsuperscript{32} SLAUGHTER, supra note 1, at 178–81.
\item \textsuperscript{33} Id. at 179, 181.
\item \textsuperscript{34} See Kenneth W. Abbott & Duncan Snidal, Pathways to International Cooperation, in THE IMPACT OF INTERNATIONAL LAW ON INTERNATIONAL COOPERATION 50, 70 (Eyal Benvenisti & Moshe Hirsch eds., 2004).
\end{itemize}
authorities, who can more easily override a network decision than a decision made by an international organization. This feature is important because it arguably makes transgovernmental networks more democratically legitimate than international organizations. As Slaughter suggests, networks may be a key to solving the “globalization paradox”—“needing more government and fearing it.” Networks may present a method of governing that is both more effective and more just than either a purely “horizontal,” state-centric approach to global issues, or a “vertical,” supranational method of governance.

II. THE CONCEPT OF TRANSGOVERNMENTAL NETWORKS IN INTERNATIONAL CRIMINAL LAW

At first glance, international criminal law would seem to present a different situation than other areas where networks have formed. International criminal law is, of course, by nature international—it is already largely “standardized” across borders (though not entirely so—as I explain later, many matters of enforcement, interpretation, and punishment still generate differences among countries affected by international crimes). Treaties and custom have created definitions of international crimes that are universal around the globe. So international criminal law does not necessarily call out for further standardization through transgovernmental networks—or at least not in the same way that, say, securities regulation might.

In fact, further standardization of international criminal law may at some point become undesirable. To the extent that there are differences in the way international criminal law is interpreted in various countries and tribunals—and there are some differences—this may actually be legitimate, as I have argued elsewhere. Criminal law involves judgments about responsibility, blameworthiness, and appropriate punishment, which are deeply political. It concerns questions that may have no single right answer and that depend on the particular moral views and political culture of the affected community.

While universal agreement exists regarding some of the central elements of international criminal law, details of interpretation and application may legitimately differ from country to country. For example, the use of the

35. See infra notes 200–204, 217–220 and accompanying text.
36. Slaughter, supra note 1, at 8.
37. Id. at 6–7.
40. For that reason, some commentators have been skeptical of the idea that networks would be created and would thrive in areas such as international criminal law, which are politicized and about which a great diversity of views exists. See Slaughter, supra note 1, at 208; cf. Bignami, supra note 11, at 867; Whytock, supra note 2, at 28–29.
death penalty for international crimes, while prohibited in international tribunals, is a legitimate choice of punishment in many countries emerging from violent conflicts. Similarly, trials in absentia, which are not permitted at international tribunals, may well have a place in domestic prosecutions, as they do in many civil law countries. Questions about substantive international criminal law—for example, what constitutes “proportionality and necessity” in military action and what is the precise boundary between military and civilian targets—may also be the subject of legitimately different interpretations in different political communities. For that reason, it may be best not to completely standardize international criminal law and instead to allow some room for diverging interpretations.

Assuming we do not necessarily want to standardize every facet of international criminal law, what good can networks do? The answer, paradoxically, is that in international criminal law, networks are more likely to help preserve diversity than they are to destroy it. This is so because in international criminal law, unlike securities, antitrust, and environmental protection, the main alternative is centralized promulgation of the law through international tribunals. Compared to these tribunals, which have established international bureaucracies to apply the law in a uniform fashion, networks are more likely to promote understandings of international criminal law that reflect the views of affected countries.

Another possibility, of course, would be to enforce international criminal law entirely at the domestic level. This would, at least in theory, allow the communities affected most directly by genocide and crimes against humanity to deal with these crimes in a manner consistent with the community’s own moral and political judgment. National prosecutions have other benefits too: They are generally more efficient and avoid some of the enforcement problems that plague international prosecutions.

But prosecution at the domestic level has frequently been problematic and is likely to continue to be so. International crimes are typically committed with the complicity or acquiescence of governments. Political pressure on local judges or a lack of resources may prevent prosecutions from hap-


43. E.g., Rome Statute of the International Criminal Court, supra note 38, art. 63.

44. WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 145–46 (2d ed. 2004).

45. See Ruth Wedgwood, The Irresolution of Rome, LAW & CONTEMP. PROBS., Winter 2001, at 193, 194; see also Rome Statute of the International Criminal Court, supra note 38, art. 8, para. 2(b)(iv); Assembly of States Parties to the Rome Statute of the International Criminal Court, 1st Sess., pt. II(B), art. 8, para. 2(b)(iii), ICC Doc. ICC-ASP/1/3 (Sep. 3–10, 2002). Other points of disagreement in international criminal law cover the definitions and application of a number of core principles, including command responsibility, superior orders, inhumane and degrading treatment, and incitement to genocide. See, e.g., SCHABAS, supra note 44, at 101–07.

pening at all or may lead to unfair results.\textsuperscript{47} Even if the government implicated in the crimes is no longer in power, the conflict that gave rise to the crimes may have strained the resources of the state and created serious political divisions that risk inflaming the violence anew.

Indeed, more frequently than is commonly acknowledged, the failure to prosecute international crimes at the domestic level is related more to lack of capacity than to sheer disregard of international law.\textsuperscript{48} During the last decade, in many countries emerging from dictatorship or a violent conflict, the new regime has sought to implement some form of transitional justice measures as a way to break with the past. These measures have taken the form of prosecutions, truth and reconciliation commissions, victim compensation schemes, vetting procedures, and most recently, referrals to the International Criminal Court.\textsuperscript{49} Where states have made a decision against prosecutions, it is often due to recognition of their limited resources or their political fragility.\textsuperscript{50} Rwanda’s post-genocide experience shows that even a country with a zeal to prosecute international crimes may have to settle for less than a full legal reckoning.\textsuperscript{51} In Iraq and Sierra Leone, too, the political

\begin{itemize}
\item \textsuperscript{47} Id.
\item \textsuperscript{48} The recent growth of organizations such as the International Center for Transitional Justice and the International Criminal Law Services Foundation, which provide advice and technical assistance to national authorities interested in pursuing accountability for international crimes, attest to the willingness of many governments to comply with international criminal law, as well as to their limited capacity to do so. This finding is consistent with the insights of Abram and Antonia Chayes’ “managerial” theory of compliance, which states that noncompliance is at least as much a result of lack of capacity as a lack of will to comply. ABRAM CHAYES \& ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS 4 (1995).
\item \textsuperscript{51} The UN set up the International Criminal Tribunal for Rwanda to assist Rwanda in its efforts to deal with international crimes committed during its civil war. The Tribunal, however, has
will to prosecute exists, but both the Special Court for Sierra Leone and the Iraqi Special Tribunal depend heavily on foreign assistance to try perpetrators of human rights violations. The recent voluntary referrals of cases to the ICC by Uganda, the Central African Republic, and the Congo also suggest a lack of capacity to deal with domestic prosecutions for human rights violations—not only for financial reasons, but also for fear of destabilizing domestic politics. In brief, domestic governments are often nominally committed to the notion of bringing perpetrators of human rights violations to justice, but they perceive that the costs of doing so outweigh the benefits.

In these circumstances, networks can help promote and facilitate prosecutions of international crimes by reducing the costs and increasing the benefits of taking that step at the national level. In particular, networks have the ability to address two key problems of purely national prosecutions—lack of resources and political frailty. They can do so first by offering technical assistance to rebuild judicial systems devastated by conflict. They can serve as a constant source of ideas and information and help build domestic enforcement capacity. Through their participation in a network, officials from post-conflict states can learn from their counterparts in more stable and developed legal systems about new models of legislation and strategies of implementing international criminal law. While international criminal law may not involve as many technical issues as, say, telecommunications or securities regulation, there is still a bit of “science” in how one goes about prosecuting international crimes. Transferable lessons can relate to the role of victims in the proceedings, witness protection, forensics of human rights violations, and a range of other techniques of investigating complex systemic crimes.

Aside from building up local capacity to prosecute crimes, networks can lend political support to actors who aim to implement international criminal law domestically. They can provide such local actors “with standards, approved by the international community, that strengthen efforts to promote new values within domestic bureaucracies and among the public.” These standards can be used to evaluate government behavior and “mobilize politi-

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53. Telephone Interview with Marieke Wierda, Senior Assoc., Int’l Ctr. for Transitional Justice (Feb. 15, 2006).

54. See id.

cal pressure when conduct falls short.” And where networks take the form of hybrid prosecutions and trials, the participation of international officials alongside local prosecutors and judges can help minimize the danger of political interference with the legal process.

Intervention by networks into domestic affairs is less likely to be perceived as an imposition of foreign norms than investigations and prosecutions by a foreign or international tribunal. In part, this is because networks involve local actors in a dialogue with their foreign counterparts. The informality of network exchanges also contributes to their political acceptability. Networks operate through soft-law mechanisms—standards and guidelines, rather than binding treaties—and these soft-law tools offer greater flexibility to domestic actors. When domestic officials are uncertain whether they can follow through on their international commitments—for example, because of weak institutions or political opposition at home—they will prefer soft-law mechanisms to international organizations or treaties. As Ken Abbott and Duncan Snidal explain, soft-law mechanisms allow local actors to “test political reactions to [international commitments] and preserve deniability if the responses are adverse.” They also “provide[] breathing space for supporters and relevant governmental agencies to organize for implementation” and to persuade skeptics.

It must be recognized, however, that international criminal law networks will not solve the problem of recalcitrant regimes that entirely reject the legitimacy of international criminal law norms. Instead, networks can work with and influence those regimes that are in principle convinced of the validity of these norms, but that perceive it as too difficult or politically inconvenient to implement them in practice.

III. PROMOTING INTERNATIONAL CRIMINAL LAW NETWORKS

While the development of international criminal law networks may seem normatively attractive for the reasons discussed in the previous Section, this may not matter much if, in practice, these networks are not likely to come into being. This Section therefore examines the forces that may propel actors at the domestic and supranational level to create and support international criminal law networks.

When compared to violations of securities, antitrust, or environmental laws, international crimes do not always create cross-border effects that would prompt countries to cooperate at the global level. Crimes associated

56. Id.
57. See id.
58. Id. at 69–70; see also Whitehead, supra note 30, at 701–02 (explaining how flexible, non-binding standards issued by the Basel Committee, a banking regulation network, allowed Japan to show commitment to the network norms, while lowering its compliance to adjust to the Asian banking crisis).
59. Abbott & Snidal, supra note 55, at 70.
60. Id.
with an armed conflict may produce a refugee crisis or embroil neighboring countries in the conflict. But in most instances, these effects are regional, rather than global, and they rarely affect the more powerful, developed countries directly. Moreover, in contrast to regulatory problems like antitrust violations or transnational crimes such as drug-trafficking and terrorism, international crimes are usually one-time, overwhelming events, which may not appear to require continuous transgovernmental coordination.

At the same time, the heinous nature of these crimes provokes unparalleled moral outrage. The outrage often compels developed countries to intervene in some fashion, even when they are not materially affected by the conflict. The intervention may occur during the conflict, in the form of a peacekeeping or humanitarian aid mission. Or it may happen after the end of the hostilities and include help with the prosecution of past atrocities and the reestablishment of the rule of law. The reactions to the Sierra Leonean, Rwandan, Yugoslav, and East Timorese conflicts, which led to the establishment of international or hybrid tribunals to prosecute war crimes and crimes against humanity, are examples of this latter type of intervention. But there are many instances in which moral outrage is not sufficient to prompt significant action by the international community, and the response to the atrocities is little more than symbolic condemnation. Whether and how the global community responds depends in large part on the level of public awareness and concern for human rights violations. This is where the next factor—the involvement of non-governmental organizations—comes into play.

Non-governmental organizations are often catalysts for global cooperation in international criminal law. They report on situations giving rise to international crimes, lobby governments and international organizations to respond to these situations, and even become directly involved in managing the response. The active participation by NGOs in the negotiations of the

61. For example, the Rwandan genocide resulted in massive refugee flows to the Democratic Republic of Congo ("DRC"). The conflict between the Hutu refugees and the Rwandan government continued on Congolese territory and was one of the catalysts for the larger conflagration within the Congo, which took on regional dimensions. E.g., U.N.: Congo War Could Result in Genocide, CNN, Nov. 24, 1998, http://www.cnn.com/WORLD/africa/9811/24/rwanda.congo/. For a discussion of the more recent refugee flows and spillover of fighting from the Sudan to Chad, see Katharine Houreld, Darfur Refugees Forced to Join the Fight, CHRISTIAN SCI. MONITOR, Apr. 28, 2006, at 6, available at http://www.csmonitor.com/2006/0428/p06s02-woeu.html.


63. For example, many NGOs have launched campaigns to raise awareness and demand action in response to the serious human rights violations in the Sudan. E.g., Amnesty International, Make An Impact—Make Some Noise, http://noise.amnesty.org/site/c.adKIvNsEkG/b.1630807/k.8DD9/Make_an_Impact.htm (last visited Sep. 23, 2006); Human Rights First, Help Organize a Peace Envoy for Darfur, http://www.humanrightsfirst.org/international_justice/darfur/index.asp (last visited Sep. 23, 2006); Human Rights Watch, Sudan: No Justice for Darfur Victims, http://www.hrw.org/english/docs/2006/06/08/sudan13516.htm (last visited Sep. 23, 2006). For a description of the various other ways in which NGOs have worked to shape norms and build transnational coalitions, see, for example, KECK & SIKKINK, supra note 6, at 79–198, and Mark A. Pollack & Gregory C. Shaffer, Transatlantic Governance in Historical and Theoretical Perspective, in TRANS-ATLANTIC GOVERNANCE IN THE GLOBAL ECONOMY, supra note 2, at 32.
Rome Statute of the International Criminal Court is perhaps the best-known example of their influence in the field of international criminal law. Non-governmental organizations supplied delegations to the Rome Conference with commentaries on the ICC draft statute, lobbied for provisions in the statute, prompted reluctant governments to sign on to the project, and ultimately saw many of their recommendations adopted by the delegations.  

The negotiation of the ICC Statute was perhaps a culmination of NGO efforts in international criminal law, but these organizations had been involved long before then and have remained actively engaged since. Transitional justice efforts in Sierra Leone and East Timor, for example, have been greatly influenced by the work of non-governmental organizations such as Human Rights Watch, No Peace Without Justice, and the International Center for Transitional Justice. These NGOs and others continue to gather and disseminate information about developments in international criminal law, and they keep these issues on the agenda of national governments. In countries emerging from conflict, NGOs are often directly involved in transitional justice efforts by providing resources, helping draft legislation, and training local authorities to investigate and prosecute international crimes. In countries that allow private parties to file a criminal complaint with the public prosecutor, NGOs have used that opportunity to press for international crimes prosecutions.

64. Christopher Keith Hall, The First Two Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court, 91 AM. J. INT'L L. 177, 183 (1997). At Rome, NGOs garnered the power of face-to-face interaction that makes networks so effective. As one participant in the Rome Conference reported:

Many of the delegates, and almost all of the Secretariat officials and key Non-Governmental Organization (NGO) representatives, knew each other personally or by reputation at the start of the negotiations, remained in the negotiations through the diplomatic conference in Rome, and are now at work in the PrepCom in New York. Knowledge of each other's styles, personalities, and abilities—both strengths and weaknesses—provided confidence, predictability and mutual forbearance.

John Washburn, The Negotiation of the Rome Statute for the International Criminal Court and International Lawmaking in the 21st Century, 11 PACE INT'L L. REV. 361, 364 (1999). NGOs' influence was also due to their expertise in the area—their representatives included former government policymakers and academics who were familiar with many of the technical issues facing the Rome negotiators, and many of the NGOs had long been operating in the field of human rights. See Richard Falk & Andrew Strauss, On the Creation of a Global Peoples Assembly: Legitimacy and the Power of Popular Sovereignty, 36 STAN. J. INT'L L. 191, 202 (2000).

65. Falk & Strauss, supra note 64, at 202 n.56 (citing Richard Falk, Telford Taylor and the Legacy of Nuremberg, 37 COLUM. J. TRANSNAT'L L. 693, 716–21 (1999)).

66. Interview with Marieke Wierda, supra note 53; Email from Noah Novogrodsky, Dir., Int'l Human Rights Program, Univ. of Toronto Law Sch., (Feb. 13, 2006) (on file with author) (noting that the recommendations by Human Rights Watch for the SCSL Statute were adopted almost in their entirety and that groups like No Peace Without Justice and the International Crisis Group had a strong role to play in the formation of the Special Court).


NGOs can open up paths of cooperation not only between themselves and government officials, but among government officials as well. By keeping international crimes on the agenda of developed countries and by establishing contact points in countries affected by conflict, they can provide the building blocks for more robust transgovernmental cooperation in the field.

Despite their critical role in promoting cooperation in international criminal law, as well as in other areas of global concern, non-governmental organizations feature only on the sidelines of the current academic discussion about global government networks. This may be because they complicate a model that is already difficult to keep conceptually tidy. For instance, to explain how individual governmental officials interact with one another, independently of their central governments, scholars must assess the level of autonomy of these officials in their exchanges with one another. It is difficult to determine empirically whether an official taking part in a network acted in a certain manner as a result of her commitment to the network, or whether she was dutifully following the orders of her central government. If we add more layers of interaction by including non-governmental organizations, it becomes even more challenging to decipher whether a certain action of the network was the result of non-governmental pressure or of the trust built up during the repeated interactions among government officials in the network.

NGOs are excluded from the discussion about networks for yet another reason—they are perceived by some scholars to detract from the normative appeal of the transgovernmental model. Anne-Marie Slaughter, for example, is concerned about the lack of accountability of private actors, and for this reason, she does not include NGOs in her model of networks. This judgment is contestable; in some undemocratic countries, NGOs may better represent popular views on human rights than the government. But more importantly, the exclusion of NGOs impoverishes the description of pathways of cooperation and influence in transnational networks. As the previous paragraphs documented, in international criminal law, non-governmental organizations have spearheaded many initiatives that may later be taken over and transformed by transgovernmental networks. Moreover, as Slaughter herself acknowledges, NGOs can have a very positive influence on the accountability of networks by monitoring the behavior of officials within those networks and preventing them from acting in complete disregard of the interests of the populations they represent.


70. SLAUGHTER, supra note 1, at 9–10.

71. Id. at 11.
In addition to NGOs, the International Criminal Court is likely to encourage transgovernmental cooperation. There are several reasons why the court may find it advantageous to take that approach. First, the court has scarce resources and limited political support, so it must rely on national authorities to enforce its decisions, to help with investigations, and to prosecute crimes that the ICC cannot address on its own. \(^7\) Given that the ICC has no independent enforcement powers, it is clear that national authorities will be of essential assistance in collecting evidence, apprehending suspects, and enforcing court judgments. \(^7\) As a policy paper of the Office of the Prosecutor ("OTP") of the ICC explains:

The principle of complementarity represents the express will of States Parties to create an institution that is global in scope while recognising the primary responsibility of States themselves to exercise criminal jurisdiction. The principle is also based on considerations of efficiency and effectiveness since States will generally have the best access to evidence and witnesses. Moreover, there are limits on the number of prosecutions the ICC can bring. \(^7\)

Given these limitations on the court’s mandate and resources, much of the burden of international-crimes prosecutions will remain with national authorities. But as discussed earlier, national authorities will sometimes lack the capacity or the willingness to prosecute international crimes on their own. Vertical networks, \(^7\) meaning closer contacts and collaboration between ICC and national officials, could therefore be an essential tool in promoting the domestic enforcement of international criminal law. In its statements, the OTP has acknowledged the importance of this type of cooperation. It has already pronounced that its outreach strategy will be to “develop a network of relationships between the Prosecutor, national authorities, multi-lateral institutions, [and] non-governmental organisations . . . to ensure that in any kind of situation in which the Prosecutor is called upon to act, practical resources are made available to enable an investigation to be mounted.” \(^7\)

In pursuing this strategy, the OTP has begun developing contacts with national authorities charged with investigating and prosecuting war crimes, crimes against humanity, and genocide. \(^7\) It has also expressed its willingness to provide information and other types of assistance to national authorities. \(^7\) Where the ICC does not have the resources or the mandate to


\(^73\) Turner, supra note 39, at 7-8.

\(^74\) Office of the Prosecutor, supra note 72, at 4.

\(^75\) Slaughter, supra note 1, at 20-22 (defining vertical networks).

\(^76\) Office of the Prosecutor, supra note 72, at 2.

\(^77\) Id. at 2, 5, 7.

\(^78\) See id. at 8; Interview with Rod Rastan, Office of the Prosecutor, Int’l Criminal Court, in The Hague, Neth. (July 13, 2006).
provide assistance, it plans to put the relevant governments in contact with other partners who can help them build up their prosecutorial capacity. Together with non-governmental organizations and state authorities, the OTP is also a key participant in the Justice Rapid Response Initiative—a program launched by national governments to help states that are willing but not quite able to investigate and prosecute international crimes. More ambitiously, the OTP has proposed a strategy of dividing the labor of investigations between national and international authorities and perhaps even conducting proceedings in the region where the crimes were committed. Once such vertical networks are established with the assistance of the ICC, they could lay the ground for more regular horizontal contacts and relations among national investigators, prosecutors, and judges.

The ICC is also likely to serve as a catalyst for networks in quite a different way. The principle of complementarity will encourage some national governments to undertake war crimes prosecutions so as to preempt action against their nationals by the ICC. To avoid a finding by the ICC that they are unable to prosecute international crimes adequately, states parties to the Rome Statute of the ICC have already begun adopting implementing legislation. As this legislation is passed, special units are likely to be established within national law enforcement and prosecution agencies to handle war crimes cases. These units will therefore be at hand to participate in international criminal law networks.

Collaboration is already occurring among state officials to combat "transnational" crimes such as terrorism, drug-trafficking, and money laundering. It is to be expected that such collaboration will expand to include efforts to address international crimes. This has already begun to happen in Europe, where several countries have established special prosecutors’ offices to deal with trans-border organized crime, as well as with war crimes and crimes against humanity. The U.S. Department of Justice ("DOJ") has also

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79. Interview with Rod Rastan, supra note 78.
80. See infra notes 121–125 and accompanying text.
broadened some of its technical assistance for efforts against transnational crimes to include international crimes. The DOJ Office of Overseas Prosecutorial Development, Assistance and Training ("OPDAT") was established with the primary mission of providing assistance to foreign nations so as to equip "the U.S. with a stronger base of foreign cooperation in the fight against organized crime, illegal narcotics, and terrorism." In the countries of the former Yugoslavia, where organized crime and war crimes are closely intertwined, OPDAT assistance has already been extended to cover prosecution of war crimes as well.86

These developments are not surprising. The skills required to investigate and prosecute transnational and international crimes are similar, and it makes sense, for the sake of efficiency, to entrust the same officials with responsibility for both types of crimes. And when programs such as OPDAT offer assistance to a post-conflict criminal justice system to address terrorism and organized crime, they help strengthen the system's overall capacities and thus also support efforts to prosecute international crimes.

Furthermore, domestic law enforcement authorities and international criminal courts' investigators are increasingly learning about the links between transnational and international crimes.87 It is hard to say whether this is because the groups committing these crimes have started interacting more frequently, or whether the connections are simply becoming clearer to law enforcement and prosecuting authorities at this point. It may well be that the greater scrutiny of war crimes and crimes against humanity after the establishment of the international and hybrid criminal tribunals has clarified pre-existing links between these crimes and cross-border organized crime. In some instances, international prosecutors may be purposely emphasizing the connections to transnational crimes in order to attract attention and resources to their own efforts. The Special Court for Sierra Leone, for example, pointed to the links between Charles Taylor and Al-Qaeda in the hope of drawing the attention of U.S. authorities, which could provide more funding to the court and put more pressure on Nigeria to surrender Taylor.88 While the connections to Al-Qaeda have not

http://www.icls-foundation.org (last visited Sep. 23, 2006) (reporting that the Chief Public Prosecutor for the Norwegian National Authority for the Prosecution of Organised and Other Serious Crimes has joined the network).


been substantiated so far, there is evidence of Hezbollah ties in Sierra Leone. More recently, the Prosecutor of the International Criminal Court has highlighted the links between cross-border financial crimes and war crimes. The Office of the Prosecutor has called on states to cooperate in the investigation of international crimes by providing information on the financial transactions that fueled the commission of such crimes; in turn, the Office has committed to offering to states whatever evidence it has of financial crimes that can be prosecuted domestically.

IV. EMERGING INTERNATIONAL CRIMINAL LAW NETWORKS

Networks of war crimes investigators, prosecutors, and judges have in fact begun to develop. Most such networks focus on tasks that can be categorized as "coordination and support." These include sharing information, coordinating investigative and prosecutorial efforts, promulgating model practices, and providing assistance to national authorities. Some networks are even more formalized and integrate foreign officials directly into the local judicial, prosecutorial, and investigative services on a temporary basis. These "joint action" networks are becoming more common in international criminal law, in the form of hybrid tribunals created to prosecute and adjudicate international crimes in post-conflict situations.

A. Coordination and Support Networks

In comparison to other areas, international criminal law is not an exceedingly complicated policy area that requires institutional coordination across borders. There is no obvious need for rule harmonization. The basic contours of the law are laid out in treaties, so they can easily be transposed into national legislation and applied by domestic courts. Still, coordination and support networks can play a very useful role in the enforcement of international criminal law. States emerging from armed conflict often lack the resources to develop and implement a prosecution strategy for international crimes, which usually involve mass atrocity, governmental complicity, ser-


90. OFFICE OF THE PROSECUTOR, supra note 72, at 2–3. To coordinate efforts in areas where transnational and international crimes intersect, the Office has also established contacts with other international and regional organizations, including Interpol, the EU Office of the High Representative for the Common Foreign and Security Policy, and Security Council Expert Panels on the exploitation of natural resources and armed conflicts. Interview with Rod Rastan, supra note 78.

91. A network of parliamentarians is also in the process of being developed, in the form of a Consultative Assembly of Parliamentarians for the International Criminal Court and the Rule of Law, but because it is still at a very early stage, it is not included in the discussion. See CONSULTATIVE ASSEMBLY OF PARLIAMENTARIANS FOR THE INT’L CRIMINAL COURT, PARLIAMENTARIANS FOR GLOBAL ACTION, WELLINGTON RESOLUTION ON THE INTERNATIONAL CRIMINAL COURT (ICC), MULTILATERALISM AND INTERNATIONAL COOPERATION (2004), http://www.pgaction.org/uploadedfiles/Wellington%20Final%20Doc(2).pdf.

92. See supra note 38.
ous security problems, and sometimes cross-border investigations. Networks can be of assistance in helping states establish effective investigation and prosecution strategies.

In particular, three sets of international criminal law networks have begun developing to exercise these functions: a network of investigators of war crimes, a prosecution network, and a global community of international-crimes judges.

1. Investigative Networks

On the investigative side, vertical support networks are developing through the international criminal tribunals and Interpol. These networks can grow stronger and also serve as the starting points for greater horizontal contacts among national officials charged with investigating war crimes, crimes against humanity, and genocide. A number of coordination and support networks have also formed to combat trans-border crime, and they can provide a model for transgovernmental coordination in complex criminal matters.

Networks of investigators have developed at the supranational as well as the transnational level. Investigators of the several international criminal tribunals have begun cooperating with each other and exchanging information and strategies. For example, when the International Criminal Court began its first investigations in Uganda, Congo, and Sudan, it relied on effective practices identified by the Yugoslavia and Rwanda tribunals before it.

Interpol, a global conduit for the exchange of information among national police forces, has also begun to focus some of its efforts on war crimes, crimes against humanity, and genocide. It has assisted in the efforts of international tribunals to track down war crimes suspects and has begun coordinating the activities of national units specializing in investigating international crimes. It has hosted several working group meetings to identify the needs of these units and has committed to playing a larger role in assisting them through the "increased use of Interpol databases, the preparation of a best practice manual, and identification of points of contact in member countries." It has further signed a cooperation agreement with the International Criminal Court, giving the court access to Interpol's databases.

In addition to the relatively formalized network-building by the international tribunals and Interpol, more decentralized exchanges are occurring among the investigators themselves. Already two international associations of investigators have begun cooperating with each other and exchanging information and strategies. For example, when the International Criminal Court began its first investigations in Uganda, Congo, and Sudan, it relied on effective practices identified by the Yugoslavia and Rwanda tribunals before it.


95. Id.

96. Id.
war crimes investigators have been formed—the Institute for International Criminal Investigations ("IICI") and the International Association of War Crimes Investigators ("IAWCI"). The IICI is sponsored by several European foreign ministries as well as by private donors, and it focuses primarily on training and deployment of international-crimes investigators at scenes of war crimes around the world. It has a close relationship with the international war crimes tribunals, and it created a manual of investigative protocols that it offered to the Preparatory Commission of the International Criminal Court in 2002. The IAWCI, on the other hand, is above all a forum for investigators to meet and exchange ideas and experiences; it emphasizes its role in creating bonds and friendships among war crimes investigators, providing career networking opportunities, and making charitable contributions to areas in need of war crimes investigative expertise.

Domestic in its origin, but transnational in its operations, the Argentine Forensic Anthropology Team is another organization that has fostered global exchanges in the investigation of human rights violations. It offers training and advisory assistance in human rights-related forensic science; promotes national and international forensic standards; and disseminates information relevant to the investigation of human rights violations.

These recent developments suggest that a global network of international-crimes investigators is on the rise. Although many of the associations that form part of it are non-governmental organizations, they are heavily supported by governments and often include national war crimes investigators in their ranks. If these networks were to be integrated more closely within national war crimes units, they could facilitate the work of these units by exchanging information and ideas with them and by offering training and technical assistance. They would improve domestic capacity to fulfill international commitments without imposing a uniform approach to war crimes investigations.

A possible model for the further development of transgovernmental networks among investigators is Europol. Created by the European Union in the early 1990s, Europol relies on a 590-member staff in assisting national efforts to combat transnational crime. Assistance mostly takes the form of generating and exchanging information and ideas. Europol's officers produce and make available to member states threat assessments, crime analyses, and op-

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99. Id.
Transnational Networks

The network also provides training and technical assistance to its members. Though Europol has not been in existence for a long time, it is already showing some results. After relying on its services in particular cases, local police officers have increasingly become convinced of the usefulness of the network. The number of requests for assistance that Europol receives has been going up steadily since its creation. Europol is particularly valued for its ability to provide competent and comprehensive analysis of cross-border crimes, to fashion multi-disciplinary approaches to law enforcement, and to help officers from different states to overcome language and cultural barriers among them.

Similar law enforcement networks have even begun developing at the sub-national level. Dissatisfied with the "slow and sometimes grudging" way in which federal agencies transmit information, chiefs of police in the United States recently announced the decision to create their own network of terrorism-related information for their common use. In fact, the New York City Police Department is "ahead of the curve": It has already established such a network with police forces and intelligence agencies around the world.

103. Id. Europol maintains a computerized system that allows the input, access, indexing, and analysis of data under a strict framework for data protection. Id.; MARCEL-EUGÈNE LEBEUF, ON ORGANIZED CRIME AND POLICE COOPERATION IN THE EUROPEAN UNION—LESSONS LEARNED: AN INTERVIEW WITH PROFESSOR CYRILLE FIJNAUT 5 (2003), http://www.rcmp-grc.gc.ca/ccaps/reports/fijnaut_e.pdf ("Europol is a collection of liaison officers... connected immediately, in one minute, by telephone, fax, by e-mail with the operational forces in the member states.").


105. LEBEUF, supra note 103, at 8-9. For example, the Netherlands relied on Europol when investigating ecstasy drug-trafficking cases and found that the cooperation significantly reduced the country's international communications burden. Id. at 9-10.


107. See Minutes of Evidence Taken Before the European Union Committee (Sub-Committee F) (Oct. 27, 2004), in EUROPEAN UNION COMM., AFTER MADRID: THE EU'S RESPONSE TO TERRORISM, 2004-5, H.L. 53, at 65, 76, available at http://www.publications.parliament.uk/pa/ld200405/ldselect/ldeucom/53/53.pdf [hereinafter AFTER MADRID] (examination of Assistant Commissioner David Veness, Metropolitan Police); Minutes of Evidence Taken Before the European Union Committee (Sub-Committee F) (Dec. 8, 2004), in AFTER MADRID, supra, at 180, 185 (explaining that the value of Europol is more on the analytical side, whereas Interpol's added value is mostly in data gathering).

108. Europol staff includes not only regular police, but also customs, immigration, border, and financial police officers.

109. Law enforcement officers can address a request to their Europol National Unit in their native language and receive the answer back in the same language.

the world and receives information from them independently of federal authorities.111

These European and sub-national networks of law enforcement officers can offer a useful blueprint for the future direction of transgovernmental cooperation in investigating international crimes. Governments can simply extend the mandate of transnational crimes units to cover war crimes and crimes against humanity. As discussed earlier, the skills required to investigate these types of crimes are transposable, and the concentration of efforts into the same office makes sense, given the increasingly visible connections between transnational and international crimes.

2. Prosecution Networks

Like investigators, prosecutors at the international criminal tribunals have begun exchanging ideas about the best way to approach common challenges. These steps provide a strong basis for the formation of a global network that would engage national prosecutors dealing with the same issues.

Through the Colloquium of Prosecutors of International Tribunals, supranational prosecutors from the ICTY, ICTR, ICC, and the Special Court for Sierra Leone (“SCSL”) meet annually to “discuss the challenges and lessons learnt in the investigation and prosecution of international crimes” and to formulate best practices.112 Topics of discussion include “evidence management, witness and protection management, gender crimes, operating procedures, tracking and arrests, speeding up trials” and “political strategies towards non-cooperating States.”113 Before the Iraqi Special Tribunal began its operation, investigators, prosecutors, and judges of the ICC and the SCSL met with their counterparts at the IST to discuss prosecutorial and trial management strategies, and more generally, the applicability of international criminal law and procedure to the cases likely to come before the IST.

These types of interactions are strongly encouraged by non-governmental organizations, the United Nations, and certain governments that have shown special interest in international criminal justice. For example, in 2005, the International Center for Transitional Justice, a New York-based NGO, put together an international criminal law conference in South Africa, assembling domestic and international war crimes prosecutors.114 The goal was to exchange information about international crimes prosecu-

111. Id.
114. Interview with Marieke Wierda, supra note 53.
tions and discuss opportunities for creating networks in the field. The Office of the United Nations High Commissioner for Human Rights has also contributed to this network- and capacity-building process by developing, together with NGOs and war crimes prosecutors, a "best practices" manual for the prosecution of crimes such as genocide, crimes against humanity, and war crimes. The manual addresses strategic issues, such as the factors to be considered in selecting targets for prosecution; practical issues, such as witness protection; and legal questions, such as the applicable law, trial management, and procedural protections. Finally, the recently created International Criminal Law Services Foundation, a non-profit organization, has begun offering international criminal law training and advice to interested national authorities and individuals. It has compiled a list of experts, including investigators, prosecutors, judges, and defense attorneys, who are available to offer their services to counterparts across the world. Some of these experts have already advised officials at the recently established hybrid court in Cambodia.

A small group of governments has supported such network-building efforts very actively and has conceived an ambitious project, the Justice Rapid Response Initiative ("JRRI"), which appears to be the beginning of a broad international criminal law network of investigators, prosecutors, judges, and NGO associates. The goal of the initiative is to enhance the ability of states to bring to justice perpetrators of war crimes, crimes against humanity, and

115. Id.
119. International Criminal Law Services Foundation, People of ICLS, http://www.icls-foundation.org/Contenuto/About/index.php (last visited Sep. 23, 2006). The foundation provides services including the following: [A]dvise a defence counsel on the international criminal law as applied in a specific case before a hybrid court; advise a registrar and prosecutor on the practical aspects of protecting witnesses in their jurisdiction; [or] train a country's senior judges on the law of the International Criminal Court as incorporated in domestic legislation . . . .

121. These governments include Argentina, Brazil, Canada, France, Germany, Netherlands, Norway, Sweden, Switzerland, and the UK. Also involved in the planning stages of the JRRI were the EU Commission, the ICC Office of the Prosecutor, and NGOs such as the Vera Institute for Justice, International Center for Transitional Justice, Coalition for an ICC, Argentine Anthropological Forensic Team, and International Institute for Criminal Investigations. INT'L CRIMINAL DEFENCE ATTORNEYS ASS'N, JUSTICE RAPID RESPONSE INITIATIVE 1 & n.3 (Aug. 2004), http://www.aiad-icdaa.org/inici/Justice%20Rapid%20Response%20Report%20Aug%2004.pdf.
Upon request by the affected national authorities, JRRI would quickly dispatch experts and offer other short-term assistance. The scope of the initiative is broad and covers all stages of the criminal process. This includes evidence preservation, prosecution assistance, short-term training of judges, and other infrastructural and training support. The degree of formality of the initiative is still being worked out. The most informal model envisions JRRI serving as a simple mechanism to share information and evaluate assistance needs. Another proposal suggests that the JRRI should not only share information and provide assistance, but also coordinate training standards. Finally, some have recommended making the JRRI an even more formal organization, with a Secretariat that would maintain a list of experts, compile relevant information, set training standards, and coordinate the training of JRRI participants. Whatever form the JRRI takes, by establishing clear contact points and methods of cooperation among national investigators, prosecutors, and judges, it has the potential to extend the benefits of short-term technical assistance to a long-lasting partnership in international criminal justice.

A possible model, and perhaps a building block, for budding international crimes networks like the JRRI are the existing networks of prosecutors dealing with terrorism, drug-trafficking and other cross-border crimes. Such alliances already operate at both the regional and international level. For example, in Latin America, the Symposium of Judges and Prosecutors of Latin America promotes the domestic enforcement of international environmental law by exchanging experiences, training prosecutors and judges in the field, and promoting public awareness on environmental issues. A more prominent regional network is Eurojust, a team of twenty-five prosecutors and investigative judges that coordinates and supports investigations and prosecutions of cross-border crimes in EU member states.

In 2003, only one year after it began operations, Eurojust handled about 300 cases. Its functions have ranged from coordinating searches in different countries to facilitating police access to foreign bank accounts, to identifying best practices in judicial cooperation across member states. One of Eurojust's most important contributions has been to promote contacts among prosecutors from different EU states and to foster trust and coordina-

122. Id. at 1.
123. Id.
124. Id. at 3.
125. Id. at 4–5.
tion among them.\textsuperscript{129} It has also provided training on questions of mutual legal assistance and cross-border crime prosecutions.\textsuperscript{130}

A much more informal prosecutorial network is the International Association of Prosecutors ("IAP"), which promotes global cooperation among prosecutors in investigating transnational crimes such as terrorism, organized crime, and money laundering. More specifically, it aims to foster good relations among prosecution agencies, facilitate the exchange of information and expertise, and help ensure speedy mutual assistance in cross-border crime investigations.\textsuperscript{131} To achieve these aims, the Association organizes conferences and meetings and coordinates training and technical assistance programs for prosecutors engaged in justice reform projects.\textsuperscript{132} It also publishes manuals to address common issues facing prosecutors around the world and to encourage prosecutions that meet a minimum standard of human rights.\textsuperscript{133}

Recently, the Association established contacts with the Office of the Prosecutor of the ICC.\textsuperscript{134} The two have begun working on a Memorandum of Understanding, which will outline possibilities for more regular exchanges.\textsuperscript{135} In that connection, the IAP Newsletter from February 2006 reports that the Office of the Prosecutor "has asked national prosecutors to be on the lookout for legal developments in [their] jurisdictions that may be appropriate for addition to the Legal Tools facility or otherwise relevant to the work of the OTP—legislation, case law, official procedures, etc."\textsuperscript{136} The IAP Newsletter further informed the members of the Association that "[t]he OTP is developing programs of assistance and protection for victims of..."
crimes and would welcome contact from practitioners with experience in this area.\textsuperscript{137}

Prosecutorial networks also form at the sub-national level. In the United States, attorneys general of different states have formed an alliance to pool their resources in the fight against crimes with federal or trans-border dimensions. The National Association of Attorneys General created the Executive Working Group on Prosecutorial Relations to coordinate state efforts in the fight against terrorism, cybercrime, and civil rights and hate crimes.\textsuperscript{138} The formation of networks at the sub-national level can be interpreted as yet another sign of the usefulness of coordination in the efforts to prosecute complex crime.

The prosecutorial alliances that have formed to deal with trans-border crime can provide a useful model of how to organize cooperation in the prosecution of serious human rights violations. Their experience can point to areas in which transnational cooperation adds real value to domestic prosecutions. Some of the functions they already exercise—for example, facilitating asset tracking and mutual legal assistance—can be used in international crimes prosecutions as well. In addition to offering a model of organization, these networks can serve as the starting point for closer cooperation among international crimes prosecutors from different countries. They can help identify contacts within national prosecutorial offices that have experience with complex trans-border crimes. More ambitiously, the mandate of these networks can be extended to include international crimes, because, as discussed earlier, the prosecution of international and transnational crimes requires similar skills and the concentration of these efforts within the same teams is likely to be more efficient.

In addition to providing technical assistance, such networks can play an important role in shaping prosecutorial norms around the globe. The publication of guidelines such as the IAP's Human Rights Manual represents a step in that direction. The ICC is considering developing similar prosecutorial standards and manuals, which it would offer as a guide to national authorities undertaking international-crimes prosecutions.\textsuperscript{139} At conferences and training sessions, these networks can further strengthen a sense of common identity among their members and spread a commitment to shared objectives. It may not be long before networks begin to influence decisions concerning whether and how to prosecute international crimes.

\textsuperscript{137} Id.


\textsuperscript{139} Interview with William Burke-White, Visiting Professor, Jurisdiction, Complementarity, and Cooperation Div., Office of the Prosecutor, Int'l Criminal Court, in The Hague, Neth. (July 13, 2006). For a discussion of how such soft law can have direct and practical effects on national authorities, see supra notes 32–34 and accompanying text.
3. Judicial Networks

Unlike investigators and prosecutors, judges have been somewhat less active in institutionalizing their transnational contacts. There are a few exceptions, but they occur in areas other than international criminal law. As mentioned above, the Symposium of Judges and Prosecutors in Latin America is a network of judges and prosecutors that exchanges information and ideas to promote the effective enforcement of environmental law. A Global Judges Symposium with the same goals and strategies was organized through the efforts of the UN Environmental Programme and the International Network on Environmental Compliance and Enforcement. At the European level, the European Judicial Network provides a point for coordinating mutual assistance in criminal matters. But these networks are very loose and have a fairly narrow mandate. They are not as institutionalized as, say, the Conferences of State Trial and Appellate Judges within the American Bar Association, which represent U.S. state judges' interests on issues of common concern, sponsor education initiatives, and promulgate standards for common practice questions, such as jury management and discovery practice.

Most transgovernmental “networking” among national and supranational judges occurs in less formal ways. These include personal exchanges during joint meetings and conferences and a dialogue set out in legal opinions. Judges from the ICC, ICTY, and ICTR have become actively involved in meetings and training sessions with their counterparts from Iraq, Indonesia, the former Yugoslavia, Cambodia, and elsewhere. These meetings provide a way to exchange information, but also to forge a common identity as international criminal law judges.

Exchanges among the judges continue beyond these joint conferences. Some judges carry lessons learned at international tribunals back to their domestic courts. Many also pursue their dialogue through decisions, law review articles, and public speeches. As Anne-Marie Slaughter has observed, we are witnessing a rise of a community of courts in which judges


141. SLAUGHTER, supra note 1, at 66 (observing that the symposium brought together judges from over eighty countries to discuss improving the adoption and implementation of environmental laws).


143. See Danner, supra note 142, at 57-58.
are increasingly referring to each other's opinions not because these opinions are binding authority, but because of their persuasive reasoning. 144

The transnational judicial dialogue touches on a number of sensitive political and moral questions. For example, courts are engaged in conversations about issues such as the death penalty, which reflect community understandings of appropriate punishment and give rise to different interpretations across the world. 145 As a result of the rise of universal jurisdiction and the creation of international criminal tribunals, national and international courts are also increasingly referring to one another's opinions on questions of international criminal law. 146

This dialogue need not necessarily lead to convergence. Slaughter suggests that "judges do not shy from arguing with one another, even acrimoniously" and they "acknowledge the validity of a wide variety of different approaches to the same legal problem"—a process she calls "positive conflict." 147 So an important benefit of these less formal judicial networks is that they accommodate legitimate diversity of opinion, even as they exchange useful ideas and information on how to implement international norms domestically.

Though such a conversation through legal opinions is undoubtedly fruitful, it may be somewhat one-sided. For example, in universal-jurisdiction opinions about war crimes and crimes against humanity, courts rely mostly on decisions by supranational tribunals or European courts. They rarely refer to judgments by non-European courts dealing with international crimes (for example, decisions of the courts of Rwanda, Ethiopia, or East Timor). 148 Judicial opinions from developing countries are not readily available for use and not widely sought out by European and American courts. And at least in American courts, there is significant political resistance—and arguably a constitutional hindrance—to using any foreign opinions, especially on constitutional matters. 149 For these reasons, the conversation with U.S. courts and others similarly constrained by their political and constitutional environment is likely to be quite unidirectional.

144. Slaughter, supra note 1, at 69.


147. Slaughter, supra note 1, at 68.


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The danger of this one-sidedness of networks is a valid concern, but two points are worth noting in response. First, just because a judge refuses to rely on foreign opinions as authority in certain domestic law matters does not mean that she is hostile to all transnational exchanges. She may still be open to sharing views and information with her foreign colleagues in the context of face-to-face meetings.\(^{150}\) And such live dialogue can itself socialize judges to be more open to considering foreign opinions and international law.

The second point is that even if networks are often one-sided, they can still make a significant contribution to the enforcement of international criminal law. In particular, the export of "rule of law" norms from more powerful network members such as the United States can have an empowering effect on some judges in countries in transition. Judges in countries emerging from conflict can use opinions from foreign courts to support their independent interpretations of human rights and humanitarian law in the face of undue political pressure by local authorities.

In brief, a more formal international association of judges working on war crimes and human rights cases, akin to the network of investigators and prosecutors discussed in the previous sections, would be a step forward in the development and enforcement of international criminal law. During regular face-to-face meetings and other interactions, judges could learn better to understand one another and their respective legal systems, ultimately producing a more informed jurisprudence of international criminal law.

B. Joint Action Networks

Whereas coordination networks involve more informal, ad hoc contacts among their participants, "joint action" networks engage participants daily in face-to-face joint activities—investigation, prosecution, or adjudication—for a sustained period of time. Joint action networks develop more rarely than coordination and support networks, as they require greater institutionalization and are generally more intrusive upon state sovereignty. But they are useful in situations in which states suffer a serious lack of capacity to prosecute and try international crimes, as is the case in many post-conflict situations. In these cases, coordination and technical assistance may not be sufficient. The actual presence of network participants in the territory where the crimes were committed and where the law will be enforced may be necessary.\(^{151}\)

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151. Joint action networks have arisen, for example, when a national government temporarily assigns (seconds) its personnel to work within a foreign government. An example of such a network can be found in Sierra Leone, where, as part of international assistance for post-conflict reconstruction, the British government appointed British officers to train and advise the local military and police. As Human Rights Watch has reported:
The most prominent joint action initiatives are the hybrid courts established to try international crimes in Sierra Leone, Kosovo, East Timor, and more recently, Cambodia and Bosnia and Herzegovina. Hybrid or mixed tribunals operate in the country where the crimes took place, but are staffed by both local and international investigators, prosecutors, and judges. The international community, typically under the UN’s auspices, is heavily involved in both the creation and financing of the tribunals. While the UN usually plays a significant role in the design of these tribunals, they are not meant to be a one-size-fits-all solution. They are created with the needs of the affected state in mind, and their statutes usually include domestic criminal law and procedure alongside international laws. The drafting of a hybrid tribunal’s statute often involves long deliberations between the international community and domestic authorities and civil society. These deliberations may diminish the speed and efficiency with which the court is created, but they increase its political legitimacy. The availability of local prosecutors and judges on the hybrid courts also means that decision-makers on these courts are more likely to respect and understand local customs and conditions than are officials from international criminal tribunals.

The transgovernmental nature of hybrid courts is therefore not in doubt. But are they “networks”? Although hybrid courts may seem too institutionalized to fit the definition, they fulfill some of the same functions as

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U.K. military personnel continued to play a major role in advising and directing military operations, including the staffing of key positions within the Sierra Leone defense headquarters. In coordination with the Commonwealth Secretariat, the U.K. also provided officers and funds for training and administration of the Sierra Leone Police, including the secondment of a British officer as inspector general.


153. Turner, supra note 39, at 37.

154. Id. at 38; see also Dickinson, supra note 151, at 294–300.


156. See id.

157. E.g., Burke-White, supra note 146, at 63–64 (reporting that the East Timorese judge on the East Timor panels explained to her Italian colleague a claim of mitigating circumstances based on an East Timorese belief in “black magic”).

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transgovernmental networks and lack many of the trappings of permanent supranational institutions. They exist on a temporary basis, and like other networks, they initiate daily dialogue among judges and prosecutors from different countries about the application of international criminal law to domestic cases.

Hybrid courts may be more likely than other, less formal networks to harmonize the application of international criminal law. In a hybrid court, the international and national judges have to come to a compromise in deciding a particular case. By contrast, such consensus is not required in the more informal transnational judicial dialogue. "Positive conflict" can be the dominant mode of operation in the latter case, because national judges and prosecutors ultimately decide for themselves how to implement international law in a particular case.

Even if hybrid courts do encourage a convergence of opinions on international criminal law, they do so after deliberation between national and international judges about the substance and application of the law. While in less formal networks, the views of judges from developed countries may predominate, hybrid courts are certain to give voice to the perspectives of judges from countries emerging from conflicts—views that are otherwise underrepresented in the international legal community. Especially if local judges have a majority on a hybrid court, their perspectives might be reflected more frequently in the development of international criminal law.

Hybrid tribunals enable prosecutors and judges from countries emerging from conflict both to shape the law that applies to their own community and to influence the future development of international criminal law. The tribunals are created on a temporary basis, so the foreign judges and prosecutors who work in them eventually go back to their own countries or move on to new hybrid or international criminal tribunals. In the process, they are likely to spread the insights they learned from their colleagues on the hybrid courts and to carry forward the transnational dialogue about international criminal law. There is yet another reason why hybrid courts' decisions are


159. See Dickinson, supra note 151, at 310.

160. See id. at 306.

161. Slaughter, supra note 1, at 68.

162. This is so not only because the local employees of the court will apply their experience in subsequent domestic cases, but also because hybrid court officials interact directly with the local legal community during their operation. For example, the Office of the Prosecutor of the Special Court for Sierra Leone undertook special outreach efforts that included training of local NGOs, delivering lectures at local universities, and buttressing legal reform efforts. Int'l Ctr. for Transnational Justice, The “Legacy” of the Special Court for Sierra Leone 6-7 (2003), http://www.ictj.com/downloads/LegacyReport.pdf.

163. Burke-White, supra note 146, at 64-65. Burundian Judge Ntukamazina, who served on the East Timor Special Panels, observed the following about his East Timorese colleague:

"Judge Maria and I discuss things together. I am helping her to understand and interpret international law . . . . Judge Maria knows Indonesian law and I have learned about that. And I have

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more likely to be followed than purely domestic decisions of a developing country. Their decisions are more likely to be available electronically, to be translated, and to be discussed by international-law commentators in law journals and treatises.\footnote{164}

Until now, hybrid investigations, prosecutions, and trials have convened national officials and judges from different countries. But as I have discussed elsewhere, it is entirely possible that in the future, hybrid courts may also combine national judges and prosecutors with their counterparts from the International Criminal Court.\footnote{165} This model would be consistent with the mandate of the ICC, and a version of it has recently been contemplated for prosecutions of war crimes and crimes against humanity committed in Sudan.\footnote{166}

V. POSSIBLE OBJECTIONS TO INTERNATIONAL CRIMINAL LAW NETWORKS

While transgovernmental networks can have many beneficial effects, there are also potential downsides. The primary challenges to the development of networks are the potential for inconsistent application of the law, a lack of transparency and accountability, and dominance of the networks’ agenda by a few powerful countries.

A. Inconsistent Application of the Law

The informal structure of networks, which provides them the needed flexibility and openness to local views on international criminal law, creates the risk of inconsistency in applying the law.\footnote{167} The more malleable and discretionary the rules and practices that networks establish, the more likely it is that interpretation and enforcement of international criminal law will differ from country to country. At some point, this variation could undermine

\footnote{Id. (quoting Sylver Ntukamazina, Judge, Dili Special Panels); see also id. at 84 (observing that trial and error in creating hybrid courts and the lessons learned from the process helped the international community create a better hybrid court in Sierra Leone).}

\footnote{164. For example, the \textit{International and Comparative Law Quarterly} and the \textit{Journal of International Criminal Justice} have published updates on the case law of the East Timor and Sierra Leone tribunals. \textit{See}, e.g., Sylvia de Bertodano, \textit{Current Developments in Internationalized Courts: East Timor—Justice Denied}, 2 J. INT’L CRIM. JUST. 910 (2004); Robert Cryer, A “Special Court” for Sierra Leone?\textit{, in }Current Developments: Public International Law, 50 \textit{INT’L & COMP. L.Q.} 420, 435–46 (2001).}

\footnote{165. Turner, supra note 39, at 35–46.}

\footnote{166. Rosanna Lipscomb, Note, Restructuring the ICC Framework To Advance Transitional Justice: A Search for a Permanent Solution in Sudan, 106 Colum. L. Rev. 182, 206 (2006); see also \textit{INT’L CRIMINAL COURT}, supra note 81, at 7.}

\footnote{167. \textit{See}, e.g., Whitehead, supra note 30, at 719.}
the effectiveness of networks in promoting coordination, cooperation, and compliance with international norms.168

This critique of networks may overvalue somewhat the need for consistency in the way international law is interpreted and enforced. A measure of variation is an important element of the local legitimacy of international law.169 If national authorities have all the relevant information about alternative approaches to applying international law, yet they choose not to follow these approaches, this may well be a valid choice, driven by “the uniqueness of . . . national traditions or the intensity of . . . political preferences.”170 For example, in international criminal law, such legitimate choices may include applying the death penalty to crimes against humanity and genocide,171 prosecuting juvenile offenders,172 or allowing trials in absentia.173 These choices might be politically legitimate if they reflect the preferences of the groups most affected by them.

The openness of networks to such diversity might also spur innovation in the development of international criminal law. Decentralized decision-making can help solve problems that actors would be unlikely to address successfully on their own, without exchanging ideas and information with one another.174

But at some point, divergence from international rules in order to accommodate local preferences may defeat the object and purpose of an international rule. Over time, it may undermine the predictability and legitimacy of international law and of efforts by networks to enforce it.175 It is therefore important to think about legal structures that can adequately

168. In addition, members reluctant to enforce international law may comply with some of their network commitments only nominally, so as to avoid being shunned from the network. But ultimately, their actions may conflict with core principles of international law. For example, even prosecutors and judges who have been advised and trained in human rights standards by their foreign peers may stage sham international prosecutions that fail to comply with minimal standards of due process. Such actions could place in question the effectiveness of networks in promoting compliance with international law.


170. SLAUGHTER, supra note 1, at 182.


172. E.g., Diane Marie Amann, Calling Children to Account: The Proposal for a Juvenile Chamber in the Special Court for Sierra Leone, 29 PEPP. L. REV. 167, 167 (2001).


175. See supra note 168.
distinguish between diversity that is salutary and divergence that impermissibly undermines international law.

Examples are available from federal, regional, and international legal systems that have already faced a similar tension. Three principles developed at the supranational level may be especially helpful to network participants as they decide what variations from network standards are acceptable. These are complementarity, margin of appreciation, and subsidiarity.

Complementarity is a provision of the Rome Statute, which regulates when the ICC ought to defer to national authorities. The Statute provides that the court can take up a case only when a state with jurisdiction is unwilling or unable to prosecute. Article 17 further specifies that a state may be found unwilling to prosecute when: 1) proceedings are undertaken “for the purpose of shielding the person concerned from criminal responsibility”; 2) there is an unjustified delay in the proceedings, which is “inconsistent with an intent to bring the person concerned to justice”; or 3) the proceedings are not “conducted independently or impartially,” and they are conducted in a manner that is “inconsistent with an intent to bring the person concerned to justice.” A state may be considered unable to prosecute when “due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.” These standards may also serve as a useful guide to international criminal law networks if government officials who take part in an international criminal law network are unfairly shielding war criminals from prosecutions, network participants may decide to suspend cooperation with these officials.

In Europe, the principles of subsidiarity and margin of appreciation similarly help balance a respect for local preferences against a need for common regulation at the European level. Under the doctrine of margin of appreciation, the European Court of Human Rights (“ECHR”) gives state signatories to the European Convention on Human Rights some leeway in

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176. In the United States, courts created doctrines of incorporation to decide how the Bill of Rights ought to be applied to states. See, e.g., Duncan v. Louisiana, 391 U.S. 145, 148 (1968). Under the doctrine of selective incorporation, a right that is an integral component of the American criminal justice system will be applied to states to the same extent as it applies at the federal level. Under the fundamental fairness approach, which was used for several decades but ultimately rejected, a right would be applied to states if, in a particular case, the right is essential to ensuring fundamental fairness. See id. Extradition law principles also have developed at the national and international level to help courts from one jurisdiction determine when to cooperate with other judicial systems in criminal matters and when to resist such cooperation in order to prevent a severe violation of rights. E.g., Model Treaty on Extradition, G.A. Res. 45/116, arts. 3–4, U.N. Doc. A/45/49 (Dec. 14, 1990), amended by G.A. Res. 52/88, arts. 3–4, U.N. Doc. A/52/49 (Dec. 12, 1997).

177. Rome Statute of the International Criminal Court, supra note 38, art. 17.

178. Id. art. 17, para. 2.

179. Id. art. 17, para. 3.

180. For a discussion of how complementarity might be applied in practice, see Burke-White, supra note 52.
interpreting and applying the Convention. In deciding how wide a margin of appreciation to grant a government whose policy has been challenged under the Convention, the ECHR looks to the degree of consensus among the laws of signatory states with respect to that policy. The less consensus there is, the more likely the court is to accept local variation in implementing the Convention. For example, in a recent case concerning the interpretation of the right to life under the European Convention, the court held that "in the absence of any European consensus on the scientific and legal definition of the beginning of life, the issue of when the right to life begins comes within the margin of appreciation" of each signatory state.

The doctrine of subsidiarity, developed by the European Court of Justice in the context of the European Union, demands that decisions be taken at a supranational level "only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by [national authorities]." It urges members of the EU to take action as close to the citizen as possible and to act at the supranational level only when this would add some value over and above what would be accomplished at the member state level. The European Commission has been reviewing all proposed EU legislation for its conformity with the principle of subsidiarity, and it has increasingly undertaken consultations with affected national and sub-national constituencies to ensure such conformity.

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186. In particular, the Protocol on the Application of the Principles of Subsidiarity and Proportionality, which is now annexed to the Treaty Establishing the European Community, establishes the following guidelines to determine whether Community action is justified:

[1] the issue under consideration has transnational aspects which cannot be satisfactorily regulated by action by Member States; [2] actions by Member States alone or lack of Community action would conflict with the requirements of the Treaty (such as the need to correct distortion of competition or avoid disguised restrictions on trade or strengthen economic and social cohesion) or would otherwise significantly damage Member States' interests; [3] action at Community level would produce clear benefits by reason of its scale or effects compared with action at the level of the Member States.


International criminal network participants ought to examine their own actions with reference to these principles. If they do not, it is likely that other actors, including domestic legislatures and NGOs, will subject them to similar scrutiny. In deciding whether action is necessary at the transnational level, network members should first examine whether their work adds any value to action at the state level. This is a question that has already arisen for transnational crime networks such as Europol. In a recent hearing before the U.K. House of Lords, Europol came under scrutiny as to whether it added any real value to national law enforcement efforts, or whether instead it burdened them by requiring domestic police forces to share information with foreign counterparts. This is the kind of analysis that networks themselves ought to perform before taking action that might sometimes be better handled by national authorities.

Networks may also need to rely on a margin of appreciation analysis to resolve conflicts among some of their members. This need arises, for example, when a participant is implementing a network standard in a way that conflicts with the understanding of the standard by a majority of the network's members. In that case, the members acting jointly may have to decide if the divergence fundamentally undermines the goals of the network or is a deviation based on a legitimate difference in values and needs. To do so, they can apply the margin of appreciation standard, which inquires whether the diverging member's interpretation is at odds with a well-formed consensus among the rest of the network members. If it is, then the network can attempt to persuade the deviating member to comply. When persuasion does not help, the network can apply a range of soft-law sanctions, including shaming, suspending technical assistance, and in the end, even excluding the transgressing member from the network.

When it comes to the work of more formal, joint action networks, we can imagine a judicial body applying the three doctrines discussed above. For example, hybrid courts can be overseen by the ICC Appeals Chamber. The Chamber could demarcate the boundaries between international law

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an obstacle” to its ability to carry out legislative functions and for failing to explore subsidiarity problems “in a substantive fashion.” Florian Sander, Subsidiarity Infringements Before the European Court of Justice: Fuitive Interference with Politics or a Substantial Step Towards EU Federalism?, 12 COLUM. J. EUR. L. 517, 543 (2006).

188. It is unlikely that an international court will have jurisdiction over the actions of most networks, because they are not generally created by treaty and are not considered formal subjects of international law. But see infra note 194 and accompanying text.

189. See Minutes of Evidence Taken Before the European Union Committee (Sub-Committee F) (Dec. 8, 2004), in AFTER MADRID, supra note 107, at 180, 185 (examination of David Makinson, Crime Reduction and Community Safety Group); Minutes of Evidence Taken Before the European Union Committee (Sub-Committee F) (Oct. 27, 2004), in AFTER MADRID, supra note 107, at 65, 76 (examination of Assistant Commissioner David Veness, Metropolitan Police).

190. Cf. Shany, supra note 183 (suggesting that the doctrine of margin of appreciation can and should be used more broadly in international law).

191. The margin of appreciation standard can therefore usefully be used in conjunction with the complementarity inquiry discussed earlier.

192. See SLAUGHTER, supra note 1, at 196–200.
norms from which no deviation is acceptable and norms that are open to diverse interpretations at the domestic level. Relying on a central body to resolve differences over the application of the law governing a network is not unprecedented—some European Union transgovernmental networks are subject to such supervision by the European Court of Justice and European Commission.

B. Lack of Transparency and Accountability

The informality of networks may not only lead to inconsistency, but also render networks politically unaccountable. As mentioned earlier, network participants are generally expected to represent national interests faithfully. Their primary loyalty is to a national agency, court, or legislative body, and their primary duties are closely tied up with national objectives. Even as they attend international conferences, exchange information, or otherwise interact with their partners across borders, they remain national representatives. They negotiate for international standards that would not interfere unduly with their national interests, and they may refuse to enforce a network decision if that decision conflicts with important domestic policy priorities. At the same time, through repeated interaction and dialogue, participants manage sometimes to overcome parochial interests and adopt a common position with their network peers. But a decision that promotes global interests might not always reflect the preferences of their domestic constituency. To the extent that network participants act against local interests, the democratic accountability of networks may suffer. In the process of socialization, networks may become little more than "a global bourgeoisie with a set of similar elite-class views . . . ."

Imagine, for example, that as a result of their socialization in a transnational network, war crimes investigators from a country emerging from conflict begin to apply evidence-gathering protocols that protect the rights of witnesses too scrupulously, at the expense of efficiency and sometimes even defendants' rights. If the choice were presented to the country's representative branches, they might vote against it. But if the agreement on the change of standards occurred at the transnational level, away from the gaze of the local media and public, representative domestic institutions might not even learn about it.

193. Turner, supra note 39, at 41.
194. Bignami, supra note 11, at 824.
195. This charge has been leveled especially at regulatory networks, where the perception has been that regulators operate too independently of central national authorities and do not adequately take into account domestic perspectives and preferences. Slaughter, supra note 1, at 221–24; see also W. Bruggeman, Policing and Accountability in a Dynamic European Context, 12 Policing & Soc'y 259, 272 (2002).
197. Id. at 1272.
A similar lack of transparency and accountability may delegitimize the work of other regulatory networks as well. For example, there is concern that intelligence agents acquiesce to tactics by their peers from other countries—for example, the use of extraordinary renditions and secret detention centers—which may not be approved by their national, democratically elected representatives. A recent inquiry by the German Parliament into the CIA's kidnapping of a German citizen suspected of terrorism revealed that a lower-level German intelligence official was informed of the suspect's seizure, but did not relate this fact to his higher-ups. The failure of the lower-level German official to inform his supervisors of the kidnapping may have simply been an individual oversight, as the German intelligence service claims. But the incident points to the lack of transparency in the interactions among intelligence officials around the world and raises questions about the legitimacy of encouraging closer cooperation among them without also strengthening the oversight of such interactions.

The first step toward enhancing democratic control over network actions is to ensure greater transparency. When networks act in a more transparent fashion, domestic representative branches can step in and reject those network actions and policies that significantly interfere with domestic preferences. Such scrutiny has already occurred in some contexts. For example, the U.S. Congress has taken steps to monitor the work of a banking regulation network, the Basel Committee on Banking Supervision. It has received regular testimony on the progress of the revisions of an international banking agreement overseen by the Basel Committee, and it has called on U.S. banking agencies to report on all proposed recommendations of the Basel Committee before agreeing to them. Similarly, the U.K. House of Lords has held hearings on the activities of Europol to determine the usefulness of the agency to national law enforcement efforts. Other national parliaments, as well as the European Parliament, have also reviewed Europol's work, and plans are being made for strengthening such control. Such legislative oversight leaves room for networks to enforce common standards, but only up to a point—until their activities conflict with local values to such a degree that the legislative branch is prompted to respond. Networks should not resist this legislative supervision. It is a crucial tool for increasing their legitimacy and, ultimately, their effectiveness.

198. Souad Mekhennet & Craig S. Smith, German Spy Agency Admits Mishandling Abduction Case, N.Y. TIMES, June 2, 2006, at A8. The suspect was flown to Afghanistan for interrogation and then detained in various countries for sixteen months until the CIA realized it had made a mistake about his identity and returned him to Germany. Id.

199. Id.

200. But see Bignami, supra note 11, at 811.

201. Barr & Miller, supra note 169, at 34; Zaring, supra note 2, at 598–99.


203. See supra note 189 and accompanying text.

Some have also criticized judges for allowing transnational dialogue to influence their constitutional decisions. When members of the U.S. Supreme Court cited foreign law in interpreting the U.S. Constitution in *Lawrence v. Texas* and *Roper v. Simmons*, Justice Scalia accused his colleagues of "'impos[ing] foreign moods, fads, or fashions on Americans.'" Yet to consider such other perspectives is what one might expect from a judge who has exchanged ideas with his or her counterparts from abroad. Commentators have observed that the increasing interactions between U.S. Supreme Court justices and their foreign peers in face-to-face meetings, conferences, and rule of law programs likely influenced the opinions in *Roper* and *Lawrence*. Some have welcomed these interactions on the grounds that they "broaden the perspectives" of the judges and "socialize their members as participants in a common global judicial enterprise." But others, like Justice Scalia, have been much more skeptical. As Kenneth Anderson has argued, the issues raised in these constitutional decisions are often tied to fundamental cultural, political, and legal values of a national community, and the difference in views among judges of different nations cannot be resolved simply through repeated dialogue. Anderson and others have suggested that when American judges adopt the views of their foreign counterparts, their decisions lack democratic legitimacy. The strength of this criticism can be questioned, however, on the ground that courts are by nature counter-majoritarian institutions that are not supposed to be governed by the preferences of the public.

To the extent that this type of counter-majoritarianism remains a concern, it is limited to those rare instances when transnational judicial dialogue affects constitutional decisions. In the vast majority of cases, the decisions of network participants—whether courts interpreting statutes or regulators promulgating new standards—can be overseen and overturned by domestic legislatures.

Networks can also hold one another accountable. For example, a global network of legislators dealing with human rights and national security issues may monitor the networks of international prosecutors and investigators, just as the European Parliament and national parliaments have begun doing

205. 539 U.S. 558, 572–73 (2003) (citing international decisions as support for striking down as unconstitutional a Texas statute criminalizing sodomy).

206. 543 U.S. 551, 575–78 (2005) (using international authorities as support for holding that state laws permitting the execution of juvenile offenders are unconstitutional).

207. *Lawrence*, 539 U.S. at 598 (Scalia, J., dissenting) (quoting Foster v. Florida, 537 U.S. 990, 990 (Thomas, J., concurring in denial of certiorari)).

208. Waters, supra note 145, at 496 & n.40.

209.slaughter, supra note 1, at 99.


211. Id. at 1287; see also Roger P. Alford, Misusing International Sources To Interpret the Constitution, 98 Am. J. Int’l L. 57, 58–61 (2004).

with respect to transnational-crimes networks such as Europol and Eurojust.\textsuperscript{213} Alliances of international criminal defense attorneys can also provide a check on prosecutorial and investigative networks. International defense attorneys' associations have already begun doing so by filing amicus briefs in domestic courts on international criminal law questions, developing their own model codes of international criminal law and procedure, and getting involved in the work of other emerging networks in international criminal law.\textsuperscript{214}

Similarly, human rights NGOs are likely to play an important role in monitoring judicial, prosecutorial, and law enforcement initiatives at the transnational level. For example, the International Center for Transitional Justice ("ICTJ"), which assists domestic transitional justice efforts upon invitation by local authorities or NGOs, works together with local civil society to assess the good faith of government actors in pursuing transitional justice. When President Kostunica invited ICTJ to help with the creation of a Truth and Reconciliation Commission in Serbia, the Center was concerned about the government's motivations in establishing the Commission and about the independence of the officials who would be assigned to the task.\textsuperscript{215} The Center therefore joined efforts with the International Humanitarian Law Institute, a local NGO, to ensure that transitional justice measures were pursued in good faith.\textsuperscript{216}

In the end, despite a degree of democratic deficit, networks are arguably more accountable in their operations than supranational institutions. If ICC investigators, prosecutors, or judges make a decision that conflicts with domestic preferences, there is little that domestic authorities can do to override it, short of leaving the court or possibly withholding funding.\textsuperscript{217} The only mechanism provided by the ICC Statute for national governments to register their disagreement with the court's priorities and actions is through the Assembly of States Parties.\textsuperscript{218} But each state will have only one vote in an assembly that makes decisions by majority or supermajority vote.\textsuperscript{219} And even when a state gathers a coalition sufficient to carry a vote in the Assembly, it is not clear that the Assembly's decisions will have real influence on prosecutorial and judicial actions at the ICC.\textsuperscript{220} By contrast, as noted earlier, networks can be checked more effectively by domestic legislatures and by

\textsuperscript{213} See Bruggeman, supra note 195, at 267–72.
\textsuperscript{215} Interview with Marieke Wierda, supra note 53.
\textsuperscript{216} Id.
\textsuperscript{217} Turner, supra note 39, at 19–20. For a discussion of the different ways in which a state can record its disagreement with an international institution such as the ICC, see Laurence R. Helfer, Exiting Treaties, 91 VA. L. REV. 1579, 1580–84 (2005).
\textsuperscript{218} Rome Statute of the International Criminal Court, supra note 38, art. 112, para. 2.
\textsuperscript{219} Id. art. 112, para. 7 (providing that the Assembly will make decisions by majority on procedural issues and by two-thirds majority on substantive issues).
\textsuperscript{220} See Turner, supra note 39, at 19–20.
other transnational networks. This is so because they operate through more informal rules and depend more heavily on domestic authority to enforce their decisions than do international organizations.

C. Dominance of Networks by a Few Powerful Countries

A third critique of networks points to the likelihood that networks would reflect the priorities of their most powerful participants. Instead of encouraging the cross-fertilization of ideas, networks may produce a one-way export of norms from more powerful countries. Commentators have observed that this has already happened in the areas of antitrust and securities regulation, in transnational law enforcement, and to some degree, in judicial exchanges on human rights questions.

As a preliminary response, it is worth noting that a one-way export of legal rules does not necessarily mean that these rules are imposed on unwilling recipient states. Countries in transition may wish to import rules from more developed countries to show their commitment to a particular legal regime, a break with the past, and a new credibility as an international partner.

And while it is possible that networks in international criminal law will replicate disparities in the international system, it is not clear that the problem would be any greater in networks than it is in traditional international institutions or in a system of bilateral agreements. In fact, traditional relations at the inter-governmental level may lead to greater power asymmetries because powerful nations can easily tie concessions in one area to rewards in another. The EU, for example, has pressured Croatia and Serbia to cooperate with the ICTY as a condition to qualifying for accession to the Union; the United States has applied economic rewards and sanctions to the former Yugoslavia to push for compliance with the ICTY's orders. Networks, by contrast, are typically focused on a single area and cannot offer rewards in other areas to pressure participants to agree to a network policy.

221. See Slaughter, supra note 1, at 229. Even if all states, rich and poor, have a voice in the collective discussions of networks, having a voice is not the same as being heard. Id.

222. Raustiala, supra note 2, at 32, 68-70.


224. See Waters, supra note 145, at 505-29.


226. See Slaughter, supra note 1, at 229.


Instead, even powerful network participants have to rely a great deal more on persuasion than on sanctions.229

Structural solutions can also be used to minimize the influence of powerful states on the outcomes of network deliberations. As mentioned earlier, joint action networks can be designed in such a way as to give officials and judges from the host state a greater say over the outcome of the deliberations—for example, by giving local judges a majority on a hybrid court bench. Such an arrangement would counterbalance some of the power asymmetries among network participants. More generally, if the transparency and domestic oversight of networks are strengthened, this will both increase the networks’ political accountability, as discussed earlier, and ensure that participants from weaker states are not unduly influenced to import foreign legal norms.

VI. IMPLICATIONS FOR OTHER TRANSGOVERNMENTAL NETWORKS

As discussed throughout this Article, networks appear to be emerging in the area of international criminal law. This development may have implications for transgovernmental networks in other areas. It suggests at least four possible lessons for the study of networks more generally.

First, the emergence of international criminal law networks indicates that networks do not require strong cross-border effects in order to develop. International crimes often have direct impacts in a particular region. They may produce refugee flows to neighboring countries, and the conflict may spill over across state boundaries. But unlike terrorism or cybercrime, which may have direct and practical impacts around the globe, the effects of international crimes are more likely to be contained to the region and rarely stir interest among powerful states. As explained in Part III, networks have arisen in this area largely because NGOs and international organizations have stepped in and facilitated transgovernmental collaboration. This suggests that in evaluating whether networks are likely to develop in other areas, scholars must look beyond the immediate incentives of powerful states and government officials from those states. Instead, it is important to look at the overall architecture of cooperation at the international level and see if it is likely to encourage the rise of networks.

Second, the existence of international criminal law networks suggests that networks can appear even in areas in which there is no imperative to further standardize rules. International criminal law is already widely standardized. What networks do here is actually closer to the opposite of their traditional function: They help create ways to accommodate different approaches to interpreting and enforcing international law. Because networks

229. Moreover, at least in the current political climate, the lack of consensus among powerful states on issues of international criminal law is likely to prevent one of them from establishing its vision against the wishes of weaker states. For example, while the European Union is urging countries to disavow the use of the death penalty even in international crimes prosecutions, the contrary position on this issue by the United States provides an important counterweight. E.g., Peter Ford, Iraqi Tribunal Stirs Fierce Debate, CHRISTIAN SCI. MONITOR, Oct. 1, 2003, at 6.
Transnational Networks rely heavily on deliberation and persuasion to create and implement standards, they are better able to tolerate different viewpoints and find pragmatic solutions to sensitive political questions. This enhances the political acceptability of the transnational norms that networks aim to enforce.

Third, international criminal law networks suggest that the presence of formal, government-sponsored international organizations can assist the creation of informal networks, rather than competing with them. This confirms the insight of early network theorists that transgovernmental cooperation is more likely to occur in areas in which established international organizations operate. Organizations such as the ad hoc international criminal tribunals and the ICC have promoted the development of networks in international criminal law. This is in large part because they depend greatly on national authorities for the enforcement of their orders. In the case of the ICC, it occurs also because the court is committed to complementarity—that is, deferring to national governments and allowing them to act whenever possible. It may be that international organizations in other areas will better promote the development of informal networks if they also apply the complementarity principle. Institutions that respect complementarity can partner with networks to build domestic capacity to enforce international law. Networks, in turn, can serve as conduits of information between domestic and international authorities and promote greater understanding between them.

Finally, the significant contribution by NGOs to the emergence of international criminal law networks suggests that NGOs can play an important role in the development of other networks as well. They can raise public awareness of global problems and prompt states to take action on issues that state officials might otherwise have chosen to ignore. Pressure to act creates incentives for state officials to seek knowledge and capacity from other places, which instigates the formation of networks. And as networks begin to operate, NGOs may continue to be a resource for them by sharing information and expertise and joining efforts to build domestic legal and administrative capacity. The key role played by NGOs in international criminal law may repeat itself in other areas.

CONCLUSION

International criminal law is not, at first sight, an area in which one would expect to see networks develop. It does not call for convergence of rules and strategies, unlike other areas in which networks have been active. Moreover, international criminal law is still a very politically charged area, in which moral and political judgments differ.

Nonetheless, international criminal law networks have begun to develop and are likely to grow for three principal reasons. First, networks can help domestic authorities build up capacity to prosecute international crimes. Second, when making and enforcing international rules, networks are likely

230. Keohane & Nye, supra note 9, at 50.
to be more responsive to domestic political views and more democratically accountable than are centralized institutions such as the ICC. Third, by empowering local judges, prosecutors, and investigators who are committed to international criminal law, networks may be able to nudge even reluctant governments toward more consistent enforcement of the law.

Given these important advantages of networks, the international community, and the ICC in particular, should actively encourage contacts and alliances among judges, prosecutors, and investigators. These alliances may serve primarily coordination and support functions, like the network of war crimes investigators initiated by Interpol. Or they could take the shape of more institutionalized joint action networks, as the hybrid courts established in East Timor and Sierra Leone. The choice between the type of network will depend on the premium that participants place on capacity-building versus informality, local control, and efficiency. In the end, both types of networks carry the promise of steering international criminal law toward fuller enforcement and broader political acceptability.