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## A Community of Courts: Toward a System of International Criminal Law Enforcement

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# A COMMUNITY OF COURTS: TOWARD A SYSTEM OF INTERNATIONAL CRIMINAL LAW ENFORCEMENT

*William W. Burke-White\**

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The need to continue codifying international law is apparent . . .  
 But an even greater challenge for us now—and, in many respects  
 an even greater opportunity—is enforcement. Although interna-  
 tional law is often caricatured as elusive and abstract, there is  
 nothing abstract about its enforcement . . . .

—Madeleine Albright<sup>1</sup>

## INTRODUCTION

Traditional models of international law enforcement assume that disputes between sovereign States will be adjudicated by a supranational tribunal, such as the International Court of Justice (ICJ) or the World Trade Organization (WTO). Such models rely on a unified international legal system bound together by a hierarchical appellate authority. A more recent development is the direct enforcement of international legal rules by national courts. This has taken place in a number of substantive areas of law, most notably in international economic law, international environmental law, and international criminal law. This Article characterizes

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1. Madeleine K. Albright, *International Law Approaches the Twenty-First Century: A U.S. Perspective on Enforcement*, 18 *FORDHAM INT'L L.J.* 1595, 1596 (1995).

and evaluates the dispersed enforcement of international law through a close analysis of international criminal law.

Despite the ratification of the Rome Statute of the International Criminal Court (Rome Statute), international criminal law enforcement authority remains nonhierarchical, distributed throughout the international system and largely centered in national courts, not supranational tribunals. For a variety of practical and political reasons explored herein, the opportunities for enforcement of international criminal law are far more promising at the national than at the supranational level. International criminal law enforcement is effectively migrating from international tribunals to national courts. National courts form the front line of a system of enforcement. Supranational tribunals act as a back-stop where national courts are unwilling or unable to adjudicate.

The emerging system of international criminal justice can be conceived as a community of courts,<sup>2</sup> a set of adjudicatory bodies in interdependent, self-organizing relationships. This emergent community of courts is engaged in a common endeavor—ensuring accountability for serious international crimes. Within the community, courts—both national and supranational—interact in numerous ways. Their jurisdictions often overlap; they are linked both horizontally and vertically; they apply a common set of laws.

Central to this emerging community are semi-internationalized tribunals grafted onto or linked to the domestic courts of many States. Semi-internationalized tribunals, the newest members of the community of courts, are being used to enforce international criminal law in countries recovering from ethnic violence and mass atrocity. Such courts—now operating in East Timor and Kosovo and under development in Cambodia and Sierra Leone—are based in domestic legal systems while drawing on international judges, jurisprudence, and resources.

This Article argues that, for political reasons, the future of international criminal law enforcement will largely be at the domestic level. It anticipates the emergence of a community of courts—domestic, semi-internationalized, and supranational. A decentralized system of international criminal law enforcement may give pause for concern: How can such a system be regulated? How can uniformity and effectiveness be assured? It is the claim of this Article that, in a world in which

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2. See Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 *YALE L.J.* 273, 372 (1997) (referring to a “recognition of a community of courts around the world, units engaged in a common endeavor”); Anne-Marie Slaughter, *A Real New World Order*, 76 *FOREIGN AFF.* 183, 187 (1997) (noting that citing international decisions helps courts “gain legitimacy by linking [themselves] to a larger community of courts”).

information is power,<sup>3</sup> the relationships between these courts—the exchange of information, ideas, and personnel—brings order and regularity to the system. These interdependent relationships are defined by the core principles of subsidiarity and complementarity. Normatively, this decentralized, horizontal enforcement system is a positive development with the potential to greatly strengthen the enforcement of international criminal law. Such relationship-based communities of courts may hold great promise for other areas of international law enforcement as well.

The first Part of this Article reviews presently available mechanisms for international criminal law enforcement and suggests conclusions about their continued effectiveness. Part II draws on international relations and comparative politics to provide a close analysis of the political decisions behind the creation of international criminal law enforcement mechanisms and includes case studies of Cambodia, East Timor, and Rwanda. Part III considers the operation and effectiveness of semi-internationalized courts (i.e., mixed panels of national and international judges applying international law) through a case study of the Special Panels in the District Court of Dili, East Timor. Part IV provides the theoretical basis for this emerging system, considering the nature of enforcement in international criminal law and the horizontal and vertical relationships in the community. Part IV then presents guiding principles for regulating the system of international criminal law in the context of international constitutional principles. Finally, the Conclusion calls for a code of conduct in international criminal law enforcement and suggests that the model of a community of courts may be effective in other areas of international law enforcement.

## I. EXISTING MECHANISMS FOR THE ENFORCEMENT OF INTERNATIONAL CRIMINAL LAW

In the past decade the possibilities for the enforcement of international criminal law have expanded dramatically. While this Part does not seek to provide a comprehensive analysis of all of these mechanisms, it is intended to situate the overall argument of this Article in the context of presently existing mechanisms for international criminal law enforcement. To this end, these mechanisms—namely, the International Criminal Court (ICC), the *ad hoc* tribunals, national courts, prosecutions under the universality principle, military tribunals, and semi-internationalized courts—are briefly reviewed. Attention is focused, first, on structure and jurisdiction and, later, on the normative considerations

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3. See generally JOSEPH NYE, *THE PARADOX OF AMERICAN POWER: WHY THE WORLD'S ONLY SUPERPOWER CAN'T GO IT ALONE* (2002).

of effectiveness and appropriateness. The most novel and potentially most significant development in international criminal justice is the operation of semi-internationalized tribunals in which mixed panels of national and international judges sit within the domestic judiciary of the host State. These semi-internationalized tribunals are considered in particular detail as crucial constituents of the community of courts.

### A. *The International Criminal Court*

Upon the ratification of the Rome Statute on April 11, 2002, many world leaders heralded the maturation of international criminal law enforcement. U.N. Secretary-General Kofi Annan announced that “[i]mpunity has been dealt a decisive blow.”<sup>4</sup> The *New York Times* reported that the ICC “closes a gap in international law”<sup>5</sup> and the *Economist* noted the world had fulfilled “a promise made after the Nuremberg trials . . . [to] provide a permanent forum for trying the world’s most despicable criminals.”<sup>6</sup>

Yet, not everyone has considered the emergence of the ICC as a positive development. Pierre Prosper, U.S. Ambassador for War Crimes, described the ICC as “an attempt to impose a justice mechanism” on the world.<sup>7</sup> The United States has taken the unprecedented step of repudiating the Rome Statute,<sup>8</sup> with one senior administration official describing it as “a product of fuzzy-minded romanticism,” and “not just naive, but dangerous.”<sup>9</sup> Writing in the *Weekly Standard*, Jeremy Rabkin described the ICC as a “kangaroo court,” an “absurd . . . political spectacle.”<sup>10</sup>

Whichever side of this debate one takes, when the Rome Statute entered into force in July 2002, the ICC became a reality; the new Court will form a significant part of the newly emergent system of

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4. Press Release, United Nations, Transcript of Press Conference with President Carlo Ciampi of Italy and Secretary-General Kofi Annan in Rome and New York by Videoconference (Apr. 11, 2002) (following ratification of the Rome Statute of the International Criminal Court in Rome, Italy).

5. Barbara Crossette, *War Crimes Tribunal Becomes Reality, Without U.S. Role*, N.Y. TIMES, Apr. 12, 2002, at A3.

6. *A World Criminal Court: Give It a Welcome*, THE ECONOMIST, Apr. 13, 2002, at 14.

7. Pierre-Richard Prosper, Remarks at the Harvard Colloquium on International Affairs (Apr. 13, 2002) (on file with author).

8. Neil A. Lewis, *U.S. Is Set to Renounce Its Role in Pact for World Tribunal*, N.Y. TIMES, May 5, 2002, at A18.

9. John R. Bolton, Under-Secretary of State for Arms Control, *quoted in Lewis, supra* note 8, at A18.

10. Jeremy Rabkin, *The International Kangaroo Court: Get Ready for the International Criminal Court to Go After Israelis and Americans*, WKLY. STANDARD, Apr. 29, 2002, at 14. Likewise, in a Wall Street Journal editorial Ruth Wedgwood called the court a “bad idea” that offers “no protection against magistrates from abroad.” Ruth Wedgwood, *An International Criminal Court Is Still a Bad Idea*, WALL ST. J., Apr. 15, 2002, at A17.

international criminal justice. Yet, as its detractors often fail to see,<sup>11</sup> and its supporters regret,<sup>12</sup> the role of the Court is limited both by its statute and its likely capacity constraints. The purpose here is merely to highlight the possible role for the ICC—based on its inherent strengths and weaknesses—in the emerging system of international criminal justice.

The limitations of the ICC arise largely from two major compromises on jurisdiction and admissibility pushed by the United States at the Rome Conference.<sup>13</sup> The first compromise imposed temporal, substantive, and political limits on the Court's jurisdiction. Jurisdiction *ratione temporis* is limited to crimes "committed after the entry into force of the Statute."<sup>14</sup> Likewise, the Court's temporal jurisdiction for States that subsequently become Parties is limited to crimes "committed after the entry into force of [the] Statute for that State."<sup>15</sup> Thus, the Court will have no jurisdiction for crimes committed before July 2002 and, with respect to States that subsequently ratify, the Court will not have jurisdiction over events before their respective ratifications.

Substantive jurisdictional constraints limit the ICC to consideration of only the gravest international crimes. According to article 1 of the Rome Statute, the Court only has jurisdiction over "persons for the most serious crimes of international concern."<sup>16</sup> Article 5 deems genocide, crimes against humanity, war crimes, and the crime of aggression to be

11. See, e.g., Wedgwood, *supra* note 10 (claiming that the ICC provides no protection against magistrates from abroad).

12. See, e.g., Mark A. Summers, *A Fresh Look at the Jurisdictional Provisions of the Statute of the International Criminal Court: The Case for Scrapping the Treaty*, 20 WIS. INT'L L.J. 57, 58 (2001) (arguing that "US-influenced compromises in the final treaty produced a fatally-flawed international criminal court" which is too weak to be effective).

13. See Young Sok Kim, *The Preconditions to the Exercise of the Jurisdiction of the International Criminal Court: With Focus on Article 12 of the Rome Statute*, 8 J. INT'L L. & PRAC. 47 (1999) [hereinafter Kim, *Preconditions*] (describing the compromises and negotiating proposals at Rome); Young Sok Kim, *The International Criminal Court: A Commentary on the Rome Statute* (2000) (unpublished J.S.D. dissertation, University of Illinois at Urbana-Champaign, on file with author) (describing the negotiation of the Rome Statute in great detail). See, e.g., David J. Scheffer, *Fourteenth Waldemar A. Solf Lecture in International Law: A Negotiator's Perspective on the International Criminal Court*, 167 MIL. L. REV. 1 (2001) [hereinafter Scheffer, *A Negotiator's Perspective*] (describing the U.S. role in the negotiation of the ICC Statute); David J. Scheffer, *Staying the Course with the International Criminal Court*, 35 CORNELL INT'L L.J. 47, 68–87 (2001) (discussing the U.S. negotiating position at Rome and how that is reflected in the Statute); David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12, 12 (1999) (considering the United States' "compelling interest in the establishment of a permanent international criminal court").

14. Rome Statute of the International Criminal Court, adopted by the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998, art. 11, U.N. Doc. A/CONF. 183/9 [hereinafter Rome Statute].

15. *Id.*

16. See *id.* art. 1; see also Mohamed M. El Zeidy, *The Principle of Complementarity: A New Machinery to Implement International Criminal Law*, 23 MICH. J. INT'L L. 869, 904 (2002).

among these most serious crimes. However, that same article also reiterates that jurisdiction shall be limited to the “most serious crimes of concern to the international community as a whole.”<sup>17</sup> While it is clear that the enumerated list of crimes is exclusive, the repetition of the seriousness clause in article 5 has been read by some as a further restriction on jurisdiction to those cases of genocide, crimes against humanity, war crimes, and aggression that are of concern to the “international community as a whole.”<sup>18</sup> Under such a reading, relatively isolated instances of crimes against humanity would not be considered of “concern to the international community as a whole” and would not vest the Court with jurisdiction.<sup>19</sup> While the effect of this clause remains ambiguous (presumably to be clarified through prosecutorial decisions and judicial rulings), it is clear that only a relatively narrow range of crimes falls within the ICC’s jurisdiction.

Political limits on the ICC’s jurisdiction depend on decisions by States Parties. Where cases are referred to the ICC by States Parties<sup>20</sup> or the prosecutor initiates the investigation *proprio motu*,<sup>21</sup> the Rome Statute imposes significant preconditions on the exercise of jurisdiction. As part of the last minute compromise in Rome, article 12(2) requires that either the territorial State (the State where the crime occurred) or the national State (the State of nationality of the defendant) be a State Party or have accepted jurisdiction with respect to the individual in question.<sup>22</sup> What emerges then is a “consent regime” based on territoriality and nationality.<sup>23</sup> This is a relatively weak form of jurisdiction, unlikely to be

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17. Rome Statute art. 5.

18. *Id.*; see also Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*, 167 MIL. L. REV. 20, 38 (2001) (noting that “in order to fall within the jurisdiction of the ICC, however, the offense must be on the high end of a scale of relative severity, and must have some quality that warrants the ‘concern of the international community as a whole’”). In deciding which cases to investigate, the Prosecutor is again required by article 53 to take into account “the gravity of the crime and the interests of victims.” Rome Statute art. 53(1)(c).

19. This reading should be contrasted with one that sees any instances of the enumerated crimes as of international concern. See Madeline Morris, *Complementarity and Its Discontents: States, Victims, and the International Criminal Court*, in INTERNATIONAL CRIMES, PEACE, AND HUMAN RIGHTS: THE ROLE OF THE INTERNATIONAL CRIMINAL COURT 177, 185 (Dinah Shelton ed., 2000) [hereinafter INTERNATIONAL CRIMES] (suggesting a reading of the Statute to limit jurisdiction to “grave instances of the delineated most serious crimes” is quite “damaging” and by “no means mandated by the treaty”).

20. See Rome Statute art. 14.

21. *Id.* art. 15.

22. *Id.* art. 12. The final text is far weaker than proposals put forward by the United Kingdom and South Korea, which would have allowed jurisdiction if the custodial State (the State who has physical control over the accused) or the victim State (the State of nationality of the victim of the crime), respectively, were a Party. See Kim, *Preconditions*, *supra* note 13, at 59–64.

23. Newton, *supra* note 18, at 50.



triggered frequently because “in internal wars, the most common form of conflict today—the present compromise provision . . . does not allow for any jurisdiction unless the State in question is a Party to the Statute.”<sup>24</sup> Despite ratification by a wide variety of States, those States most likely to be the sites of international crimes are also the least likely to be a State Party.<sup>25</sup>

A stronger form of jurisdiction arises under article 13 of the Statute when the case has been “referred to the prosecutor by the Security Council acting under Chapter VII.”<sup>26</sup> In these cases, the requirement that the national or territorial State be party to the Statute is waived.<sup>27</sup> This follows from the fact that, according to the U.N. Charter, States are required to “accept and carry out the decisions of the Security Council,”<sup>28</sup> thereby “overrid[ing] a State’s inherent national authority to insist on using its own judicial processes.”<sup>29</sup> However, for the Security Council to refer such a case requires chapter VII authority as well as agreement of all five permanent members not to exercise a veto. This is an unlikely scenario at present given the Bush administration’s open hostility to the Court.<sup>30</sup>

The second major compromise pushed by the United States during the Rome negotiations limits the admissibility of cases before the ICC through the principle of complementarity.<sup>31</sup> The Rome Statute requires that the Court find the case inadmissible when the case is being “investigated or prosecuted by a State which has jurisdiction” unless the State is “unwilling or unable to prosecute” or where the case has already been investigated by such a State and the State has decided not to prosecute.<sup>32</sup> The principle of complementarity has a history dating back to the Treaty of Versailles, in which the “Allies agreed to accept Germany’s offer to try a select number of accused offenders before its Reichsaericht Su-

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24. Hans-Peter Kaul, *The International Criminal Court: Jurisdiction, Trigger Mechanism and Relationship to National Jurisdictions*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A CHALLENGE TO IMPUNITY* 49, 60 (Mauro Politi & Giuseppe Nesi eds., 2001).

25. Examples might include States such as Iraq, the Russian Federation (signed but not ratified), North Korea, and Burma.

26. Rome Statute art. 13.

27. Kaul, *supra* note 24, at 60.

28. U.N. CHARTER art. 25.

29. Newton, *supra* note 18, at 49.

30. Crossette, *supra* note 5, at A3 (citing War Crimes Ambassador Pierre Prosper for the U.S. position “that we continue to oppose the treaty and do not intend to become a party”).

31. See El Zeidy, *supra* note 16, at 896–929.

32. Rome Statute art. 17(1). Two additional limits on admissibility are where (c) “[t]he person has already been tried for the conduct”; and (d) “[t]he case is not of sufficient gravity to justify further action by the court.” *Id.*

preme Court sitting at Leipzig.”<sup>33</sup> Likewise, complementarity appeared in the first proposals for an international criminal court in 1943.<sup>34</sup> The principle reflects the “sovereign right of states to prosecute their own nationals” where they are able and willing to do so.<sup>35</sup> David Scheffer, former U.S. Ambassador for War Crimes, describes complementarity as a “primary deferral to national courts” and an “extraordinary . . . protective mechanism.”<sup>36</sup>

The application of complementarity and, particularly, the meaning of “unwilling or unable to prosecute” will rest with the Court itself,<sup>37</sup> although the Statute and the Rules of Procedure and Evidence<sup>38</sup> provide some guidelines. According to the Statute, a State is unable or unwilling to prosecute when the prosecution has been undertaken for the purpose of shielding the accused from proceedings before the ICC, where there has been unjustified delay in prosecution<sup>39</sup> or where proceedings are not “being conducted independently or impartially.”<sup>40</sup> In making such determinations the Court is instructed to “consider whether, 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 . . . to carry out its proceedings.”<sup>41</sup> The Prosecutor is required to notify States Parties of investigations and to give those States the opportunity to initiate their own investigations. Likewise, the Rules of Procedure and Evidence provide an opportunity for a State to present evidence that “its courts meet internationally recognized norms and standards for the

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33. El Zeidy, *supra* note 16, at 872.

34. According to the 1943 draft proposal for an international criminal court: “[A]s a rule, no case shall be brought before the Court when a domestic court of any one of the United Nations has jurisdiction to try the accused and is in a position and willing to exercise jurisdiction.” London Int’l Assembly, Draft Convention for the Creation of an International Criminal Court art. 3 (1943), *reprinted in* MEMORANDUM SUBMITTED BY THE SECRETARY-GENERAL, HISTORICAL SURVEY OF THE QUESTION OF INTERNATIONAL CRIMINAL JURISDICTION, U.N. Doc. A/CN.4/7/Rev.1, U.N. Sales No. 1949.v.8 (1949).

35. Newton, *supra* note 18, at 26–27.

36. Scheffer, *A Negotiator’s Perspective*, *supra* note 13, at 10.

37. See El Zeidy, *supra* note 16, at 899 (observing “some subjectivity had to be retained to give the court latitude on its decision on unwillingness”).

38. PREPARATORY COMM’N FOR THE INT’L CRIMINAL COURT, FINALIZED DRAFT TEXT OF THE RULES OF PROCEDURE AND EVIDENCE, ch. 3, U.N. Doc. PCNICC/2000/1/Add.1. (2000) [hereinafter ICC R.P. & EVID.].

39. Such unjustified delay might well apply in situations such as currently seen in Cambodia, where domestic prosecutions have been delayed for decades. See *infra* Section II.B.1. Though, of course, the ICC would not have temporal jurisdiction over the crimes of the Khmer Rouge.

40. Rome Statute art. 17(2)(C).

41. Rome Statute art. 17(3).

independent and impartial prosecution of similar conduct,” so as to avoid ICC jurisdiction.<sup>42</sup>

The complementarity provisions of the Rome Statute create a system in which national courts are given the opportunity to prosecute locally and the ICC serves as a backstop when States are unable or unwilling to prosecute. This has been described by commentators as a “tiered allocation of authority”<sup>43</sup> or as “stratified concurrent jurisdiction.”<sup>44</sup> In such a system, the interests of the national State to prosecute are protected up until the point where they conflict with the “thin preferences of the transnational polity in favor of prosecution,” at which point the case becomes admissible in the international forum.<sup>45</sup> While the role of complementarity in the emerging system of international criminal justice will be discussed more thoroughly below,<sup>46</sup> it is sufficient to observe here that the complementarity principle significantly limits the circumstances in which cases are admissible before the ICC. While there will certainly be cases in which States Parties are unable or unwilling to prosecute, they are likely to be few and far between.

In addition to the two major compromises of jurisdiction and admissibility, a third limitation on the ICC is sheer capacity. The ability of the ICC to hear cases is constrained by staffing and resources. Since 1995, the International Criminal Tribunal for the Former Yugoslavia (ICTY) has only issued nineteen judgments<sup>47</sup> and, while some of these have covered more than one individual, an international adjudicatory body is not likely to have the capacity to hear every case of crimes against humanity, genocide, and war crimes that falls within its jurisdiction. While future high level offenders, such as Milosevic or Pinochet, could well find themselves before the ICC, the Court will presumably lack the necessary capacity to deal with the hundreds of thousands of possible defendants likely to be incriminated after mass genocide or ethnic strife such as in Rwanda. Commentators have observed that this will likely produce a situation in which “the international forum seeks to prosecute the leader-

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42. ICC R.P. & EVID. 51, *supra* note 38. Prosecutorial decisions on admissibility are reviewable by the Pre-Trial and Trial Chambers. *See* Rome Statute art. 18.

43. Newton, *supra* note 18, at 67.

44. Morris, *supra* note 19, at 196.

45. William W. Burke-White, *Reframing Impunity: Applying Liberal International Law Theory to an Analysis of Amnesty Legislation*, 42 HARV. INT’L L.J. 467, 476 (2001) (using liberal international law and international relations theory to justify referencing domestic policy choices where they do not conflict with an “international constitution” defined through the preferences of the transnational polity).

46. *See infra* Section IV.A.2.

47. *Judgements*, at <http://www.un.org/icty/judgement.htm> (last visited Feb. 5, 2003) (ICTY website).

ship stratum and leaves the lower strata of defendants to be tried in national courts.”<sup>48</sup>

Taken collectively, the two major compromises on jurisdiction and admissibility along with de facto capacity constraints make the ICC an inherently limited tool. While the ICC’s role is important, it is unlikely to deal the “decisive blow . . . to impunity” predicted by Kofi Annan. For the Court to be truly effective then, it must be part of a larger system of international criminal justice.

### B. *The Ad Hoc Tribunals*

The jurisprudence, practices, and contributions of the two *ad hoc* tribunals—the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda (ICTR)—have been the subject of much scrutiny. It is indisputable that the ICTY and ICTR have handed down important and well-reasoned judgments that have had a profound impact on the development of international criminal law. The *Tadic* case articulated the rules of command responsibility, the *Kunarac* case found rape to be a crime against humanity, and the *Akayesu* case was the first modern international decision to find an individual guilty of genocide.<sup>49</sup> The simple fact that Slobodan Milosevic currently stands before the ICTY accused of genocide and crimes against humanity is a significant step in the fight against impunity.<sup>50</sup> Opinions of supranational tribunals will continue to shape the contours of international criminal law.

For the purposes of this argument, however, the larger question is what role such tribunals will play in the future enforcement of international criminal justice. The short answer to that question is little to none. While the jurisprudence of the *ad hoc* tribunals will have far-reaching consequences as applied by other courts, the tribunals themselves have such limited jurisdiction that they are unlikely to have a meaningful role in future enforcement. The ICTR can only hear cases from the Rwandan genocide of 1994<sup>51</sup> and the ICTY only has jurisdiction over crimes on the

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48. Morris, *supra* note 19, at 196.

49. Prosecutor v. Tadic, ICTY Case No. IT-94-1-T, Opinion and Judgment (May 7, 1997), available at <http://www.un.org/icty/judgement.htm>; Prosecutor v. Kunarac, ICTY Case No. IT-96-23-T & IT-96-23/1-T, Judgment (Feb. 22, 2001), available at <http://www.un.org/icty/judgement.htm>; Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment (Sept. 2, 1998), available at <http://www.icttr.org>.

50. Bill Keller, *The Monster in the Dock*, N.Y. TIMES, Feb. 9, 2002, at A19 (op-ed, observing that Milosevic’s trial “would serve as a check on cyclical vengeance, and that it might even give pause to some future monster”).

51. Statute of the International Tribunal for Rwanda, S.C. Res. 955, Annex, U.N. SCOR, 49th Sess., 3453d mtg., art. 7, U.N. Doc. S/Res/955 (1994), amended by S.C. Res.

territory of the former Yugoslavia since 1991.<sup>52</sup> While these two courts will continue to help resolve the pressing need for justice in Rwanda and Yugoslavia, they have no ability to hear cases from other parts of the world.

As the two *ad hoc* tribunals were created by the U.N. Security Council acting under chapter VII authority,<sup>53</sup> the Security Council could create additional *ad hoc* tribunals or vest the ICTY with additional jurisdiction in appropriate circumstances.<sup>54</sup> However, given the political alignments necessary for and the expense of creating additional *ad hoc* tribunals, this seems most unlikely. The 2001 budget for the ICTY was U.S.\$96.4 million, with a similar amount spent on the ICTR.<sup>55</sup> As these funds come from assessed (required) contributions to the U.N., they are the subject of much criticism.<sup>56</sup> Proposals for an *ad hoc* international tribunal for East Timor, for example, have been scuttled due to the potential cost.<sup>57</sup> The creation of further *ad hoc* tribunals is strictly limited by politics on the Security Council. Because such tribunals are created under chapter VII, all of the permanent members must agree not to veto the enabling resolution. Given the outright hostility that the Bush administration has shown toward international criminal justice and the recent testimony of the U.S. War Crimes Ambassador that the *ad hoc* tribunals should end their work by 2008, it seems highly unlikely that the United States would support their proliferation.<sup>58</sup> While the creation of an *ad hoc* tribunal might fall within the

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1165, U.N. SCOR, 53d Sess., 3877th mtg., U.N. Doc. S/Res/1165 (1998); S.C. Res. 1329, U.N. SCOR, 55th Sess., 4240th mtg., U.N. Doc. S/Res/1329 (2000).

52. Statute of the International Tribunal [for Yugoslavia], adopted by S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., art. 8, U.N. doc. S/Res/827 (1993), reprinted in BASIC DOCUMENTS OF THE ICTY (1998).

53. See, e.g., S.C. Res. 827, *supra* note 52 (creating the ICTY); S.C. Res. 955, *supra* note 51 (creating the ICTR). See generally Andreas Paulus, *Article 29, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 539 (Bruno Simma et al. eds., 2d ed. 2002) [hereinafter CHARTER COMMENTARY] (discussing the legal basis and history of the ICTY and ICTR).

54. This possibility was raised in the wake of September 11 as a "better alternative" to the use of military tribunals for the prosecution of Al Qaeda members. See Anne-Marie Slaughter, *Terrorism and Justice*, FIN. TIMES, Oct. 11, 2001, at 23.

55. See Key Figures, at <http://www.un.org/icty/glance/keyfig-e.htm> (last visited Apr. 11, 2001); see also Patricia Wald, *To Establish Incredible Events by Credible Evidence*, 42 HARV. INT'L L.J. 535, 536 n.3 (2001).

56. Patricia Wald, the U.S. Judge at the ICTY from 1999 to 2002, has criticized the cost of the tribunals given their slow pace. See Patricia Wald, *Inside A War Crimes Tribunal: Does International Justice Really Work?*, Lecture at Harvard Law School (Feb. 6, 2002).

57. Nelson Belo & Christian Ranheim, *Prosecuting Serious Crimes in East Timor*, Address at Justice and Accountability in East Timor: International Tribunals and Other Options 5-7 (Oct. 16, 2001), at <http://www.etan.org/lh/pdfs/justeng.pdf> (last visited Dec. 6, 2002) (report of a one-day Seminar in Dili).

58. Pierre-Richard Prosper, Ambassador-at-Large for War Crimes Issues, Statement Before the House International Relations Committee, Washington, D.C. (Feb. 28, 2002), available at <http://www.state.gov/s/wci/trls/rm/2002/8571.htm> (testifying that "this Administration is calling for action. We have and are urging both Tribunals to begin to aggressively focus on the end-game and conclude their work by 2007-2008."). For further discussion of the

perceived national interests of the permanent Security Council members in some circumstances, it appears unlikely to happen in the near future. Moreover, with the entry into force of the ICC Statute, the Security Council could simply refer the case to the ICC, pursuant to article 14(b) of the Statute, rather than create a new tribunal.

While *ad hoc* tribunals have served an important role in bringing justice to some individuals and in the articulation of international criminal law, their future effectiveness as enforcement mechanisms of international criminal law seems limited.<sup>59</sup> The creation of *ad hoc* tribunals appears to be a particular phenomenon of the 1990s. Patricia Wald, former U.S. Judge at the ICTY, has described the *ad hoc* tribunals as “successful weigh stations, warts and all, on the path to permanent and effective judicial mechanisms.”<sup>60</sup> She is correct to note the past successes of *ad hoc* tribunals as well as the fact that they are not likely to be far-reaching or long-lasting mechanisms to combat impunity.

### C. Domestic Courts

Given the above considerations, domestic courts are playing and will continue to play a key role in the enforcement of international criminal justice. Such domestic enforcement comes in two principle varieties that warrant independent consideration: first, domestic courts operating under the territoriality or nationality principles of jurisdiction and, second, domestic courts operating under the universality principle. Taken together these domestic courts represent the “backbone of the emerging system of global justice.”<sup>61</sup>

#### 1. Domestic Courts Exercising Territorial and National Jurisdiction

Every day throughout the world, national courts operate locally, exercising jurisdiction over their citizens and those who commit crimes on their territory. This alone is nothing new. But, many of these courts are

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rapidly expanding schism between the United States and Europe over this issue, see Andrew Moravcsik, *The Human Rights Blame Game; Europe and America Are at Odds over the New International Criminal Court. They Shouldn't Be.*, NEWSWEEK (International Edition), Apr. 22, 2002, at 26 (noting the ideological divide between European egalitarianism and American libertarianism, whereby “human rights institutions lie closer to the core of Europe’s international identity; unilateral military action against perceived enemies lies closer to America’s”).

59. Jochen Frowein & Nico Krisch, *Article 41*, in CHARTER COMMENTARY, *supra* note 53, at 735, ¶ 19.

60. Wald, *supra* note 56.

61. William W. Burke-White, *What If? Prosecuting Crimes of Chemical Terror*, in TREATY ENFORCEMENT AND INTERNATIONAL COOPERATION IN CRIMINAL MATTERS WITH SPECIAL REFERENCE TO THE CHEMICAL WEAPONS CONVENTION 77, 78 (Rodrigo Yepes-Enriquez & Lisa Tabassi eds., 2002).

also empowered to prosecute serious crimes subject to international law—namely genocide, crimes against humanity, and war crimes. When they do, they become part of the community of courts, the enforcement mechanisms of international criminal justice.

Today, nearly all domestic courts are able to prosecute the constituent elements of international crimes, such as murder. A significant proportion of States have also enacted the necessary domestic legislation to criminalize the actual international wrongs. While U.S. practice in this regard is limited,<sup>62</sup> other States are far more progressive and have provisions covering international crimes in their domestic laws.<sup>63</sup>

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62. While the United States has codified the Genocide Convention, U.S. courts only have jurisdiction where the crime is committed on U.S. territory or by a U.S. national. *See* 18 U.S.C. § 1091(d) (2000). U.S. courts do not have jurisdiction over crimes against humanity, except where they constitute torture or where the perpetrators are military officers subject to the Uniform Code of Military Justice. *See* 18 U.S.C. § 2340A(b)(2) (2000); *see also* Douglass Cassel, *Empowering United States Courts to Hear Crimes Within the Jurisdiction of the International Criminal Court*, 35 *NEW ENG. L. REV.* 421, 429 (2001) (observing that “crimes against humanity are not codified as such”). Likewise, war crimes are only partially codified in U.S. law, with the added requirement that the victim or perpetrator be a U.S. national. *See* 18 U.S.C. § 2441(b) (2000).

63. *See* MARC WELLER & WILLIAM BURKE-WHITE, *NO PLACE TO HIDE: NEW DEVELOPMENTS IN THE EXERCISE OF INTERNATIONAL CRIMINAL JUSTICE* (forthcoming 2003) (manuscript ch. 3) (providing the text of the domestic legislation in a variety of States). For instance, Australia has criminalized war crimes as well as some crimes against humanity. *See* War Crimes Amendment Act, 1988 (Austl.). *See also* Polukhovich v. Commonwealth (1991), 172 C.L.R. 501, for an Australian crimes against humanity trial. Austrian courts have jurisdiction to punish those crimes which Austria is obligated to punish based on its treaty ratifications, including the Geneva Conventions and the Torture Convention. *See* § 64 Abs 7 StGB. Belgian courts are empowered to prosecute grave breaches of the Geneva Conventions as well as crimes against humanity. *See* Belgian Act Concerning the Punishment of Grave Breaches of International Humanitarian Law, *translated in* 38 *I.L.M.* 918 (Act of June 16, 1993 concerning the punishment of grave breaches of the Geneva Conventions of 12 August 1949 and their Additional Protocols I and II of the Geneva Conventions of 18 June 1977, as amended by the Act of 10 February 1999 concerning the punishment of grave breaches of international humanitarian law). Bosnian courts can hear cases of genocide and war crimes. *See* Criminal Code of the Federation of Bosnia and Herzegovina, ch. XVI, arts. 153–66 (1998) (Criminal Offences Against Humanity and International Law), *available at* <http://www.ohr.int/ohr-dept/legal>. Botswana’s courts can hear cases of war crimes. *See* Geneva Conventions Act of 1970, Government Gazette 237 (Supp. F) (Aug. 26, 1970). Canadian Courts have jurisdiction over war crimes and crimes against humanity. *See* Crimes Against Humanity and War Crimes Act, ch. 24, 2000 S.C. (Can.) (implementing the Rome Statute). *See also* R. v. Finta, [1994] S.C.R. 701 (Can.), in which the Canadian Supreme Court ruled on crimes against humanity committed during World War II. Chile can prosecute war crimes and international crimes specified in international treaties. *See* Código Penal 1874 (Chile) (as amended). Croatian courts are empowered to hear any crime that Croatia is obligated to punish under international law. *See* Penal Code (Kasnemi Zakon), Official Gazette of the Republic of Croatia 110/1997 (Oct. 21, 1997). This is but a small sample of the more than one hundred States that can prosecute international crimes domestically.

For a more extensive list including the text of implementing legislation, including Czech Republic, Denmark, El Salvador, Ethiopia, Germany, Finland, France, Guatemala, Hungary, India, Ireland, Israel, Italy, Japan, Malawi, Malaysia, Mexico, Nepal, Netherlands, New

Examples of local courts being used to prosecute international crimes are numerous. Even in the United States, domestic courts have been used for the prosecution of international crimes including piracy, slave trading, and, more recently, international terrorism.<sup>64</sup> Three recent cases are illustrative of these possible charges under domestic federal and state law. First, Richard Reid, the alleged “shoe bomber” who is accused of attempting to bring down an American Airlines flight from Paris to Miami in December 2001, has been indicted in U.S. federal court for attempted murder, hijacking, and use of a weapon of mass-destruction.<sup>65</sup> Second, Zacarias Moussaoui, accused of conspiring with Al Qaeda as the twentieth hijacker of September 11, has been indicted in the Federal District Court for the Eastern District of Virginia on charges of conspiracy to commit terrorism, conspiracy to commit aircraft hijacking, and conspiracy to kill U.S. employees.<sup>66</sup> Likewise, the 1993 World Trade Center bombers were tried in U.S. federal court in New York for terrorism.<sup>67</sup> Domestic courts from Rwanda to Kosovo have also been active in prosecuting international crimes that occurred locally.

The reasons why national courts are bound to play a significant role in the enforcement of international criminal law are clear. Local courts are ubiquitous. Nearly every State has courts of justice, though these differ in form, structure, and procedure. Given the omnipresence of local judicial mechanisms, nearly every international crime is subject to the territorial jurisdiction of the courts of some State. Whether those courts are empowered and willing to exercise jurisdiction is another question. Likewise, local courts are close to the acts in question. Given physical proximity, local courts often have the best access to information, evidence, and testimony about the alleged events.

There are, however, significant dangers in the local prosecution of international crimes. First, local courts are more likely to be biased or politically motivated than the international courts discussed above. The very proximity to the crime, the local press coverage, and the searing pain of knowing victims and survivors (all the reasons why

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Guinea, New Zealand, Nicaragua, Nigeria, Norway, China, Portugal, Russia, Senegal, Seychelles, Singapore, Slovenia, Spain, Sri Lanka, Sweden, Switzerland, Tadjikistan, Uganda, United Kingdom, Uruguay, Vietnam, Yugoslavia, and Zimbabwe, see WELLER & BURKE-WHITE, *supra*.

64. Harold Hongju Koh, *We Have the Right Courts for Bin Laden*, N.Y. TIMES, Nov. 23, 2001, at A39.

65. Indictment, *United States v. Reid*, (D. Mass. 2002) (No. 02-10013-WGY), at <http://news.findlaw.com> (last visited Dec. 20, 2002).

66. Indictment, *United States v. Moussaoui*, (E.D. Va. 2001) (No. 1:01-cr-00455-A), at <http://notablecases.vaed.uscourts.gov> (last visited Dec. 20, 2002).

67. Benjamin Weiser, *Suspected Chief Plotter in Trade Center Blast Goes on Trial Today*, N.Y. TIMES, Aug. 4, 1997, at B1.



venue change is often sought in ordinary trials) may undermine the fairness of the procedure. Second, the quality of justice in local courts differs dramatically. While some States have extremely well-developed legal systems,<sup>68</sup> others lack even the most rudimentary legal tools.<sup>69</sup> Third, in the prosecution of international crimes, there is often a need to convince both a local and a global polity of the fairness of the proceedings and the legitimacy of justice rendered. Local courts are least likely to be viewed as fair and unbiased by outside observers.

Given their ubiquity and the omnipresence of their jurisdiction, local courts will likely find themselves on the front line of adjudicating international crimes. While many States may be fortunate enough to avoid having international crimes committed locally, September 11 is illustrative of the growing “threats posed by non-State actors . . . by civil conflict spilling across borders, by shadowy global criminal networks, and by chemical, biological, and nuclear weapons.”<sup>70</sup> However, there remains a gaping hole in the ability of States to prosecute international crimes locally. Many States, including the United States, have not enacted the requisite domestic legislation to prosecute certain major international crimes, such as genocide and crimes against humanity. If national courts are to play a significant role in a system of international criminal justice, there is a need to close this gap.<sup>71</sup>

## 2. National Courts Exercising Universal Jurisdiction

In addition to hearing cases based on the territoriality and nationality principles of jurisdiction, many of the ubiquitous national courts described above are also able (based on the principle of universality) to hear cases of the most severe international crimes committed extraterritorially.<sup>72</sup> When States exercise universal jurisdiction, they become “independent actors in the international arena . . . apply[ing] interna-

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68. Koh, *supra* note 64 (arguing for the prosecution of September 11 crimes and observing “if any judicial system in the world can handle a case like this fairly, efficiently, and openly, it is ours”).

69. Interview with Gerald Gahima, Attorney General of Rwanda, in Kigali, Rwanda (Aug. 27, 2001) (noting the need for pencils and paper to record statements in trials).

70. Anne-Marie Slaughter & William Burke-White, *An International Constitutional Moment*, 43 HARV. INT’L L.J. 1, 2 (2002).

71. Cassel, *supra* note 62, at 436.

72. This principle was first articulated by Hugo Grotius in 1624. See HUGO GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES*, book II, ch. XX, § XL(I), at 504 (James Brown Scott ed., Francis W. Kelsey trans. 1925) (1624) (“[T]he fact must also be recognized that kings, and those who possess rights equal to those kings, have the right of demanding punishments not only on account of injuries committed against themselves or their subjects, but also on account of injuries which do not directly affect them but excessively violate the law of nature or of nations, in regard to any person whatsoever . . .”).

tional norms impartially, without deferring to their governments.”<sup>73</sup> For the purposes of this Article, it is not necessary to provide a detailed account of the exercise of universal jurisdiction.<sup>74</sup> Rather, the goal is to consider briefly where and how universal jurisdiction will be exercised and where it fits within the emerging system of international criminal law enforcement.

In order for a court to hear a case under the universality principle, the State in which the court sits must make an *a priori* political decision to grant its courts universal jurisdiction.<sup>75</sup> This is often a contentious decision for the domestic legislature and national executive. Non-Governmental Organizations (NGOs) and victims groups advocate the enactment of universal jurisdiction, while military and diplomatic authorities argue the need to protect State sovereignty and to avoid, in the words of Henry Kissinger, “substituting the tyranny of judges for that of governments.”<sup>76</sup> Nonetheless, many States have enacted the requisite domestic legislation to exercise universal jurisdiction over the most serious international offenses.<sup>77</sup> More than 120 States have adopted legislation to prosecute war crimes under the universality principle<sup>78</sup> and at least 95 have adopted legislation with respect to crimes against humanity.<sup>79</sup>

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73. Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT’L L. 1103, 1104 (2000) (borrowing from the French Institute of International Law).

74. For a more detailed discussion of the exercise of universal jurisdiction, see PRINCETON PROJECT ON UNIVERSAL JURISDICTION, THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION (2001) [hereinafter PRINCETON PRINCIPLES] (offering a framework of guidelines for the exercise of universal jurisdiction); AMNESTY INT’L, UNIVERSAL JURISDICTION: THE DUTY OF STATES TO ENACT AND ENFORCE LEGISLATION, AI No. OIR 53/005/2001 (2001) [hereinafter AMNESTY INT’L, UNIVERSAL JURISDICTION] (for an exhaustive fifteen-part review of the domestic implementing legislation); WELLER & BURKE-WHITE, *supra* note 63 (reviewing the history of universal jurisdiction, the crimes subject thereto, and domestic legislation authorizing courts to exercise universal jurisdiction); William J. Aceves, *Liberalism and International Legal Scholarship: The Pinochet Case and the Move Toward a Universal System of Transnational Law Litigation*, 41 HARV. INT’L L.J. 129 (2000) (considering the Pinochet case as a move toward more general enforcement of international criminal law); Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785 (1988) (discussing the history of universal jurisdiction); Marc Weller, *On the Hazards of Foreign Travel for Dictators and Other International Criminals*, 75 INT’L AFF. 599 (1999) (discussing the impacts of the Pinochet case on universal jurisdiction and accountability).

75. Cf. PRINCETON PRINCIPLES, *supra* note 74, at 30 (finding that the lack of domestic implementing legislation should not be a bar to prosecution).

76. Henry A. Kissinger, *The Pitfalls of Universal Jurisdiction*, FOREIGN AFF., July/Aug. 2001, at 86, 86; cf. Christopher Hitchens, *Court Time for Henry*, THE NATION, Nov. 5, 2001, at 9 (arguing that the time has come for a trial of Henry Kissinger under the universality principle); CHRISTOPHER HITCHENS, THE TRIAL OF HENRY KISSINGER (2000).

77. For an exhaustive list of such States, see WELLER & BURKE-WHITE, *supra* note 63.

78. AMNESTY INT’L, UNIVERSAL JURISDICTION, *supra* note 74.

79. See *id.* ch. 6 (providing a complete chart of domestic implementing legislation for the exercise of universal jurisdiction); see, e.g., C.P.M. art. 208 (Braz. 1969); Code

Laws authorizing the exercise of universal jurisdiction vary significantly in scope and character, from highly restrictive applications of universal jurisdiction to legislation, such as that of Belgium, which opens the door to its nearly unfettered exercise. Because of the broad scope of universal jurisdiction legislation, Belgium has found its courts flooded with cases and, according to its Foreign Minister, is now considering restricting the exercise of universal jurisdiction, at least “to modify the issue of immunity for serving politicians.”<sup>80</sup> The scope of legislation, and whether to enact such legislation at all, remains a political choice for executives and legislatures around the globe.

The second prerequisite for the exercise of universal jurisdiction is that a prosecutor, an investigating judge, or, in the *partie civile* system, a victim must decide to initiate a case. There are a growing number of examples where this has occurred. The most obvious, of course, is the Pinochet case, in which an NGO—the Progressive Union of Prosecutors—filed a complaint against Pinochet with the Spanish Audiencia Nacional.<sup>81</sup> A human rights entrepreneur,<sup>82</sup> namely the Spanish magistrate Baltazar Garzón, who was already familiar with the dirty war in Chile, catalyzed the investigation of Pinochet and eventually sought his extradition from the United Kingdom.<sup>83</sup> Those to whom Harold Koh refers as

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d’instruction criminelle art. 10 and Law of Dec. 3, 1998 (Belg.); Crimes Against Humanity and War Crimes Act, ch. 24, 2000 S.C. (Can.); Código Penal art. 150 (1999) and Código Orgánico de Tribunales arts. 6, 8 (Chile 1990); Penal Code of the Empire of Ethiopia of 1957, art. 17(1); Código Penal de El Salvador art. 361 (1973); Penal Code of Finland (1975), ch. 13; §§ 6(1), § 6, 220a StGB; Penal Code of Honduras, arts. 5.5, 320 (1984); Penal Code §§ 12, 223–225 (Nor. 1902); Penal Code art. 358 (Rom. 1968) (the act must also be criminal in the place of commission for Romania to be able to exercise jurisdiction); L.O.P.J. art. 23.4 (Spain); Lag om Straff för Folkmord [Law on Punishment of Genocide] art. 169 (1964) (Swed.); Swiss Military Penal Code art. 110 (1937) (Switzerland can only exercise universal jurisdiction if the crime is committed as part of an armed conflict); Código Penal art. 10.7 (Uru. 1934); Criminal Code of the Socialist Federal Republic of Yugoslavia ch. 16 (1976); see also Attorney Gen. of Israel v. Eichmann (Isr. S. Ct. 1962), reprinted in 36 I.L.R. 277, 299, 304 (the trial of Adolph Eichmann for crimes against humanity). See generally Marianne Holdgaard Bukh, *Prosecution Before Danish Courts of Foreigners Suspected of Serious Violations of Human Rights or Humanitarian Law*, 6 EUR. REV. PUB. L. 339 (1994) (on Danish law).

80. Marlise Simons, *Human Rights Cases Begin to Flood into Belgian Courts*, N.Y. TIMES, Dec. 27, 2001, at A8.

81. See Aceves, *supra* note 74, at 162.

82. See, e.g., MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* 31 (1998) (referring to “organizations and individuals within advocacy networks” as “political entrepreneurs who mobilize resources like information and membership and show a sophisticated awareness of the political opportunity structures within which they are operating”).

83. See Aceves, *supra* note 74, at 164. For the British proceedings, see Regina v. Bow St. Metro. Stipendiary Magistrate, *Ex parte Pinochet Ugarte* (No. 3), 1 A.C. 147 (H.L. 2000).

“international norm entrepreneurs,”<sup>84</sup> such as Judge Garzón, have been following this pattern around the globe.<sup>85</sup> Belgium has convicted numerous individuals of war crimes against civilian populations in Rwanda<sup>86</sup> and “targets of other lawsuits include officials from Cuba, Iraq, Ivory Coast, Rwanda, Cambodia, Chad, Iran and Guatemala.”<sup>87</sup> To comply with the ICJ’s recent Congo decision,<sup>88</sup> Belgium has had to drop prosecutions of sitting officials such as Israeli Prime Minister Sharon. Germany and Switzerland have likewise prosecuted Bosnian war crimes under the principle of universal jurisdiction.<sup>89</sup> In light of this growing State practice, M. Cherif Bassiouni has observed that “[u]niversal jurisdiction has become the preferred technique by those seeking to prevent impunity for international crimes.”<sup>90</sup>

Notwithstanding the Congo decision limiting prosecutions of sitting heads of State and foreign ministers, universal jurisdiction is likely to play a significant role in the future enforcement of international criminal law. Again, comparative politics helps explain decisions to enforce international criminal law. The initial decision to enact legislation authorizing courts to exercise universal jurisdiction is relatively low cost for the legislature and executive of the enacting State. At the time the enabling legislation is passed, it is unlikely for there to be particular cases pending and therefore fewer entrenched interests against passage. While some States such as the United States are unlikely to support universal

84. See, e.g., Harold Hongju Koh, *How International Human Rights Law is Enforced*, 74 IND. L.J. 1397, 1409 (1999).

85. See generally REDRESS TRUST, *UNIVERSAL JURISDICTION IN EUROPE: CRIMINAL PROSECUTIONS IN EUROPE SINCE 1990 FOR WAR CRIMES, CRIMES AGAINST HUMANITY, TORTURE, AND GENOCIDE* (1999).

86. Loi relative à la répression des violations graves de droit international humanitaire § 7 (Feb. 10, 1999) (Belg.), reprinted in *MONITEUR BELGE* (Mar. 23, 1999), allows prosecution under the universality principle. Cases have included the trials of two Catholic nuns, Consolata Mukangango and Julienne Mukabutera, who were sentenced to over ten years imprisonment. See *Appeal of Three Rwandans Convicted of Genocide Put Off to December*, WORLD NEWS CONNECTION, Oct. 10, 2001, available at 2001 WL 28793236.

87. Simons, *supra* note 80, at A8.

88. Given the recent International Court of Justice decision in the Congo case, in which it was found that the Belgian arrest warrant for the sitting foreign minister of the Congo violates international law, Belgium may well need to carve out an immunity exception for serving politicians. See *Arrest Warrant of 11 April 2000 (Congo v. Belg.)* (I.C.J. Feb. 14, 2002), reprinted in 41 I.L.M. 536 (2002).

89. See, e.g., *Public Prosecutor v. Djajic*, No. 20/96, S. Ct. Bavaria, 3d Strafsenat (1997), reprinted in 92 AM. J. INT’L L. 528 (1998) (prosecution under the universality principle for killing unarmed Muslim civilians); see also BGHSt 45, 64. For the Swiss case, see *In re G. Military Tribunal*, Division 1, Lausanne, Switz., Apr. 18, 1997, discussed in Andreas R. Ziegler, *International Decision*, 92 AM. J. INT’L L. 78 (1998).

90. M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT’L L. 81, 82 (2001).

jurisdiction,<sup>91</sup> a sufficient number of States already have demonstrated the exercise of universal jurisdiction to be a potent tool.

The second prerequisite necessary for the exercise of universal jurisdiction—namely, that a prosecutor, investigating judge, or victim initiates a case—is also likely to be met frequently. Victims seek redress in any forum available. For prosecutors, universal jurisdiction satisfies humanitarian concerns and may provide career-enhancing publicity.<sup>92</sup> While the challenges of obtaining extradition and custody over an accused remain, the Pinochet case demonstrates the possibilities for apprehension.<sup>93</sup> Thus, the procedural hurdles to initiating universal prosecutions are relatively low, the political costs thereof to necessary actors are nominal, and the potential benefits to human rights entrepreneurs pursuing such cases are extremely high.

Given the growing importance of universal jurisdiction, a brief normative consideration is in order. The principle benefit of universal jurisdiction is the provision of an alternate means of bringing to justice serious criminals when the State where the crimes occurred is unable or unwilling to prosecute. In the Pinochet case, for example, Chile was neither able nor willing to prosecute its former president. Universal jurisdiction offered an alternative recourse to ensure that Pinochet was held accountable for his crimes. There are, however, drawbacks. First, the prosecuting court may be far removed from the locus of the crime, making investigation and community engagement with the proceedings more difficult and the potential reconciling effects of justice more elusive. Second, some individuals and groups may not recognize the right of the prosecuting State to exercise universal jurisdiction, impeding the perceived legitimacy of the process. Third, many States have not enacted the requisite domestic legislation to prosecute crimes universally, making prosecution impossible in some cases. Finally, as the Pinochet case indicates, such prosecutions are easily politicized and may cause conflict between a State's judicial and foreign affairs functions. Nonetheless, in many cases, prosecution under the universality principle may be the preferred way to avoid impunity for serious international criminals.

#### D. Military Tribunals

President George W. Bush's decision to create military tribunals for the trial of Al Qaeda suspects and detainees raises the possibility of trials

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91. See Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. CHI. LEGAL F. 323.

92. Before the Pinochet Case, Baltazar Garzón was a relatively unknown regional magistrate; today he travels the world on the lecture circuit in addition to his judicial duties.

93. See *Regina v. Bow St. Metro. Stipendiary Magistrate, Ex parte Pinochet Ugarte*, 1 A.C. 147 (H.L. 2000); see also Weller, *supra* note 74.

by military tribunals for certain classes of international criminals. The President's military order of November 13, 2001 requires the Secretary of Defense to set regulations for and establish military courts to try any non-U.S. citizen who "has engaged in, aided or abetted, or conspired to commit, acts of international terrorism."<sup>94</sup> As long as international crimes are included in that grant of jurisdiction to military courts, such courts will be able to enforce international criminal law.

While military courts are extremely rare, there are some precedents. With varying degrees of constitutional legitimacy, the United States used military courts after the Civil War and World War II to try, for example, German nationals who infiltrated the United States via submarine.<sup>95</sup> The United Kingdom convened the Diplock Courts to deal with crimes in Northern Ireland.<sup>96</sup> In so doing, it discarded many of the traditional protections afforded suspects, notably the right to a jury trial and limits on admissibility of evidence. Abandoning these protections required the United Kingdom to issue notices of derogation pursuant to article 15 of the European Convention on the ground that there was an emergency situation in Northern Ireland.<sup>97</sup> Nonetheless, challenges to the Diplock process before the European Court of Human Rights were in part successful, with the Court ruling that extended detention was inconsistent with the Convention.<sup>98</sup> Israel has also relied on military justice during the First Intifada.<sup>99</sup>

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94. Military Order No. 222, 66 Fed. Reg. 57,831 (Nov. 16, 2001).

95. See *Ex Parte Quirin*, 317 U.S. 1 (1942).

96. See Carol Daugherty Rasic, *Northern Ireland's Criminal Trials Without Jury: The Diplock Experiment*, 5 ANN. SURVEY INT'L & COMP. L. 239 (1999).

97. John D. Jackson & Sean Doran, *Conventional Trials in Unconventional Times: The Diplock Court Experience*, 4 CRIM. L.F. 503, 508 (1993); see also *Communication of the Permanent Representation of the United Kingdom to the Council of Europe*, No. 2, 1973 Y.B. Eur. Conv. on H.R. 26-28; *Note Verbale, United Kingdom Permanent Representative to the Council of Europe Strasbourg*, 1975 Y.B. Eur. Conv. on H.R. 18; 1978 Y.B. Eur. Conv. on H.R. 22 (*Communication of the Permanent Representation of Turkey to the Council of Europe*, No. 823/152). The European Convention provides that during "war or other public emergency threatening the life of the nation," parties may "take measures derogating from [their] obligations under this Convention to the extent strictly required by the exigencies of the situation." *Convention for the Protection of Human Rights and Fundamental Freedoms*, Nov. 4, 1950, art. 15, 213 U.N.T.S. 221, 232 [hereinafter *European Convention*].

98. See *Brogan v. United Kingdom*, 145 Eur. Ct. H.R. (1989); see also Jackson & Doran, *supra* note 97, at 509; Wilson Finnie, *The Prevention of Terrorism Act and the European Convention on Human Rights*, 52 MOD. L. REV. 703 (1989); Stephen Livingstone, *A Week Is a Long Time in Detention: Brogan and Others v. United Kingdom*, 40 N. IR. L.Q. 288 (1989).

99. Emanuel Gross, *Human Rights, Terrorism, and the Problem of Administrative Detention in Israel: Does a Democracy Have the Right to Hold Terrorists as Bargaining Chips?*, 18 ARIZ. J. INT'L & COMP. L. 721, 736 (2001) (quoting AMNESTY INT'L, *ISRAEL'S FORGOTTEN HOSTAGES: LEBANESE DETAINEES IN ISRAEL AND KHAM DETENTION CENTER* (1997): "[B]etween 1986 and 1988, eleven people were captured in Lebanon and brought to Israel.

The structures, procedures, independence, and fairness of military courts vary dramatically. President Bush's original order was drafted with extreme breadth, allowing for secret tribunals without guarantees of the core minimum rights to free and fair trial. A vigorous policy debate in the United States helped shift the position of the Bush administration,<sup>100</sup> leading to the issuance of operating regulations that provide significantly greater procedural protections including rights to public trial, to confront witnesses and to representation by counsel.<sup>101</sup> Even these more liberal regulations, however, have been criticized for violating international legal obligations.<sup>102</sup>

The prospects for the use of military commissions as part of the system of international criminal justice are mixed. On the one hand, military commissions offer the promise of short-run efficiency. They are easy to create (such as through Bush's military order) and can be vested with the power to prosecute international crimes. Yet, as the proposed use of military tribunals after September 11 indicates, they may produce a significant backlash from civil society, imposing a different set of political costs. Moreover, military tribunals are often inconsistent with the liberal motives States normally articulate for the enforcement of international criminal justice. If enforcement is really, as Gary Bass claims, the product of the "principled idea" of "legalism," then States will presumably choose enforcement mechanisms which better complement the legalist paradigm.<sup>103</sup> Thus, military tribunals are only likely to be used where a nation feels directly threatened and international criminal justice is being exercised for retribution and incapacitation, rather than as part of a move toward legalism. While September 11 is unlikely to be the only incident that produces such conditions, we may hope similar incidents are few and far between.

Beyond the politics of military tribunals, normative considerations militate against their use. Military tribunals, depending on their structure and rules, may well violate core principles of international law, such as

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There, they were put on trial before military courts and sentenced to prison terms, ranging from eighteen months to ten years.").

100. For this debate see, e.g., Koh, *supra* note 64; Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 MICH. J. INT'L L. 1 (2001); Slaughter, *supra* note 54; Ruth Wedgwood, *The Case for Military Tribunals*, WALL ST. J., Dec. 3, 2001, at A18.

101. See, e.g., Charles Lane, *Terrorism Tribunal Rights Are Expanded*, WASH. POST, Dec. 28, 2001, at A1; Katherine Q. Seelye, *Pentagon Says Acquittals May Not Free Detainees*, N.Y. TIMES, Mar. 22, 2002, at A13; Editorial, *How to Try a Terrorist*, N.Y. TIMES, Dec. 29, 2001, at A32 (noting that the Bush administration was "about to release procedural rules for its proposed military tribunals that are much fairer than originally feared").

102. See generally Jordan Paust, *Anti-Terrorism Military Commissions: The Ad Hoc DOD Rules of Procedure*, 23 MICH. J. INT'L L. 677 (2002).

103. GARY BASS, *STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS* 7 (2000).

the right—enshrined in numerous international conventions—to a fair trial before an independent arbiter.<sup>104</sup> In fact, prior to September 11, the U.S. State Department was a vocal critic of the use of military tribunals in Burma, China, Columbia, Egypt, Malaysia, Nigeria, Peru, Russia, and the Sudan.<sup>105</sup> President Bush and Defense Secretary Rumsfeld have subsequently argued that military tribunals are necessary to allow swift trials that do not jeopardize witnesses, judges, and the public at large.<sup>106</sup> However, the successful trials of the first World Trade Center bombers in federal court and of high-ranking Serb army commanders by the ICTY suggest that domestic courts and specialized international tribunals are at least as well equipped to handle such cases. The most significant argument against military courts is that, no matter how fair they may be in practice, they lack the perceived legitimacy crucial to reconstructing societies and judicial systems in the wake of serious international crimes.<sup>107</sup> The need for transparency, procedural regularity, and conformity with international obligations advises against the use of military tribunals.

#### E. Internationalized Domestic Courts

The most recent enforcement mechanisms to emerge are internationalized domestic courts (semi-internationalized courts), which are part of the domestic justice systems of their host countries, but include a mix of local and international judges who apply both international and domestic law. Such courts are currently in operation in East Timor<sup>108</sup> and Kosovo.<sup>109</sup> They will soon come into effect in Sierra

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104. See, e.g., Paust, *supra* note 100, at 2 (noting that “the Military Order will create military commissions that involve unavoidable violations of international law and raise serious constitutional challenges”). The rights to a free and fair trial are recognized by all major political, social, religious, and cultural systems. The Universal Declaration of Human Rights states that everyone “is entitled in full equality to a fair and public hearing by an independent and impartial tribunal.” Even in times of war, common article 3 of the Geneva Conventions requires that anyone accused of a crime be afforded “all the judicial guarantees which are recognized as indispensable by civilized peoples.” The International Covenant on Civil and Political Rights, the Inter-American Convention on Human Rights, the Cairo Declaration on Human Rights in Islam, the African Charter on Human and Peoples’ Rights and the European Convention all contain similar guarantees of fair judicial process.

105. See Human Rights Watch, *Fact Sheet: Past U.S. Criticism of Military Tribunals* (Nov. 28, 2001), at <http://www.hrw.org/press/2001/11/tribunals1128.htm> (last visited Dec. 23, 2002).

106. See, e.g., Mike Allen, *Bush Defends Order for Military Tribunals*, WASH. POST, Nov. 20, 2002, at A14.

107. Military courts, which, through the military chain of command are directly accountable to the executive, are widely viewed as susceptible to executive pressure.

108. See *On the Organization of Courts in East Timor*, UNTAET Reg. 2000/11, §§ 10.1, 10.3, U.N. Doc. UNTAET/REG/2000/11 (Mar. 6, 2000).

109. See *On Assignment of International Judges/Prosecutors and/or Change of Venue*, UNMIK Reg. 2000/64, U.N. Doc. UNMIK/REG/2000/64 (Dec. 15, 2000).



Leone,<sup>110</sup> and may eventually begin operation in Cambodia.<sup>111</sup> These courts tend to be individualized to meet the needs of the domestic State as well as the demands of the international community, which often contributes finances, resources, and judges. Given the importance of these new judicial forums, Part II argues that internationalized domestic courts will become a very significant component of the international criminal justice system. Part III reviews their operation.

From a normative perspective, internationalized domestic courts offer a unique combination of the benefits of the models discussed above. First, they can provide some of the legitimacy of an international tribunal, as foreign judges are more likely to be impartial and viewed as such both by domestic audiences and by the global community. Likewise, internationalized domestic courts can demonstrate the general global consensus that international crimes will not be tolerated. These semi-internationalized courts are also far easier to establish and much less expensive to operate than their fully internationalized counterparts.<sup>112</sup> They do not require chapter VII authority and, as part of a State's preexisting domestic judiciary, they can draw on resources already in place without the need to create an entirely new judicial entity. Like purely domestic courts, semi-internationalized courts are proximate to the events in question, have the best access to relevant evidence, and may be able to play a positive role in the local processes of reconciliation. Semi-internationalized domestic courts, when properly implemented, might then offer a powerful new mechanism for the enforcement of international criminal law.

## II. THE POLITICS OF DOMESTIC ENFORCEMENT OF INTERNATIONAL CRIMINAL LAW

The overview in Part I argued that the ICC and other fully internationalized courts will play a role, but a limited one, in the emergent system of international criminal law enforcement. The bulk of enforcement work will have to be done by national courts—either operating locally or universally and possibly borrowing judicial elements from

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110. Statute of the Special Court for Sierra Leone (2002), available at <http://sierra-leone.org/specialcourtstatute.html>.

111. Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (2001) (on file with author).

112. Of course, the quality of justice rendered will be directly proportional to the funding provided to the internationalized court. Savings may be available in terms of infrastructure as the court may draw on the preexistent domestic legal system. However, a clear lesson from East Timor is that where funding is limited or nonexistent, the court may not be able to function and certainly will not be able to meet the standards of well-funded, fully internationalized courts.

other States. This Part draws on comparative politics and international relations inquiry to understand the creation of enforcement mechanisms for international criminal law. It begins with a consideration of the politics of creating international tribunals—such as the *ad hoc* tribunals for Yugoslavia and Rwanda. Then it presents three case studies of countries where domestic and semi-internationalized adjudicatory bodies with jurisdiction over international crimes have been or are being established: Cambodia, East Timor, and Rwanda.

The politics of the enforcement of international criminal law is of significance for three reasons. First, political considerations may indicate when one can expect States or groups of States to establish mechanisms of enforcement. Second, comparative political analysis can suggest where third States and international institutions may have the most leverage in facilitating the creation of such mechanisms. Third, the politics of establishing tribunals may highlight potential dangers and difficulties inherent in particular approaches to international criminal justice.

On the surface, international relations inquiry provides the necessary context for understanding State decisions to enforce international criminal law. As Kenneth Abbott has argued, “international relations helps us . . . incorporat[e] the political factors that shape the law.”<sup>113</sup> But, at a deeper level, these interactions at the international level are dependent on domestic politics. As Andrew Moravcsik notes, the “basic liberal insight [is] about the centrality of State-society relations to world politics.”<sup>114</sup> Understanding the decisions of sovereign States to establish enforcement mechanisms for international criminal law must begin with an understanding of State-society relations and domestic politics. To that end, this Part engages in an inquiry of how and why some States have created semi-internationalized courts.

### A. *The Politics of International Tribunals*

A body of recent scholarship addresses the question of when States create international war crimes tribunals. Gary Bass argues that States establish such international enforcement mechanisms when they seek to export legal norms. Bass’s comprehensive historical analysis of the politics behind Nuremberg and the ICTY provides a useful starting point. He argues that war crimes tribunals are only established by liberal States; they “spring from a particular kind of liberal domestic polity.”<sup>115</sup> He

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113. Kenneth Abbott, *International Relations Theory, International Law, and the Regime Governing Atrocities in International Conflicts*, 93 AM. J. INT’L L. 361, 362 (1999).

114. Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INT’L ORG. 513, 513 (1997).

115. BASS, *supra* note 103, at 7. Bass’s claim depends on the proposition that liberal States do, in fact, behave differently. See Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT’L L. 503 (1995); cf. José E. Alvarez, *Do Liberal States Behave*

observes that when “illiberal states have fought each other, they have *never* established a bona fide war crimes tribunal.”<sup>116</sup> The creation of war crimes tribunals is a consequence of the fact that “liberal states tend to operate abroad by some of the same rules they observe at home.”<sup>117</sup> The particular norm of the domestic polity which liberal States export in the creation of war crimes tribunals, according to Bass, is legalism. For him, legalism consists of a “fixation on process, a sense that international trials must be conducted roughly according to well-established domestic practice.”<sup>118</sup> Only liberal States, he claims, are committed to legalism.

Bass further suggests that the creation of international war crimes tribunals will be limited to circumstances in which the risk of exposure of the State’s soldiers is extremely low.<sup>119</sup> Such risk could come either from the actual enforcement of international criminal law through, for example, the apprehension of suspects, or from possible trial by a tribunal itself. Recent examples demonstrate the accuracy of Bass’s findings. NATO has been extremely hesitant to locate and arrest Yugoslav war crimes suspects such as Ratko Mladic, the former Bosnian Serb military leader, as “there is much fear that it will cost lives to apprehend” such individuals.<sup>120</sup> Likewise, the Bush administration has renounced the Rome Statute of the ICC, fearing it may “open American officials and military personnel in operations abroad to unjustified, frivolous or politically motivated suits.”<sup>121</sup>

Bass also observes that war crimes tribunals will only be created when States are outraged “by wars waged against them.”<sup>122</sup> The public outrage in the United States<sup>123</sup> and Britain<sup>124</sup> after World War II, for ex-

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*Better? A Critique of Slaughter’s Liberal Theory*, 12 EUR. J. INT’L L. 183, 194 (2001) (noting that “[w]e do not know for sure [whether liberal States behave better] but there is plenty of reason to be skeptical”).

116. BASS, *supra* note 103, at 19.

117. *Id.* at 18. In his War Message to Congress (1917), Woodrow Wilson noted, “We are at the beginning of an age in which it will be insisted that the same standards of conduct and of responsibility for wrong shall be observed among nations and their governments that are observed among the individual citizens of civilized states.” *Id.* at 18–19.

118. *Id.* at 20.

119. *Id.* at 29.

120. Ian Fisher, *Ex-Commander in Yugoslavia Will Surrender to U.N. Tribunal*, N.Y. TIMES, Apr. 15, 2002, at A3.

121. Crossette, *supra* note 5, at A3.

122. BASS, *supra* note 103, at 30.

123. In July 1942, for example, 39 percent of Americans desired Hitler to be shot, while 23 percent demanded imprisonment. *Id.* at 160. It is important to note, however, that public opinion and mass outrage can undermine legalism if pushed too far. A May 1945 poll, for example, showed that the majority of the American Public wanted German leaders placed in forced labor camps, rather than tried. *Id.* at 161.

124. After World War II, 97 percent of Britons thought top Nazis should be punished and 53 percent demanded executions. *Id.* at 183.

ample, played a significant role in the domestic politics behind the Nuremberg Tribunal. As Bass notes, “legalism without outrage [both mass and elite] could result in a dreary series of futile legal briefs.”<sup>125</sup>

These observations significantly narrow the range of circumstances in which international war crimes tribunals are likely to emerge. Under the constraints, Bass observes, for war crimes tribunals to arise, liberal States must be the outraged victims of war crimes and be able to export domestic norms of legalism without further jeopardizing their own citizens and soldiers. This appears a highly unlikely proposition. Democratic peace theorists assert that “[l]iberal states have created a separate peace” and are unlikely to go to war against one another,<sup>126</sup> thereby decreasing the number of conflict-dyads that could give rise to war crimes enforcement mechanisms. If Bass’s argument holds, only when liberal States go to war with nonliberal States and those nonliberal States commit significant crimes against the citizens of liberal States are we likely to see war crimes tribunals. However, even when all of these conditions are met—such as the United States’ war on terrorism—international war crimes tribunals do not necessarily emerge.

A second strand of emerging scholarship in the area of war crimes enforcement stresses the realist power politics behind war crimes enforcement regimes. In an analysis of the creation and implementation of the ICTY, Christopher Rudolph argues “the ICTY illustrates how the strategic interests of powerful States . . . shape the process of institutionalization and its use.”<sup>127</sup> Though powerful liberal States had not been the direct victims of war crimes in the Balkans, their domestic liberal politics were nonetheless outraged as “vivid images from Balkan prison camps recalled memories of the Holocaust.”<sup>128</sup> The creation of the ICTY was seen by States as a “means to respond to such calls in a politically

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125. BASS, *supra* note 103, at 31.

126. Michael W. Doyle, *Liberalism and World Politics*, 80 AM. POL. SCI. REV. 1151, 1152 (1986). The literature on the democratic peace is extensive and suggests that due both to belief systems and domestic structures, liberal States rarely go to war with other liberal States, although liberal States may well have particular “liberal reasons for aggression” against nonliberal States. *Id.* John Owen has argued that “liberal ideas [as mediated through liberal institutions] cause liberal democracies to tend away from war with one another, and that the same ideas prod these states into war with illiberal states.” John M. Owen, *How Liberalism Produces the Democratic Peace*, INT’L SEC., Fall 1994, at 87, 88. For further reading on the democratic peace see, Michael Doyle, *Kant, Liberal Legacies, and Foreign Affairs*, 12 PHIL. & PUB. AFF. 205 (1983); David A. Lake, *Powerful Pacifists: Democratic States and War*, 86 AM. POL. SCI. REV. 24 (1992) (presenting an institutionalist explanation for the democratic peace based on rent seeking); T. Clifton Morgan & Sally Howard Campbell, *Domestic Structure, Decisional Constraints, and War: So Why Kant Democracies Fight?*, 35 J. CONFLICT RESOL. 187 (1991) (explaining the democratic peace based on decisional rules in democracies).

127. Christopher Rudolph, *Constructing an Atrocities Regime: The Politics of War Crimes Tribunals*, 55 INT’L ORG. 655, 660 (2001).

128. *Id.* at 665.

inexpensive way.”<sup>129</sup> Realist concerns dictated the creation of a court, but one with little power and influence. According to Kenneth Abbott, the ICTY was created precisely because realist power interests were limited: “[T]he threat of prosecution was materially less costly than economic sanctions or military intervention.”<sup>130</sup> Powerful States were not the direct victims as they were at Nuremberg,<sup>131</sup> and they provided “strong rhetorical support, but little aid in enforcement.”<sup>132</sup>

Rudolph’s conclusions likewise suggest international war crimes tribunals will be created only rarely. While he notes that “expanding liberal norms of state conduct and protecting human rights” may help “explain the existence of tribunals in locales with little strategic or material importance,” he claims that effective international tribunals will only exist where realist politics so dictate.<sup>133</sup> He argues “realist variables of power and interest best explain why tribunals may be established” and, even once established, the same variables can lead States away from conducting “investigations in politically sensitive areas” and prevent them from “allocating adequate resources . . . in areas perceived to have little strategic importance.”<sup>134</sup>

Great powers will rarely identify such realist interests in the creation of an international criminal enforcement mechanism.<sup>135</sup> U.S. inaction and failure to intervene militarily in Rwanda, for example, is highly indicative of this lack of great-power strategic interest where atrocities seem most likely to occur.<sup>136</sup> Other than in extremely rare cases where such direct strategic interests exist, liberal States are only likely to create international criminal enforcement mechanisms where domestic interest groups can “raise the domestic costs in a liberal country for ignoring foreign atrocities.”<sup>137</sup> Even in those cases, however, Rudolph argues that the mechanisms created may lack the political will and military muscle to be effective.

The observations presented by Bass and Rudolph paint a relatively bleak picture for the creation of viable enforcement mechanisms of in-

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129. *Id.*

130. Abbott, *supra* note 113, at 373–74.

131. See Bass, *supra* note 103, at 147–205.

132. Rudolph, *supra* note 127, at 665.

133. *Id.* at 681–82.

134. *Id.* at 682–83.

135. See Abbott, *supra* note 113, at 374.

136. See, e.g., Samantha Power, *Bystanders to Genocide: Why the United States Let the Rwandan Tragedy Happen*, ATLANTIC MONTHLY, Sept. 2001, at 84; see also SAMANTHA POWER, “A PROBLEM FROM HELL”: AMERICA AND THE AGE OF GENOCIDE (2002).

137. Bass, *supra* note 103, at 33; see also KECK & SIKKINK, *supra* note 82, at 12–13 (describing the boomerang effect, whereby NGOs can raise domestic interests in liberal States and thereby force such States to act in relation to human rights violations in foreign States).

international criminal law. Their claims, taken collectively, indicate that international criminal tribunals will emerge in two situations: first, where liberal States are victimized and outraged and can create an enforcement mechanism with little risk to their own citizens; and, second, where States find significant power-politics strategic interests. Yet, both Bass and Rudolph focus on international war crimes tribunals without recognizing the broad array of domestic and semi-internationalized enforcement mechanisms reviewed in Part I.

### B. *The Politics of Domestic International Criminal Enforcement*

The future enforcement of international criminal law may not be as dire as the observations of Bass and Rudolph suggest. By shifting the focus from why powerful States create international war crimes tribunals to when and why victim States enforce international criminal law at home, significant opportunities emerge for international criminal law enforcement.

Three case studies—the creation of tribunals in Cambodia, East Timor, and Rwanda—illustrate additional political alignments, beyond those identified by Bass and Rudolph, that may give rise to viable enforcement mechanisms in the victim State itself. The case of Cambodia shows how political divisions within a powerful elite may lead to attempts at domestic enforcement. The East Timor case demonstrates the role of U.N. administration and suggests the circumstances in which States may seek semi-internationalized enforcement mechanisms to externalize the political costs of prosecutions vis-à-vis a powerful neighbor. The example of the Rwandan Gacaca shows how domestic demands for justice along with severe resource constraints can encourage innovation in the enforcement of international criminal law.

Each of the following case studies combines international law, international relations, and comparative political analysis, drawing particularly on liberal theories of international relations.<sup>138</sup> None of these case studies is intended to be exhaustive—further analysis particularly through comparative politics methodologies would be required to ascertain the exact political dynamics within each country. Nonetheless, the following discussions do highlight important opportunities and alignments allowing for the exercise of international criminal justice by domestic courts.

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138. According to positive liberal international relations theory, individuals—the basic actors in international society—organize to promote their own interests; States represent some subset of those domestic interests; and international outcomes depend on the configuration of national interests. See generally Moravcsik, *supra* note 114.

## 1. Cambodia: Political Divisions and International Criminal Enforcement

The ongoing process of establishing courts to try the leadership of the Khmer Rouge in Cambodia demonstrates that even illiberal States will attempt to design mechanisms to enforce international criminal law when policy externalities of international criminal law enforcement yield net benefits for members of political elites and governing coalitions. The argument here proceeds in four steps: First, it will be demonstrated that divisions within the Cambodian political elite account for the stop-and-go approach to the creation of a tribunal in Cambodia. Second, it will be shown that this slow process has played directly into the hands of the Cambodian governing elite, strengthening its position vis-à-vis political rivals. Third, the way the U.N. and other international actors have guided the process to date has further enhanced the Cambodian elite's political power. Finally, conclusions will be drawn from the Cambodian case for the creation of semi-internationalized tribunals more generally.

Before proceeding, it is necessary to situate this political process in the larger context of the recent history of the creation of a tribunal in Cambodia.<sup>139</sup> The process of bringing the Khmer Rouge leadership to justice has its roots in 1979 when Vietnam and its puppet government in Cambodia tried and convicted Pol Pot and Ieng Saray—two of the senior leaders of the Cambodian genocide—in a trial lacking any claim to fairness or due process.<sup>140</sup> In 1997, toward the end of the civil war in

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139. Unfortunately, a history of the negotiations to establish the Khmer Rouge Tribunal has not yet been written. Much of the negotiation process has remained secret and many key documents from inside the Cambodian government, as well as most of the correspondence between the Cambodian government and the U.N., have not been made public. See, e.g., Anette Marcher, *UN Accepts Flawed Tribunal for KR*, PHNOM PENH POST, Oct. 13, 2000, at 1. The analysis that follows does not attempt a comprehensive history, but rather seeks to analyze the political alignments behind the ongoing attempts to create a Khmer Rouge tribunal, based on interviews and the limited documentary evidence available.

140. See STEPHEN HEDER & BRIAN D. TITTEMORE, SEVEN CANDIDATES FOR PROSECUTION: ACCOUNTABILITY FOR THE CRIMES OF THE KHMER ROUGE 13 (2001); see also DAVID CHANDLER, BROTHER NUMBER ONE 160–62 (1999). The July 1979 law under which Pol Pot was tried for genocide deviates significantly from international definitions of the crime. Under article 1 of the law, genocide is defined as “the pre-planned mass killing of many innocent people, expulsion of the people from the towns and their villages in order to concentrate and compel them to work to the point where their strength was broken in conditions that destroyed them both physically and mentally, smashing religion, wrecking the cultural infrastructure and other relations with family and society.” July 1979 Law, art. 1, reproduced in *Somnomreuang Robah Tolakar Kat-toh Ban Pralay Puch-sah Pol Pot-Ieg Sary* [Dossier of the Court Judging the Pol Pot-Ieng Saray Genocidal Clique], quoted in HEDER & TITTEMORE, *supra*, at 13 n.17. This definition deviates significantly from that provided in article 2 of the Genocide Convention:

[G]enocide means any of the following acts committed with an intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such:

Cambodia that raged until the death of Pol Pot and the surrender of the Khmer Rouge leadership in 1998, First Prime Minister Norodom Ranariddh and then Second Prime Minister Hun Sen wrote to the U.N. Secretary-General seeking international assistance to try “the persons responsible for the genocide and crimes against humanity during the rule of the Khmer Rouge from 1975 to 1979.”<sup>141</sup> In response, a U.N. Group of Experts issued a report in March 1999 on the prospects for justice in Cambodia, recommending the establishment of a U.N. Tribunal for Cambodia along the lines of the ICTY.<sup>142</sup>

In the intervening period, Hun Sen, the former Second Prime Minister, staged a coup which led to the formation of a coalition government in November 1998 between Hun Sen’s Cambodian People’s Party and the United National Front for an Independent, Neutral, Peaceful and Co-operative Cambodia (FUNCINPEC), the second most important party in Cambodia, thereby ousting First Prime Minister Norodom Ranariddh.<sup>143</sup> Over the next four years, Hun Sen’s government engaged in negotiations with the U.N. to establish a tribunal for the Khmer Rouge. Throughout 1999 and 2000, the Cambodian government, led in this effort by Senior Minister Sok An,<sup>144</sup> met with U.N. counterparts, Ralph Zaklin and Hans Corell.<sup>145</sup>

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- (a) Killing members of the group;
  - (b) Causing serious bodily or mental harm to members of the group;
  - (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction, in whole or in part;
  - (d) Imposing measures intended to prevent births within the group;
  - (e) Forcibly transferring children of the group to another group.

Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. 2, 78 U.N.T.S. 277, 280 [hereinafter Genocide Convention].

141. Letter from the First and Second Prime Ministers of Cambodia to the Secretary-General (June 21 1997), *annexed to* U.N. GAOR, 52d Sess., U.N. Doc. A/1997/488 (1997).

142. Report of the Group of Experts for Cambodia established pursuant to General Assembly Resolution 52/135, Identical letters from the Secretary-General to the President of the General Assembly and the President of the Security Council (Mar. 15, 1999) (on file with author) [hereinafter Report of the Group of Experts].

143. Michael Hayes, *Another Chapter Opens as Hun Sen Gives Prince Ranariddh the Deal*, PHNOM PENH POST, Nov. 27, 1998, at 1.

144. Sok An serves as Chairman of the Council of Ministers and President of the Task Force for Cooperation with Foreign Legal Experts and Preparation of the Proceedings for the Trial of Senior Khmer Rouge Leaders.

145. See, e.g., *One Hurdle Left on KR Trial*, PHNOM PENH POST, Sept. 3, 1999, at 1 (noting that agreement between the U.N. and Cambodia had been reached on most points, with the exception of the number of judges); Anette Marcher, *National KR Tribunal Takes Shape*, PHNOM PENH POST, Nov. 26, 1999, at 1 (“Key aspects of the Government’s latest proposal on the Khmer Rouge tribunal include Cambodian jurisdiction for the trial and the appointment of judges by the Supreme Council of Magistracy.”); Anette Marcher & Yin Sœum, *KR Trial Sails Through Council*, PHNOM PENH POST, Jan. 7, 2000, at 1 (noting that



The result of these negotiations is the proposed tribunal rooted in the Cambodian domestic judiciary, with a mix of international and local prosecutors and judges applying international law. In mid-1999, differences of opinion between the Cambodian government and the U.N. emerged on several key issues, namely the nationality of the majority of judges and the prosecutor, the status of amnesties granted Ieng Saray, and the willingness of the government to arrest indictees.<sup>146</sup> International diplomacy eventually led to a breakthrough in the negotiations and the novel proposal for a tribunal with a majority Cambodian bench, but requiring a supermajority, including at least one international judge, to convict.<sup>147</sup>

On December 29, 2001, Sok An presented the Cambodian government's draft law for a semi-internationalized tribunal as part of the domestic judiciary to the National Assembly,<sup>148</sup> which unanimously passed the law three days later.<sup>149</sup> Further delay ensued as the Constitutional Council, Cambodia's highest judicial authority, challenged the law's constitutionality on grounds that article 3 of the draft law incorporates aspects of the Cambodian Penal Code of 1956 that provide for the death penalty, in violation of article 32 of the Cambodian Constitution.<sup>150</sup> While finding that the general semi-internationalized format of the proposed court was constitutionally permissible,<sup>151</sup> the Council sent the law

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the "Council of Ministers yesterday approved the draft law for future trials against former Khmer Rouge leaders").

146. Anette Marcher, *KR Tribunal Talks Inch Forward*, PHNOM PENH POST, Mar. 31, 1999, at 1. From July 4 to July 7, 2000, Hans Corell engaged in negotiations with the Cambodian government in an attempt to resolve these differences. After these meetings observers were upbeat noting that "its beginning to look like the real thing." Anette Marcher, *Agreement Close on KR Trial*, PHNOM PENH POST, Jul. 7, 2000, at 1.

147. See, e.g., Anette Marcher & Vong Sokheng, *Kerry Visit Raises KR Tribunal Hopes*, PHNOM PENH POST, Nov. 24, 2000, at 1.

148. See Sok An, *Presentation and Comments to the National Assembly on the Draft Law on the Establishment of Extraordinary Chambers of the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea*, Dec. 29, 2000 & Jan. 2, 2001 (on file with author) (outlining the details of the law and describing it as "embody[ing] new formulas, new concepts, and new and significant principles").

149. See Vong Sokheng & Phelim Kyne, *Trial Law Sails Through Assembly*, PHNOM PENH POST, Jan. 5, 2001, at 1 (noting that "legislators unanimously passed 47 of 48 articles of the Khmer Rouge tribunal law without a whisper of debate").

150. Paragraph 2, article 32 of the Cambodian Constitution is unambiguous: "there shall be no capital punishment." CAMB. CONST. art. 32(2); see Constitutional Council, Case No. 038/001/2001 (Jan. 17, 2001), Decision No. 040/002/2001 (Feb. 12, 2001) (on file with author). Paragraph 1, article 3 of the Khmer Rouge Tribunal Law incorporates ten articles of the Penal Code of 1956 which allow "third degree criminal penalty." Article 21 of the Penal Code states that "third degree criminal penalty is the death sentence."

151. Among other issues considered, the Council found "that prohibiting the Royal Government of Cambodia to request amnesty . . . does not infringe the Constitution." Case No. 038/001/2001. It approved "Articles 9 to 32, which define the composition of the Extraordinary Chambers," noting that there "is no article in the Constitution found to prohibit a national

back to the National Assembly to “remove any mention” of the death sentence.<sup>152</sup>

Even after the revision of the law to conform to the Constitutional Council’s order,<sup>153</sup> significant delays in implementation continued.<sup>154</sup> The standoff between the U.N. and the Cambodian government on the issues of the independence of the prosecutor and the status of amnesties previously granted to Khmer Rouge leaders was exacerbated by statements from Prime Minister Hun Sen loudly critical of the U.N.<sup>155</sup> In January 2002, Sok An and Hans Corell yet again exchanged letters in an attempt to reconcile these differences, but were unable to do so.<sup>156</sup> On February 8, 2002, the U.N. withdrew from negotiations, concluding that “as currently envisaged, the Cambodian court would not guarantee independence, impartiality, and objectivity.”<sup>157</sup> After a seven month delay, in early September 2002, the U.N. indicated a willingness to reenter into discussions if the Security Council or General Assembly gave “a mandate to do so.”<sup>158</sup> At the time of publication, this process is ongoing and its outcome remains uncertain.

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institution, in particular the Supreme Council of the Magistracy, from appointing people from the United Nations.” It found that the extension of the statute of limitations on certain crimes was appropriate as “Cambodia has not ruled that [statutes of limitations] are a fundamental principle of equal value with its Constitution.” *Id.*

152. *Id.*; see also Phelim Kyne & Vong Sokheng, *KR Law Moves, But Fine Print Threatens*, PHNOM PENH POST, Feb. 16, 2001, at 1.

153. See Vong Sokheng, *Senate Approves KR Tribunal Law Change*, PHNOM PENH POST, Aug. 3, 2001. Subsequently, King Norodom Sihanouk signed the draft law in mid-August 2001. See Vong Sokheng & Bill Bainbridge, *King Signs KR Law, But Obstacles Loom*, PHNOM PENH POST, Aug. 17, 2001.

154. Vong Sokheng, *UN Role in Tribunal Decisions Under Fire*, PHNOM PENH POST, July 6, 2001 (asking why a “matter that took the Council of Ministers about [fifteen] minutes to approve has taken six months to get done”).

155. Hun Sen is on record as saying that “[i]f you are not taking part, we will proceed without the United Nations, because when we toppled Pol Pot’s genocidal regime we did not have United Nations help at all.” Seth Mydans, *U.N. Ends Cambodia Talks on Trials for Khmer Rouge*, N.Y. TIMES, Feb. 9, 2002, at A4 (quoting Hun Sen); see also Vong Sokheng, *Trial Delay UN’s Fault—PM*, PHNOM PENH POST, Nov. 23, 2001 (noting the Prime Minister’s comment that “the tribunal law to try the former Khmer Rouge was approved and they (the UN) vetoed it”).

156. Interview with Sok An, Chairman, Cambodian Council of Ministers, in Phnom Penh, Cambodia (Jan. 11, 2002).

157. Mydans, *supra* note 155, at A4.

158. Seth Mydans, *Cambodia and U.N. Break an Icy Silence on Khmer Rouge Trials*, N.Y. TIMES, Sept. 1, 2002, at A11. In mid-November, the U.N. Sixth Committee provided that mandate through a resolution requesting the continuation of negotiations. Elizabeth Becker, *U.N. Revives Plan to Try Remnants of Khmer Rouge in Cambodia*, N.Y. TIMES, Nov. 21, 2002, at A8. The resolution of the Sixth Committee, however, has been much criticized by international observers for relaxing standards of due process and granting too much power to Cambodia to structure and administer the court. See *id.*

The first principal claim of this Section is that the preceding saga of repeating cycles of small steps toward the creation of a semi-international court, followed by delay and backpedaling can be explained by divisions within the Cambodian political elite. Steps forward have occurred when the policy externalities of enforcement of international criminal law have benefited ruling members of the political elite; steps back have occurred when proposed enforcement has threatened controlling members of this elite.<sup>159</sup>

Cambodia remains a relatively illiberal democracy with a narrow and extremely powerful political elite. The Cambodian government is not the kind of democratic polyarchy Robert Dahl describes as being “completely or almost completely responsive to all its citizens.”<sup>160</sup> Moreover, Cambodian civil society—still in its infancy—lacks what Dahl refers to as “organizational pluralism.”<sup>161</sup> Exemplary of this lack of pluralism are reports by election monitors that in the February 2002 commune elections, the government’s “landslide would not have been possible but for a pre-polls campaign of vote buying, intimidation, and violence, including the killing of more than twenty candidates and party activists.”<sup>162</sup>

In circumstances such as these, government policy rests not with the broad spectrum of the Cambodian people, but instead with a narrow political elite. Liberal international relations theory indicates that the government’s actions on the international stage represent some subset of the domestic polity.<sup>163</sup> In Cambodia, then, that subset is a political power elite. Government by elites occurs when, to quote C. Wright Mills, “the

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159. That justice in Cambodia should turn on politics is not surprising in a country in which history, culture, death, and memory have all been purposefully politicized by the government to entrench power and undermine enemies. See Mary K. Magistad, *Pol Pot’s Shadow: The Politics of Memory in Cambodia*, Remarks to the Radcliffe Institute Colloquium, Apr. 29, 2002.

160. ROBERT A. DAHL, *POLYARCHY: PARTICIPATION AND OPPOSITION 2* (1971); see also Freedom House Survey Team, *Freedom in the World 2002: The Democracy Gap*, available at <http://www.freedomhouse.org/research/freeworld/2002/essay2002.pdf> (last visited Nov. 24, 2002) (describing Cambodia as “not free”).

161. Robert A. Dahl, *Pluralism Revisited*, in *THREE FACES OF PLURALISM* 191, 192, 187 (S. Ehrlich & G. Wootton eds., 1980) (defining organizational pluralism as “the number and autonomy of organizations that must be taken into account in order to characterize conflicts among a given collective of persons” and observing that “organizational pluralism is ordinarily a concomitant, both as a cause and effect, of the liberalization and democratization of hegemonic regimes”).

162. Leo Dobbs, *Spotlight: Cambodia Votes*, 165 *FAR E. ECON. REV.* 6 (2002). Likewise Cambodia’s own election-monitoring organizations have found hundreds of cases of irregularities during the campaign. See Lon Nara, *Election Monitors List Irregularities*, *PHNOM PENH POST*, Feb. 15, 2002, at 6 (noting 128 cases of illegal activities by the CCP and 105 cases of intimidation).

163. Moravcsik, *supra* note 114, at 513.

men of the circles composing this elite, severally and collectively. . . make . . . key decisions.”<sup>164</sup>

When a government is controlled by a political elite, private conflicts are often acted out on a very public stage. According to Robert Putnam’s seminal work in the area, political elites consist of “networks of personal communication, friendship and influence” which, at times “act out private drives and conflicts, cloaking this fact in publicly acceptable rhetoric.”<sup>165</sup> While such elites are often “homogeneous in terms of party affiliation” and political goals, cleavages within elites are frequent.<sup>166</sup> Putnam explains: “In some societies intralite competition and fragmentation reaches extreme levels” directly affecting political outcomes.<sup>167</sup>

Understanding the outcomes of the negotiations between the U.N. and the Cambodian government requires characterizing the dynamics of this political elite. Competition within the political elite in Cambodia has at times driven the creation of the Khmer Rouge Tribunal and, at other times, delayed the process. A principle division within the Cambodian government falls precisely along the line of the establishment of a tribunal for the Khmer Rouge. The side of this issue on which a member of the Cambodian elite falls depends largely on the individual’s position during the time of Khmer Rouge rule. As the U.N. Group of Experts explains: “[B]oth of the principal political parties have over the years had strong connections with the Khmer Rouge and include former Khmer Rouge among their members, including some who might be targets of any investigation into atrocities of the 1970s.”<sup>168</sup> Obviously, likely targets of investigation and their supporters are strongly against the creation of a tribunal. Further, while Prime Minister Hun Sen suggests that the proposed tribunal be limited to ten suspects at most,<sup>169</sup> others fear that they may be implicated in the proceedings by damaging information revealed in the course of judicial inquiry. For example, former Khmer Rouge commanders, such as Sou Met and Yim Phana, who currently hold

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164. C. WRIGHT MILLS, *THE POWER ELITE* 28 (1956); see also ROBERT D. PUTNAM, *THE COMPARATIVE STUDY OF POLITICAL ELITES* 9 (1976) (describing how “a tiny proportion of the citizens of any of these countries has more than an infinitesimal chance of directly influencing national policy”).

165. *Id.* at 72.

166. *Id.* at 113.

167. *Id.* at 119 (noting that “[a]most inevitably such cleavages rend the national political elite and raise the specter of civil war, as in America in the 1860s, Germany in the 1930s, and Nigeria and Northern Ireland in the 1960s”).

168. Report of the Group of Experts, *supra* note 142, ¶ 96.

169. *Justice Not Vengeance; Prime Minister Hun Sen Supports a War-Crimes Tribunal—So Long As It Focuses Only on Top Khmer Rouge Leaders*, NEWSWEEK (Atlantic Edition), Aug. 13, 2001, at 17.

high-ranking army posts, have publicly expressed concern that “the trial might be connected to us.”<sup>170</sup> Yim Phana admits that these personal tribulations have direct effects on “other politicians and other political parties.”<sup>171</sup>

While fear of prosecution leads some members of the Cambodian elite to argue against the creation of a tribunal, others see the tribunal as an opportunity to expose and implicate political enemies. To use an analogy from a military officer: “[T]he trial should end up like a meal of shrimp soup: [W]hen diners pick up one shrimp three or four others cling on.”<sup>172</sup> As one Cambodian official explained on condition of anonymity: “There are many powerful people in government who fear this trial will reveal something about them, but there are also many even more powerful who would be happy to have facts about others revealed. It is a political game and the stakes are very high.”<sup>173</sup>

The second principal argument of this Section is that both the efforts toward and delays in creating a Khmer Rouge tribunal play directly into the hands of the Cambodian government. At the center of the ongoing political game in Cambodia sits Prime Minister Hun Sen, himself a former member of the Khmer Rouge before defecting to Vietnam in the 1970s.<sup>174</sup> While he and his closest advisors would not be subject to legal proceedings by any proposed tribunal, many of his political rivals, such as those in the FUNCINPEC Party, which was “closely allied with the Khmer Rouge in the struggle against Viet Nam” could be damaged by information which might surface in the course of trial.<sup>175</sup> Information that could potentially emerge in a trial has been described by some as “a powerful weapon to hold over [some of] his FUNCINPEC coalition partners.”<sup>176</sup>

Yet, Hun Sen’s own allies are not immune from the threat of possible trials. Revelations about some sitting government officials from one potential defendant, Ta Mok, have been described as “career wrecking at best, and at worst could result in criminal charges being brought.”<sup>177</sup> More recently, Cambodian political commentators have suggested a split within Hun Sen’s own Cambodian People’s Party between Chea Sim and Hun Sen over the tribunal issue, reflecting this private political game

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170. Vong Sokheng, *Senior KR Nervous as Trial Looms*, PHNOM PENH POST, Aug. 31, 2001.

171. *Id.*

172. *Id.*

173. Interview with Cambodian Official, Office of the Council of Ministers, in Phnom Penh, Cambodia (Jan. 11, 2002).

174. Report of the Group of Experts, *supra* note 142, ¶ 96.

175. *Id.*

176. *Trials for Khmer Rouge Ever More Remote*, PHNOM PENH POST, Aug. 6, 1999, at 1.

177. *Id.*

being played out on a national policy-making stage.<sup>178</sup> By controlling this process, Hun Sen is able to threaten his rivals while simultaneously resting secure that his allies will not in fact be subject to prosecution.

In 1997, when Hun Sen and his co-Prime Minister wrote to the U.N. seeking assistance in the establishment of the tribunal, the threat of a court may well have seemed a potent tool to use against political enemies, particularly those with extremely close Khmer Rouge ties. Given the seemingly remote likelihood of an actual trial, it was presumably a weapon that Hun Sen could brandish at will to scare, coerce, and control other factions within the government. After all, no one could be sure what files might turn up at trial. A comment by Om Yen Tieng, Senior Advisor to Hun Sen on the creation of a Khmer Rouge Tribunal is suggestive of the power this issue may have given to the Prime Minister: "There were lots of different views about this within the government. Before we could start to draft the law we had to resolve these internal differences. The Prime Minister was able to look at the problems and neutralize the different factions."<sup>179</sup>

However, as the tribunal came closer to reality over the past few years and it appeared that the U.N. would have greater authority than the Cambodian government, Hun Sen may well have realized that a trial—at least one outside of his direct control—could be dangerous. According to one European diplomat in Phnom Penh "there is still the lingering doubt that if [Hun Sen] cannot control the trial, it could produce some evidence that would be embarrassing either for people close to him or for himself."<sup>180</sup> Another political commentator has observed: "[T]he trials might both implicate his party allies and foster subversive ideas about legal accountability in the minds of his restive citizens."<sup>181</sup> This fear of loss of control may well have driven the demands by Hun Sen's government to either end negotiations or to leave final authority over the proceedings to Cambodia, including the appointment of a majority of Cambodian judges. This sentiment was reflected by Senior Minister Sok An: "[W]e must conduct the process with full respect for national sovereignty."<sup>182</sup> By asserting sovereignty and delaying a final deal with the U.N., Hun Sen may have been seeking to protect himself from embarrassment,

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178. Robert Carmichael & Lon Nara, *Sar Kheng: On the Job, The Trial, Crime and Politics*, PHNOM PENH POST, Aug. 31, 2001 (interviewing Sar Kheng, Deputy Prime Minister and co-Minister for the Ministry of the Interior).

179. Interview with Om Yen Tieng, Advisor to Prime Minister Hun Sen, in Phnom Penh, Cambodia (Jan. 12, 2002).

180. Seth Mydans, *Khmer Rouge Trials Won't Be Fair, Critics Say*, N.Y. TIMES, Feb. 10, 2002, at A12.

181. Chung Kuo Jih Pao, *Cambodia, UN Agree on Trial*, CHINA DAILY, May 25, 2000, <http://www.chinadaily.com.cn>.

182. Interview with Sok An, *supra* note 156.

while maximizing the effectiveness of the use of the “tribunal weapon” against rival members of the Cambodian elite.

As Hun Sen further cements his hold on power, the need for the tribunal as a hypothetical weapon against rivals may decline. Such a decline could have two different effects on the negotiations. If Hun Sen’s own calculations suggest that trials would actually be more dangerous to him and his friends, the tribunal issue could slip off the agenda. If, on the other hand, he deems his enemies to be the more likely losers of actual rather than hypothetical trials, the government’s commitment to justice may increase.

The looming omnipresence of a hypothetical tribunal may also have played into Hun Sen’s political hand, affording him a bargaining tool in the negotiation of a peace deal with the Khmer Rouge. Judith Goldstein observes in the context of NAFTA that the creation of legal mechanisms “may be directed as much at domestic concerns as by considerations of the more aggregate national interest.”<sup>183</sup> Because the possibility of trial existed, Hun Sen was able to offer surrendering Khmer Rouge protection from eventual prosecution. In fact, in 1996, when Ieng Saray<sup>184</sup>—a top Khmer Rouge commander and a likely defendant—led the defection of significant Khmer Rouge forces to the government, Hun Sen “recommended that King Sihanouk grant Saray an amnesty and a pardon.”<sup>185</sup> Thus, Hun Sen was able to win favor with still influential Khmer Rouge cadres by offering them protection from the very threat of prosecution he had hypothetically created.

Moving away from granting such amnesties may further serve Hun Sen’s interests. By claiming that the U.N. has forced him not to recognize these grants of amnesty, he may be able to use the process of

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183. Judith Goldstein, *International Law and Domestic Institutions: Reconciling North American “Unfair” Trade Laws*, 50 INT’L ORG. 541, 562 (1996).

184. See HEDER & TITTEMORE, *supra* note 140, at 63–75 (noting that “there is sufficient evidence of Ieng Saray’s individual responsibility for CPK crimes, for repeatedly and publicly encouraging arrests and executions within his Foreign Ministry and throughout Democratic Kampuchea”).

185. See Tom Fawthrop, *No Reason for Standoff on KR Law*, PHNOM PENH POST, Mar. 2, 2001, at 1. Note that according to article 27 of the Cambodian Constitution, “the King shall have the right to grant partial or complete amnesty.” Constitutional Council, Case No. 038/001/2001 (Jan. 17, 2001). However, the King only considers amnesty grants when so requested by the government. Interview with Sok An, *supra* note 156. Om Yen Tieng has suggested that the amnesties granted to Saray are not binding: “Ieng Saray was granted amnesty when the government requested it. But because we are using a special chamber we don’t believe that past amnesty is a bar to prosecution in any way.” Interview with Om Yen Tieng, *supra* note 179. For a further discussion of the binding nature and enforceability of amnesty grants, see generally, William Burke-White, *Reframing Impunity: Applying Liberal International Law Theory to an Analysis of Amnesty Legislation*, 42 HARV. J. INT’L L. 647 (2001) (arguing that amnesties should not be given validity unless the enacting government was legitimate and the amnesty itself is of limited scope).

legalization to continue to threaten those same individuals he originally pardoned. In the words of a European diplomat, Hun Sen “has no love for any of these people [the senior Khmer Rouge leaders]”<sup>186</sup> and would quite probably be happy to have them removed from the political landscape. As Om Yen Tieng, Hun Sen’s senior advisor, explains: “We have been working to ‘prepare the land’ for the trial like a gardener would . . . The government is working hard to neutralize these people.”<sup>187</sup>

In many ways, the threat of the possibility of prosecution—rather than prosecution itself—is the most effective means of neutralizing these former Khmer Rouge bosses. Fear of the unknown is often worse than the event itself. Moreover, Hun Sen may not want to actually break the “secret deals he made with key Khmer Rouge leaders to get them to defect in the last few years.”<sup>188</sup> Some of these Khmer Rouge commanders, such as Ieng Saray, are rumored to have evidence and information about Hun Sen’s activities during the Khmer Rouge time, which would be extremely damaging if released.<sup>189</sup>

The Cambodian political landscape is a murky world of mystery and intrigue. Rumors, threats, and uncertainty abound. What is clear is that the slow negotiation process has been caused by splits within the political elite and Hun Sen has been able to use the threat of prosecution as a political tool against his enemies. In so doing he has externalized the political costs onto the U.N. He created a political situation in which it was left to the U.N.’s top negotiator to declare that “no amnesty shall be a bar to prosecution”<sup>190</sup> and demand that the prosecutor must be able to make independent indictments.<sup>191</sup> Thereby, Hun Sen can appear to be respecting his promises to the Khmer Rouge leadership, while still threatening them with the specter of prosecution.<sup>192</sup>

The third principal claim of this Section is that the way the U.N. and international actors have structured the Cambodian tribunal creation process has enhanced Hun Sen’s power. As shown above, the stops, starts, and delays in the process have given Hun Sen an important political tool to use against his enemies. By allowing negotiations to drag out over a period of years, the U.N. has tacitly condoned, or, at least, allowed the continuation and use of justice as a political weapon.

186. Mydans, *supra* note 180, at A12.

187. Interview with Om Yen Tieng, *supra* note 179.

188. Chung Kuo Jih Pao, *supra* note 181.

189. Magistad, *supra* note 159.

190. Fawthrop, *supra* note 185, at 1 (quoting Hans Corell).

191. Interview with Sok An, *supra* note 156.

192. In a similar context, Vojislav Kostunica’s decision to allow Slobodon Milosevic’s extradition to The Hague, represents a similar kind of cost externalization onto the U.N.



More directly, Hun Sen has been able to use the negotiation process with the U.N. to enhance his own legitimacy. Andrew Moravcsik has argued that “international cooperation” such as between Hun Sen’s government and the U.N. “redistributes control over four important political resources: initiative, institutions, information, and ideology . . . such shifts tend to benefit . . . national executives.”<sup>193</sup> The negotiations over the creation of the tribunal may have “created informational asymmetries” in the government’s favor and allowed Hun Sen’s government to “manipulate the [perceived] credibility of government policy” as he appeared to commit himself to an international process, which lent “ideological legitimation” to his regime.<sup>194</sup> The process of negotiation—even without results—may have thus bolstered Hun Sen’s political power at home.

Finally, the proceeding discussion of the creation of the Khmer Rouge tribunal has important implications for understanding the politics of international criminal law enforcement. It is apparent that semi-liberal or illiberal States do negotiate for the creation of international criminal law enforcement mechanisms when such negotiation furthers the political goals of the controlling elite. Where political elite divide along pro-enforcement and anti-enforcement lines or where the government in power is largely immune from prosecution, an illiberal State may well favor the creation of a judicial enforcement mechanism. Such circumstances should be identified as real opportunities for domestic or semi-internationalized criminal law enforcement.

There is, of course, risk in the creation of international criminal law enforcement mechanisms when they are used as a political tool by particular elements of a domestic government. First, the Cambodian example highlights the possibility that political infighting can undermine the creation of a tribunal, where the threat of prosecution is a more valuable political commodity than prosecution itself. Second, politics may subjugate the rule of law to the point where it no longer has the characteristics of obligation, precision, and delegation associated with legalized regimes in international relations.<sup>195</sup> Comments by the U.N. upon withdrawal from negotiations in February 2002 were indicative of this failure to achieve impartial justice.<sup>196</sup> The Cambodian example thus draws atten-

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193. ANDREW MORAVCSIK, WHY THE EUROPEAN UNION STRENGTHENS THE STATE: DOMESTIC POLITICS AND INTERNATIONAL COOPERATION 63 (Ctr. for European Studies, Working Paper Series No. 52, 1994).

194. *Id.* at 10, 12, 14.

195. See generally Kenneth W. Abbott et al., *The Concept of Legalization*, 54 INT’L ORG. 401 (2000) (defining legalized regimes as those “characterized by three components: obligation, precision, and delegation”).

196. See Mydans, *supra* note 155, at A4.

tion to the crucial role international organizations and third States will have to play in achieving fair and just outcomes when international criminal law becomes overly politicized.

Political fissures along such fault lines are likely to be a frequent occurrence in States recovering from massive ethnic violence and thus present numerous opportunities for the enforcement of international criminal law. Some elements of the sitting government are likely to have been involved in the atrocities, while others likely have cleaner hands. Political divisions can provide an opportunity for the creation of a domestic enforcement mechanism by generating strong domestic political interests in favor of prosecution. The international community needs to be able to identify such opportunities for the creation of enforcement mechanisms and to provide appropriate outside pressure and assistance to realize them.

In the process of deciding how and whether to support domestic attempts at semi-internationalized criminal justice, the U.N. and international actors must understand that their negotiating tactics may become part of a domestic political game. Where a potential tribunal has become a political as well as judicial weapon, international actors will further the interests of some subset of domestic political interests. While external pressure may give the pro-enforcement forces the upper hand, international involvement has a direct effect on domestic political bargaining.<sup>197</sup> This is not to say that the U.N. should not support the creation of semi-internationalized courts, but in doing so, it must recognize and evaluate their impact on domestic politics. The international community must be on guard against strengthening the hand of a regime or particular politician in the name of international justice. Careful analysis of domestic political interests, factions, and dynamics will be required for such international pressure to be successful.

## 2. East Timor: Nation Building and Cost Externalization

The ongoing prosecutions of crimes against humanity and war crimes in East Timor present two additional situations in which States and international organizations may establish domestic enforcement mechanisms for international criminal law. First, when the U.N. exercises effective sovereignty over a territory in the wake of mass violence, it may impose international criminal justice. Second, States may use semi-internationalized courts in order to externalize the political costs of prosecutions vis-à-vis a powerful neighbor onto an international organization.

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197. See, e.g., Robert Putman, *Diplomacy and Domestic Policy: The Logic of Two-Level Games*, 43 INT'L ORG. 427 (1988)

The troubled history of East Timor, its Portuguese colonial era and Indonesian occupation,<sup>198</sup> the violence of its quest for independence in 1999,<sup>199</sup> and the role of the U.N. in reconstruction thereafter<sup>200</sup> have been well documented. Prior to the December 1975 Indonesian invasion, East Timor was a Portuguese colony. Over the next quarter century, a Timorese independence movement fought a sometimes violent struggle for independence.<sup>201</sup> In January 1999, the government of Indonesia offered a “popular consultation” with the potential for independence.<sup>202</sup> Prior to, during, and after the August 1999 consultation, “Indonesian security forces unleashed a wave of violence in which pro-independence supporters were terrorized and killed.”<sup>203</sup> Amidst increasing violence, the government of Indonesia agreed to the presence of an international force under Australian leadership, which was deployed on September 20, 1999.<sup>204</sup> Through Resolution 1272 of October 25, 1999, the U.N. Security Council, acting under chapter VII authority, established the U.N. Transitional Administration for East Timor (UNTAET), which exercised sovereign authority over the territory through May 2002.<sup>205</sup>

The first claim of this Section is that the U.N. may effectively “impose” international criminal justice on territories it administers. Given

198. See generally NATALIE L. REID, PEBBLES AND SAND: CASE STUDIES IN SECOND-HAND CONFLICT 21 (1999) (describing Indonesia’s occupation of East Timor as “second hand colonialism” which implies “the imposition of political control by military force, and the occupation and exploitation of the recolonized territory by its new masters”).

199. See, e.g., *Report of the International Commission of Inquiry on East Timor to the Secretary-General, annexed to Identical Letters Dated 31 January 2000 from the Secretary-General Addressed to the President of the General Assembly, the President of the Security Council and the Chairperson of the Commission on Human Rights*, U.N. GAOR, 54th Sess., Agenda Item 96, ¶¶ 5–13, U.N. Doc. A/54/726 (2000) [hereinafter *Commission of Inquiry Report*] (summarizing the period from 1991–1999); *id.* ¶¶ 26–92 (documenting specific examples of violence in 1999); *Situation of Human Rights in East Timor: Note by the Secretary-General*, U.N. GAOR, 54th sess., Agenda Item 116(c), ¶¶ 10–22, U.N. Doc. A/54/660 (1999) [hereinafter *Human Rights Report 1999*] (discussing the violence surrounding the 1999 election in considerable detail).

200. See, e.g., Hansjörg Strohmeyer, *Making Multilateral Interventions Work: The UN and the Creation of Transitional Justice Systems in Kosovo and East Timor*, 25 FLETCHER F. WORLD AFF. 107 (2001) (comparing U.N. administration of Kosovo and East Timor); Boris Kondoch, *The United Nations Administration of East Timor*, 6 J. CONFLICT SECURITY L. 245–65 (2001) (considering the relationship between East Timor and the U.N.); Suzannah Linton, *Cambodia, East Timor and Sierra Leone: Experiments in International Justice*, 12 CRIM. L.F. 185, 202–06 (2001); Sarah Pritchard, *United Nations Involvement in Post-Conflict Reconstruction Efforts: New And Continuing Challenges in the Case of East Timor*, 24 U.N.S. WALES L.J. 183, 183–90 (2001).

201. See REID, *supra* note 198, at 33.

202. *Human Rights Report 1999, supra* note 199, ¶ 18.

203. *Id.* ¶ 20.

204. *Id.* ¶ 22.

205. S.C. Res. 1272, U.N. SCOR, 54th Sess., 4057th mtg., U.N. Doc. S/Res/1272 (1999).

the U.N. reputation as a foremost protector of human rights as well as its obligation to prosecute certain international crimes such as crimes against humanity and war crimes,<sup>206</sup> the U.N. Administration in East Timor faced significant pressure both from within the organization and from Member States to design an adequate enforcement mechanism for the prosecution of serious crimes committed in East Timor during 1999. The Security Council Resolution establishing UNTAET granted the U.N. Transitional Administration the power to “exercise all legislative and executive authority, including the administration of justice.”<sup>207</sup> Less than two months later, on December 10, 1999, the Special Rapporteur of the Commission on Human Rights Report on East Timor affirmed that “the international community would exert every effort to ensure that those responsible [for serious crimes in East Timor] would be brought to justice”<sup>208</sup> and suggested that an international criminal tribunal might be appropriate to guarantee “individual responsibility for the crimes committed in the past year.”<sup>209</sup>

The Secretary-General has noted the heightened responsibility of the U.N. to ensure accountability. In a cover letter to the report of the International Commission of Inquiry established to gather information on violations of human rights in East Timor,<sup>210</sup> he noted: The “United Nations . . . has a particular responsibility to the people of East Timor in connection with investigating the violations, establishing responsibilities,

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206. See, e.g., Diane Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537 (1991) (arguing that “[a] state’s complete failure to punish repeated or notorious instances” of certain international crimes constitutes a violation of international law); WELLER & BURKE-WHITE, *supra* note 63 (noting that States may face an obligation to exercise universal jurisdiction over certain international crimes); Kondocho, *supra* note 200, at 261 (noting that “[a]lthough the United Nations is not a party to the above named conventions it is undisputed that the United Nations has legal personality, which implies that the United Nations can be bound *mutatis mutandis* by customary international law” to prosecute certain crimes). Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 49, 6 U.S.T. 3114, 3146, 75 U.N.T.S. 31, 62 (observing that “[e]ach High Contracting Party shall be under the obligation to search for persons alleged to have committed . . . such grave breaches, and shall bring such persons . . . before its own courts”); Velasquez Rodriguez Case, Judgment, Inter-Am. Ct. H.R., ser. C, no. 4, ¶ 174 (July 29, 1988) (finding a duty under the Inter-American Convention to “carry out a serious investigation of violations committed within its jurisdiction”).

207. S.C. Res. 1272, *supra* note 205, ¶ 1.

208. *Human Rights Report 1999*, *supra* note 199, ¶ 3.

209. *Id.* ¶ 74(5).

210. The International Commission of Inquiry was established by the U.N. Economic and Social Council in 1999 pursuant to E.S.C. Dec. 1999/293, Resolutions and Decisions Adopted by the Economic and Social Council at Its Resumed Substantive Session of 1999, Agenda Item 14(h), at 10, U.N. Doc. E/1999/INF/2/Add.3 (2000).

punishing those responsible and promoting reconciliation.”<sup>211</sup> The Commission of Inquiry’s report found that “all persons who committed or authorized violations of human rights or international humanitarian law were individually responsible and accountable for those violations and must be brought to justice.”<sup>212</sup> Likewise, the Commission called on the U.N. to “establish an independent and international body” to “prosecute those guilty of serious human rights violations.”<sup>213</sup>

As the sovereign authority over East Timor, the U.N. was committed to the enforcement of international criminal law. The most obvious possibility was to establish an *ad hoc* tribunal similar to the ICTY and the ICTR. The Human Rights Report, after all, had specifically recommended such an international criminal tribunal.<sup>214</sup> Under a chapter VII mandate, the tribunal would have the enormous benefit of obligating Indonesia to cooperate and turn over indictees for prosecution.

Yet, for at least three reasons, a fully international tribunal was not created. First, the *ad hoc* international tribunals are created through chapter VII resolutions,<sup>215</sup> requiring a finding of a “threat to peace and security” and raising the possibility of veto by permanent Security Council members. Some have argued that the presence of UNTAET in East Timor eliminated the threat to peace and security,<sup>216</sup> thereby undermining the legal basis to create an international tribunal under chapter VII. With sufficient political will, the Security Council probably could have found a continuing threat to peace and security in the region, but such political will was lacking. Indonesian President Wahid had specifically requested the use of national, rather than international, means to bring the perpetrators of the 1999 crimes to justice.<sup>217</sup> The Secretary-General, noting Indonesia’s Foreign Minister’s assurances “of the Government’s determination that there will be no impunity for those responsible,”<sup>218</sup> agreed that “if the government has the capacity and willingness to do it, you don’t want to create another tribunal.”<sup>219</sup> More-

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211. Identical Letters Dated 31 January 2000 from the Secretary-General Addressed to the President of the General Assembly, the President of the Security Council and the Chairperson of the Commission on Human Rights, U.N. Doc A/54/726, S/2000/59.

212. *Commission of Inquiry Report*, *supra* note 199, ¶ 3.

213. *Commission of Inquiry Report*, *supra* note 199, ¶ 152.

214. *Human Rights Report 1999*, *supra* note 199, ¶ 74(5).

215. See Mydans, *supra* note 155, at A4.

216. Kondocho, *supra* note 200, at 263.

217. See E. Timor Inst. for Reconstruction Monitoring and Analysis, *Sites for Justice Related Efforts*, LA’O HAMUTUK BULL., Oct. 2001, at 2, 2, available at <http://www.etan.org/lh/bulletin.html> [hereinafter *Sites for Justice Related Efforts*].

218. *Sites for Justice Related Efforts*, *supra* note 217 (quoting Secretary-General Annan).

219. Linton, *supra* note 200, at 213 n.95.

over, Indonesia's powerful allies on the Security Council deferred to Jakarta's request that it have the right to prosecute its own.<sup>220</sup>

The second reason the U.N. rejected calls for another *ad hoc* tribunal was financial. As discussed above,<sup>221</sup> the costs of an international tribunal can be exorbitant. The total budget for governing East Timor, including judicial reconstruction, for 2001 was U.S.\$65 million.<sup>222</sup> Yet, that same year, the ICTY budget was U.S.\$96.4 million.<sup>223</sup> Even assuming a far more modest *ad hoc* tribunal for East Timor, the budget of such an international tribunal could have easily exceeded that of the entire government of East Timor. To create such a tribunal, either additional funds would have to be contributed by international actors or other government services curtailed. Permanent members of the Security Council were generally unwilling to increase assessed contributions to fund a third *ad hoc* tribunal and East Timor itself had few spare resources at its disposal.<sup>224</sup>

The third justification for rejecting calls for another *ad hoc* tribunal was the perceived need for local justice and the reconstruction of the East Timorese judiciary. An integral part of UNTAET's mandate was to "support capacity building for self-government."<sup>225</sup> By situating the enforcement mechanisms of international criminal law within the East Timorese system, rather than as an external international court, UNTAET could further this reconstruction process often overlooked by international tribunals such as the ICTY and ICTR. Likewise, the 1999 Human Rights Report and the Report of the Commission of Inquiry had both noted that "the primary responsibility for bringing perpetrators to justice rested with national judicial systems."<sup>226</sup> Even calls for an *ad hoc* international tribunal by East Timorese NGOs noted that "trying crimes before domestic courts will in most cases be preferred due to a number of reasons, not least from the perspective that the perpetrators of crimes should be brought to justice in the country in which the crimes were committed."<sup>227</sup>

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220. *Sites for Justice Related Efforts*, *supra* note 217.

221. *Supra* Section I.B.

222. This figure is separate from the UNTAET peacekeeping budget of approximately U.S.\$560 million. See AMNESTY INT'L, EAST TIMOR: JUSTICE PAST, PRESENT AND FUTURE 6 (July 2001), AI Index: ASA 57/001/2001 [hereinafter AMNESTY INT'L, EAST TIMOR]; see also Press Release, UNTAET Press Office, UNTAET Basic Facts (Dec. 2, 2001) (on file with author).

223. See ICTY Key Figures, <http://www.un.org/icty/glance/keyfig-e.htm> (last modified Nov. 8, 2002); Wald, *supra* note 55, at 536 n.3.

224. *Sites for Justice Related Efforts*, *supra* note 217.

225. S.C. Res. 1272, *supra* note 205, ¶ 2(e).

226. *Commission of Inquiry Report*, *supra* note 199, ¶ 3.

227. Nelson Belo & Christian Ranheim, *Prosecuting Serious Crimes in East Timor*, in JUSTICE AND ACCOUNTABILITY IN EAST TIMOR: INTERNATIONAL TRIBUNALS AND OTHER

Given the lack of political will, the costs of an *ad hoc* tribunal, and the perceived benefits of local prosecution, the Security Council placed judicial authority in the hands of UNTAET<sup>228</sup> and demanded “that those responsible for [violations of international law] be brought to justice” either by UNTAET or by the Government of Indonesia.<sup>229</sup> With that authority, the Special Representative of the Secretary-General (SRSG), Sergio Vieira de Mello, signed Regulation 1999/1 establishing the law of East Timor<sup>230</sup> and creating a Transitional Judicial Service Commission with the goal of creating a judicial system.<sup>231</sup> In early 2000, UNTAET established a court system for East Timor, including Special Panels, composed of “both East Timorese and international judges,” with universal jurisdiction over genocide, war crimes, crimes against humanity, and murder.<sup>232</sup>

Taken together with similar actions by the U.N. Mission in Kosovo,<sup>233</sup> the creation of semi-internationalized courts appears to be the preferred method for accountability in U.N. administered territories. It seems likely this trend will continue. Michael Matheson has argued that “the role of the U.N. has substantially expanded . . . with respect to the governance of societies affected by conflicts.”<sup>234</sup> Such cases of nation building—though not necessarily U.N. administration per se—are more numerous than might at first be imagined; they include Haiti, Rwanda, Mozambique, Uganda, and Bosnia.<sup>235</sup> Moreover, nation building or “government building” is likely to become a more frequent phenomenon in

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OPTIONS, REPORT OF A ONE-DAY SEMINAR IN DILI 5, 6 (Oct. 16, 2001), available at <http://www.jsmp.minihub.org/Reports/justicereport.pdf>.

228. S.C. Res. 1272, *supra* note 205. However, note that UNTAET itself could not establish an international tribunal in the mold of the ICTY or ICTR with jurisdiction over individuals in Indonesia as “its mandate only extends to East Timor and not Indonesia.” Kondoch, *supra* note 200, at 263.

229. S.C. Res. 1264, U.N. SCOR, 54th Sess., 4045th mtg., U.N. Doc. S/Res/1264 (1999).

230. *On the Authority of the Transitional Administrator in East Timor*, UNTAET Reg. 1999/1 § 3.1, U.N. Doc. UNTAET/REG/1999/1 (Nov. 27, 1999).

231. *On the Establishment of a Transitional Judicial Service Commission*, UNTAET Reg. 1999/3 § 1, U.N. Doc. UNTAET/REG/1999/3 (Dec. 3, 1999).

232. UNTAET Reg. 2000/11, *supra* note 108, §§ 10.1, 10.3.

233. Strohmeyer, *supra* note 200, at 111–13, 119. Security Council Resolution 1244 established the U.N. Mission in Kosovo (UNMIK) under a similar mandate to that of UNTAET. See S.C. Res. 1244, U.N. SCOR, 54th Sess., 4011th mtg., U.N. Doc. S/Res/1264 (1999). While plans for special panels for international crimes were not implemented in Kosovo, international judges do sit alongside Kosovar Judges in ordinary domestic courts and even on the Supreme Court. Strohmeyer, *supra* note 200, at 118.

234. Michael J. Matheson, *United Nations Governance of Postconflict Societies*, 95 AM. J. INT’L L. 76 (2001).

235. Fareed Zakaria, *Don’t Abandon Afghanistan*, NEWSWEEK, Dec. 17, 2001, at 28.

the years ahead.<sup>236</sup> Though then-Presidential candidate George W. Bush was initially skeptical of nation building,<sup>237</sup> the Bush administration's actions in Afghanistan and plans for a possible post-war Iraq speak to the growing importance of nation building.<sup>238</sup> This points to a more general opportunity to create enforcement mechanisms for international criminal law where the U.N. administers a territory or reconstructs a government after war, revolution, or ethnic strife.

The second claim of this Section is that the case of East Timor demonstrates how weak States may create semi-internationalized courts to externalize the political and diplomatic costs of prosecution onto international actors. While the creation of the Special Panels can be attributed to U.N. administration of the territory, the decision by the newly formed government of East Timor to continue those trials after independence on May 20, 2002 requires a separate explanation.

Throughout the winter and spring of 2002, the democratically elected Constituent Assembly of East Timor met in Dili to draft a constitution and design a new government around the blueprint of the UNTAET administration.<sup>239</sup> The new constitution specifically provides that "acts committed between the 25th of April 1974 and the 31st of December 1999 that can be considered crimes against humanity of genocide or of war [sic] shall be liable to criminal proceedings with[in] national or international courts."<sup>240</sup> However, the first draft of the constitution failed to provide for the continued operation of Special Panels of national and international judges to hear cases of serious crimes.<sup>241</sup> Once

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236. Richard Lowry, *Two Cheers for Nation Building*, NAT'L REV. ON-LINE, Oct. 22, 2001, at <http://www.nationalreview.com/lowry/lowryprint102201.html> (noting the importance of nation building and arguing that the U.S. "should generally be pursuing it").

237. See Jane Perlez, *For Eight Years, a Strained Relationship with the Military*, N.Y. TIMES, Dec. 28, 2000, at A17 (observing "[i]n the presidential campaign, Governor George W. Bush of Texas expressed an almost visceral distaste for assigning America's fighting forces to nation-building missions").

238. See, e.g., The National Security Strategy of the United States of America 2 (Sept. 19, 2002), available at <http://www.whitehouse.gov/nsc/nss.html> (making it a national priority to "expand the circle of development by opening societies and building the infrastructure of democracy").

239. Seth Mydans, *U.N. Certifies First Election in the Newly Born East Timor*, N.Y. TIMES, Sept. 11, 2001, at A15.

240. E. TIMOR CONST. § 160 (Serious Crimes). The text of this section demonstrates a misunderstanding of the drafters as to the meaning of crimes against humanity. According to one member of the Constituent Assembly, the international legal adviser had told them that crimes against humanity included all international crimes and therefore it was not necessary to enumerate the particular crimes, as are currently enumerated in UNTAET Regulation 2000/11. E-mail from Caitlin Reiger, Judicial Systems Monitoring Program, East Timor Constituent Assembly (Apr. 26, 2002) (on file with author); see UNTAET Reg. 2000/11, *supra* note 108, § 10.1.

241. Press Release, Judicial Systems Monitoring Program, Constituent Assembly Adopts Serious Crimes Articles, Jan. 31, 2002, available at <http://www.jsmp.minihub.org>. It appears that the draft constitution lacked the requisite provision due to a misunderstanding of the



legislators were made aware that the new constitution as written would extinguish the jurisdiction of Special Panels, they amended the section to allow continuation of the Special Panels as long as "deemed strictly necessary."<sup>242</sup> According to one local court observer: Despite the restrictive wording of this provision, "the intent of the drafters was to continue with the current Serious Crimes Investigation Unit and Special Panels in the Dili District Court."<sup>243</sup> Moreover, funding has been secured for the continued operation of the Special Panels at least through June 2003.<sup>244</sup>

This decision to continue internationalized trials in independent East Timor raises the question of why a newly emergent State with extraordinary resource constraints would seek to continue prosecuting crimes against humanity, particularly when funds for the court are drawn from the overall East Timor budget and not specifically earmarked by the U.N. for that purpose.<sup>245</sup> One answer, of course, is momentum.<sup>246</sup> With such prosecutions already underway, continuing them merely maintains the status quo. While institutional momentum may have played a part, after operating for just over a year, the Special Panels were hardly well entrenched by May 2002. A second possibility is that preferences of domestic interests in favor of accountability have been articulated in government policy. Various domestic interest groups have lobbied hard for justice and accountability with an international component to ensure fairness.<sup>247</sup> The new President of East Timor has acknowledged the "peo-

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drafters. Only when NGOs "lobbied the Constituent Assembly about the original wording was some . . . attention paid to the issue" leading to the new version of the text. E-mail from Caitlin Reiger, *supra* note 240.

242. E. TIMOR CONST. § 163(1) (Transitional Judicial Organization). The section reads in full: "The collective judicial instance existing in East Timor, integrated by national and international judges with competencies to judge serious crimes committed between the 1st of January and the 25th of October 1999, shall remain operational for the time deemed strictly necessary to conclude the cases under investigation." *Id.* This provision has been interpreted by the Serious Crimes Investigation Unit as "mean[ing] they can just continue, and there doesn't seem to be any suggestion that investigations will be curtailed after independence." E-mail from Caitlin Reiger, *supra* note 240.

243. E-mail from Caitlin Reiger, *supra* note 240.

244. Interview with Stuart Alford, Prosecutor, UNTAET Special Crimes Unit, in Dili, East Timor (Jan. 14, 2002). Presumably, this funding will again be renewed by the U.N. in mid-2003.

245. The limited availability of funding for the court must be contrasted with the relatively generous funding for the office of the prosecutor drawn from assessed U.N. contributions and specifically earmarked for the serious crimes unit.

246. See, e.g., Cheryl Shanks et al., *Inertia and Change in the Constellation of Intergovernmental Organizations*, 50 INT'L ORG. 593 (1996).

247. Interview with Joaquim Fonseca, Yayasan HAK, in Dili, East Timor (Jan. 17, 2002); see also Letter from East Timorese NGOs to the Members of the Security Council (Oct. 24, 2001) (on file with author) (calling for the establishment of an international tribunal for East Timor).

ple's profound understanding of the need for reconciliation."<sup>248</sup> Additional research by comparative political scientists is required to determine the salience of these possible explanations, but it seems likely that interest groups within East Timor have led to the formulation of a national preference in favor of holding the perpetrators of the 1999 crimes accountable.

Once the underlying preference has been established, the pursuit of accountability through semi-internationalized courts and their continued operation after independence must be separately analyzed. The semi-internationalized tribunal has allowed the new government of East Timor to externalize the political and diplomatic costs of prosecution vis-à-vis Indonesia onto the U.N. To invoke a concept coined by Robert Keohane and Joseph Nye, East Timor and Indonesia are in an interdependent relationship.<sup>249</sup> More particularly, this relationship can be characterized as one in which East Timor is both extremely sensitive and highly vulnerable.<sup>250</sup> In other words, policy changes in Indonesia are quickly felt in East Timor and East Timor has few viable alternative options but to follow the policy preferences of Indonesia for the time being.<sup>251</sup> As the former colonial master, the regional hegemon, and the only State to share a land border with East Timor, Indonesia's influence is beyond dispute. Given East Timor's isolation and relative poverty,<sup>252</sup> it has few means at its disposal to alter the political balance and decrease its sensitivity vis-à-vis Indonesia. East Timorese President Gusmao has been swayed by this combined sensitivity and vulnerability, defining the East Timorese national interest as one of "guaranteeing stability along the border and of strengthening our cooperation with Indonesia."<sup>253</sup>

Through its actions and public statements, Indonesia has made its preference to avoid prosecution of international crimes in East Timor all

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248. President Xanana Gusmao, *Reconciliation—the Challenge for All*, Address to the Stockholm International Forum, Conference on Truth, Justice and Reconciliation (Apr. 23, 2002), available at <http://www.stockholmforum.gov.se>.

249. See ROBERT O. KEOHANE & JOSEPH NYE, *POWER AND INTERDEPENDENCE: WORLD POLITICS IN TRANSITION* 8 (1977) ("Interdependence in world politics refers to situations characterized by reciprocal effects among countries or among actors in different countries . . .").

250. Keohane and Nye describe sensitivity as involving "degrees of responsiveness within a political framework—how quickly do changes in one country bring costly changes in another." *Id.* at 12. The "vulnerability dimension of interdependence rests on the relative availability and costliness of alternatives that various actors face." *Id.* at 13.

251. At least until oil and gas production in the Timor Gap between East Timor and Australia comes on line, East Timor has few resources to decrease its vulnerability. See Becky Gaylord, *Accord Is Set on Timor Gap Energy Revenue*, N.Y. TIMES, July 4, 2001, at W1 (noting that "East Timor is expected to receive substantially more than \$3.6 billion in revenue from existing and planned developments in the area the next 24 years").

252. See AMNESTY INT'L, EAST TIMOR, *supra* note 222, at 6.

253. Gusmao, *supra* note 248.

too clear. Though a limited human rights tribunal is finally sitting in Jakarta, the government of Indonesia has taken every possible opportunity to delay proceedings.<sup>254</sup> The cases now being heard have been criticized for both lack of fairness and mild sentences.<sup>255</sup> Even UNTAET Transitional Administrator, Sergio Vieira de Mello, expressed concern that the Indonesian tribunal might not “get down to work.”<sup>256</sup> Indonesia’s preference for impunity has been further evidenced by its systematic failure to cooperate with the UNTAET judiciary.<sup>257</sup> Despite a Memorandum of Understanding between Indonesia and UNTAET reaffirming the commitment to hold the perpetrators of the 1999 crimes accountable and providing for extradition,<sup>258</sup> Indonesia has repeatedly refused to hand over suspects for prosecution.<sup>259</sup>

The continuation of prosecutions in East Timor, despite this strong pressure for impunity from a powerful neighbor, can be explained by political cost externalization. Had East Timor initiated prosecutions without U.N. mandate, pressure from Indonesia to cease might have become overbearing. Instead, the East Timorese Constituent Assembly and President Gusmao have shifted the diplomatic costs of prosecution vis-à-vis Indonesia onto the international community. Since the U.N. created the Special Panels, East Timor can legitimately claim that it had no choice but to allow prosecutions. While the decision to continue operations of the Special Panels is within East Timor’s control, the East

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254. The Indonesian law on Human Rights Tribunals was passed in 2000, yet numerous technicalities were found to delay the initiation of proceedings. *See RI Opens Historic East Timor Tribunal*, JAKARTA POST, Mar. 14, 2002; *Trial Begins in Indonesia This Week for East Timor Crimes*, ASSOCIATED PRESS, Mar. 10, 2002, available at <http://iasnt.leidenuniv.nl> (noting the “long delayed trials”).

255. Seth Mydans, *East Timor’s Scourge Serves Time on His Patio*, N.Y. TIMES, May 16, 2001, at A4.

256. Press Conference and Interview with Sergio Vieira de Mello, Special Representative of the Secretary-General to East Timor, in Dili, East Timor (Jan. 17, 2002).

257. *See* Linton, *supra* note 200, at 223 (describing an “atmosphere of hostility and unwillingness to cooperate”).

258. Memorandum of Understanding Between The Republic of Indonesia and the United Nations Transitional Administration in East Timor Regarding Cooperation in Legal, Judicial and Human Rights Matters § 9.1 (entered into force Apr. 6, 2000), reprinted in Official Gazette of East Timor, vol. 1, No. 1, U.N. Doc. UNTAET/GAZ/2000/Add.2, 93 (Feb. 16, 2000), available at <http://www.jsmp.minihub.org/Reports/MOU.htm> (“Parties undertake to transfer to each other all persons whom the competent authorities of the requesting Party are prosecuting for a criminal offence.”).

259. *See, e.g.*, Linton, *supra* note 200, at 223 (observing that Indonesia has “refused to transfer the militia leader Enrico Guterras to stand trial” in East Timor); *Indonesia to File First Timor Abuse Cases Thursday*, REUTERS, Feb. 20, 2002, available at <http://iasnt.leidenuniv.nl> (noting a comment by the spokesman for the Indonesian Attorney General that “Indonesia has no obligation to send suspects across the border”); Seth Mydans, *Modest Beginnings for East Timor’s Justice System*, N.Y. TIMES, Mar. 4, 2001, at A10 (commenting on a unanimous view in East Timor that “no Indonesian is likely ever to be sent to court in East Timor”).

Timorese government can cite strong U.N. pressure, rather than its own national preferences as the driving force behind prosecution. In so doing it can avoid Indonesia's wrath. Moreover, by having two international judges on each panel, East Timor can "blame" the internationals and distance itself from decisions implicating Indonesian suspects. This hypothesis of cost externalization was frequently confirmed by officials and observers in the judiciary and policy community in East Timor.<sup>260</sup>

To cast this argument in the terms of liberal international relations theory, East Timor and Indonesia have divergent national preferences with respect to prosecution. If East Timor were to prosecute crimes without U.N. mandate, the negative policy interdependence of these preferences might make the costs of prosecution too high for East Timor to bear. According to Moravcsik, policy interdependence "can be described as the set of costs and benefits for dominant social groups in foreign societies . . . that arise when dominant social groups in a given society seek to realize their own preferences internationally."<sup>261</sup> In this case, the costs of the East Timorese preference in favor of prosecution are extremely high on dominant Indonesian social groups, which might be implicated or prosecuted. Liberal international relations theory "assumes that this pattern of interdependence among state preferences . . . imposes a binding constraint on state behavior."<sup>262</sup> Without U.N. involvement, Indonesian preferences against prosecution could impose such a binding constraint on East Timor's behavior.

However, the involvement of an international actor such as the U.N. can change the policy interdependence resulting from divergent national preferences. The U.N. has effectively shifted the cause, or, at least the perceived cause, of the negative externalities imposed on Indonesia by East Timorese prosecutions, thereby expanding the set of possible outcomes. What would have been a "zero-sum . . . bargaining game [between two governments] with . . . a high potential for interstate tension and conflict" is transformed into a three-level game in which international preferences articulated through U.N. involvement shift the policy interdependence between East Timor and Indonesia.<sup>263</sup>

This concept of a three-level game builds on Robert Putnam's two-level game model. Two-level games operate first at the national level, at

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260. Interview with Jim Coy, Human Rights Officer, UNTAET (Jan. 15, 2002) (noting that it is "politically much easier to have the U.N. prosecute these crimes. East Timor needs good relations with Indonesia. The advantage of the internationalized tribunal is that the UN, not East Timor, is seen as pushing Indonesia.").

261. Andrew Moravcsik, *Liberal International Relations Theory: A Scientific Assessment*, in *PROGRESS IN INTERNATIONAL RELATIONS THEORY* (Colin Elman & Miriam Fendius Elman eds., forthcoming 2003) (manuscript ch. 5, at 7, on file with author).

262. *Id.*

263. *Id.* at 8.

which “domestic groups pursue their interests by pressuring the government to adopt favorable policies and politicians seek power by constructing coalitions among these groups.”<sup>264</sup> Second, on the international game board, “national governments seek to maximize their own ability to satisfy domestic pressures.”<sup>265</sup> In East Timor, a third level is added, in which both the East Timorese and Indonesian governments must also negotiate with the U.N. and UNTAET. Gusmao and the Assembly may have “spot[ted] a move on one board that will trigger realignments on other boards, enabling them to achieve otherwise unattainable objectives.”<sup>266</sup> More specifically, Gusmao could call for amnesty for some perpetrators as a means of strengthening cooperation with Indonesia.<sup>267</sup> Yet, simultaneously, prosecutions could continue under the U.N. mandate, placating domestic interests strongly in favor of accountability<sup>268</sup> and satisfying the demands of UNTAET.<sup>269</sup> This is a clear example of “complex patterns of interdependence . . . creat[ing] new possibilities for creative statecraft.”<sup>270</sup> To invert a claim made by Peter Evans, domestic bargains are not simply about the relations between the State and its citizens. They are also about the distribution of costs and benefits between States and international organizations.<sup>271</sup> Yet another way to frame this cost externalization is to see East Timor as “borrowing government” from the U.N. to decrease its accountability vis-à-vis Indonesia.<sup>272</sup>

The possibility of international institutions externalizing political costs was first suggested by Keohane and Nye as early as 1974.<sup>273</sup> Arthur

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264. Putman, *supra* note 197, at 434.

265. *Id.* at 434.

266. *Id.*

267. See Gusmao, *supra* note 248 (defending the need for amnesty for those indicted).

268. Interview with Joaquim Fonseca, *supra* note 247 (noting a “high demand for justice” among the East Timorese people).

269. Interview with Sergio Vieira de Mello, *supra* note 256.

270. Andrew Moravcsik, *Introduction: Integrating International and Domestic Theory of International Bargaining*, in *DOUBLE EDGED DIPLOMACY: INTERNATIONAL BARGAINING AND DOMESTIC POLITICS* 3, 16 (Peter B. Evans et al. eds., 1993).

271. This is the inverse of Peter Evans’s claim that “[i]nternational bargains are not simply about relations between nations. They are also about the distribution of costs and benefits among domestic groups and about domestic opinion divided on the best way of relating to the external environment.” Peter B. Evans, *Building an Integrative Approach to International and Domestic Politics: Reflections and Projections*, in *DOUBLE EDGED DIPLOMACY: INTERNATIONAL BARGAINING AND DOMESTIC POLITICS*, *supra* note 270, at 397.

272. ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (forthcoming Nov. 2003) (manuscript ch. 5, at 13, on file with author) (explaining that the phenomenon of borrowing government allows a foreign government to adjudicate a rule or dispute where the domestic State is unable or unwilling).

273. Robert Keohane & Joseph Nye, *Transgovernmental Relations and International Organization*, 27 *WORLD POL.* 39, 61 (1974) (suggesting the “political significance of international organizations”).

Rovine has similarly suggested that legalization of dispute settlement through international organizations gives “weaker states . . . an obvious advantage . . . in disputes with more powerful opponents . . . the strong give up much of their leverage in a contest of legal briefs and argumentation.”<sup>274</sup> Similarly, one explanation for ratification of the Rome Statute was that the ICC might “effectuate a change in interstate power relations by moving an important category of interstate disputes out of the diplomatic realm and into that of compulsory jurisdiction.”<sup>275</sup> While semi-internationalized courts—such as the Special Panels in East Timor—do not provide the same kind of compulsory jurisdiction, conflicts between more vulnerable States and their powerful neighbors are still moved from the world of interstate diplomacy to that of international legal settlement. Although powerful States may see through this political cost externalization,<sup>276</sup> legalization and the involvement of international institutions is a politically savvy strategy to alter policy interdependence and expand the range of possible outcomes in favor of accountability.

To generalize, the political context of the Special Panels in East Timor yields two significant propositions. First, where the U.N. serves as the administrating power in a nation-building context, it may internationalize (both in terms of law and judges) local courts to ensure the prosecution of serious international crimes. Second, where a vulnerable State faces pressure from a more powerful neighbor not to prosecute (presumably because the neighbor will be implicated in the proceedings), the vulnerable State may borrow adjudicatory mechanisms or individual judges from other States and the international community, thereby externalizing political costs, altering policy interdependence, and creating the possibility for otherwise unattainable justice.

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274. Arthur Rovine, *The National Interest and the World Court*, in *THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE* 313, 319 (Leo Gross ed., 1976). In addition to the weaker State gaining political power through the use of institutions, Andrew Moravcsik has observed that such international negotiations “tend to benefit those domestic actors—generally, but not always national executives—who control access to international negotiations.” MORAVCSIK, *supra* note 193, at 63. The newly elected East Timorese government may well have seen the possibilities of strengthening its hand domestically, as well as internationally, through continued involvement with the U.N. in judicial proceedings.

275. Madeline Morris, *High Crimes and Misconceptions: The ICC and Non-Party States*, in *INTERNATIONAL CRIMES*, *supra* note 19, at 219, 233.

276. Rovine, *supra* note 274, at 319 (noting that “this is precisely why many leading nations are not particularly anxious to establish a Court regime of peaceful change”).

### 3. The Rwandan Gacaca: Domestic Demands and Resource Constraints

The Gacaca courts in Rwanda suggest two additional circumstances in which States may develop domestic enforcement mechanisms for international criminal law. First, when domestic interests in a responsive (if not fully liberal) State demand accountability and the international externalities of prosecution are either positive or only slightly negative, domestic courts may be used to enforce international law. Second, where resource constraints limit the effectiveness of international tribunals and normal domestic courts, specialized domestic mechanisms of accountability may be created.

A brief history of the creation of the Rwandan Gacaca courts is a necessary starting point. After serving as a “bystander to genocide” in Rwanda,<sup>277</sup> the U.N. established an international criminal tribunal for Rwanda, along the lines of the ICTY, with jurisdiction to prosecute serious violations of international law during 1994.<sup>278</sup> By December 2002, however, the International Criminal Tribunal for Rwanda had only completed eleven cases,<sup>279</sup> a paltry figure given the more than 110,000 Rwandans in detention for genocide related crimes at that time.<sup>280</sup> According to a Report by the International Panel of Eminent Personalities, officials in the Rwandan government were “so frustrated . . . by the ICTR’s initial dysfunction . . . that in early 1996 they created special courts within the existing judicial system.”<sup>281</sup> An August 1996 law empowered these special courts to hear cases “of genocide, or crimes against humanity” and divided these crimes into four categories based on the seriousness of the offense.<sup>282</sup> Yet even these specialized courts were

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277. See Samantha Power, *Bystanders To Genocide*, ATLANTIC MONTHLY, Sept. 2001, at 85 (documenting how the United States and the international community “let the Rwandan tragedy happen”).

278. See S.C. Res. 955, *supra* note 51. For a discussion of the reasons for creation of the ICTR, and, in particular, a contrast between the “international legal paradigm” and “the more ethnocentric journalistic one,” see José E. Alvarez, *Crimes of State/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT’L L. 365, 369 (1999). See also Paulus, *supra* note 53.

279. ICTR Website, <http://www.ictt.org/> (last visited Jan. 23, 2003).

280. Aloisea Inyumba, Chairwoman, National Commission on Unity and Reconciliation, *Restoring Human Dignity and Reconciling the People of Rwanda*, Presentation at the Stockholm International Forum: Truth, Justice and Reconciliation (Apr. 23, 2002).

281. International Panel of Eminent Personalities (IPEP), Report on the 1994 Genocide in Rwanda and Surrounding Events ¶ 18.35 (July 7, 2000), *reprinted in* 40 I.L.M. 141, 213 (2001) [hereinafter IPEP Report].

282. See Rwanda Organic Law No. 8/96 of August 30, 1996 on the Organization of Prosecutions for Offenses Constituting the Crime of Genocide or Crimes Against Humanity Committed Since October 1, 1990, *available at* <http://www.preventgenocide.org/law/domestic/rwanda.htm> (last visited Jan. 23, 2003). Article 2 of this law divides crimes into four categories. Category I includes “person[s] whose criminal acts or whose acts of criminal participation place them among the planners, organizers, instigators, supervisors and leaders of

unable to address the overwhelming number of outstanding cases. Between 1996 and 1998, only 1,500 to 2,500 trials occurred, with one hundred times that many accused and still in detention.<sup>283</sup> A more dramatic solution to the problem of accountability for the 1994 genocide was therefore needed.

Since 1999, the Rwandan government has been designing and preparing to implement the Gacaca system. Those individuals falling into Category I—namely the planners and organizers of genocide and crimes against humanity—will appear before normal courts, all other suspects will be handled through the Gacaca process.<sup>284</sup> Gacaca is not a standard judicial forum. Rather, the idea derives from a traditional dispute resolution mechanism in the form of a “meeting which is convened whenever the need arises and in which . . . inhabitants of one hill [the basic community structure in Rwanda] participate [and] supposedly wise old men . . . seek to restore the social order.”<sup>285</sup> While the Gacaca as applied will have some resemblance to a judicial proceeding, it will be largely based on this traditional model. Communities will meet under the leadership of elected “judges” or local elders. Suspects will be presented to them and members of the community will have the chance to speak for or against the accused.<sup>286</sup> In a May 2001 pilot program, some communities met almost as if in an early version of the common law grand jury<sup>287</sup> to review

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the crime of genocide or a crime against humanity,” persons who “acted in positions of authority at the national, prefectural, communal, sector or cell level or in a political party who fostered such crimes,” “notorious murderers,” and “persons who committed acts of sexual torture.” Category II includes “persons whose criminal acts or whose acts of criminal participation place them among the perpetrators, conspirators or accomplices of international homicide or of serious assault against the person causing death.” Category III includes “persons whose criminal acts or whose acts of criminal participation make them guilty of other serious assaults against the person.” Category IV includes “persons who committed offenses against property.” *Id.*

283. IPEP Report, *supra* note 281, ¶ 18.36, at 214 (citing the 1,500 trial figure); *cf.* AMNESTY INT’L, RWANDA: THE TROUBLED COURSE OF JUSTICE 2 (Apr. 2000), AI Index: AFR 47/10/00 (citing the 2,500 trial figure) [hereinafter AMNESTY INT’L, RWANDA].

284. Interview with Isabelle Kalihangabo, Supreme Court of Rwanda, Gacaca Division, in Cambridge, Mass. (Nov. 13, 2001).

285. IPEP Report, *supra* note 281, ¶ 18.43, at 215. The term comes from the Kinyarwanda (the Rwandan language) word for “the grass that village elders once sat on as they mediated the disputes of rural life.” Ian Fisher, *Massacres of ‘94: Rwanda Seeks Justice in Villages*, N.Y. TIMES, Apr. 21, 1999, at A3; *see also* Erin Daly, *Between Punitive and Restrictive Justice: The Gacaca Courts in Rwanda*, 34 N.Y.U. J. INT’L L. & POL. 355, 370–71 (2002) (“Gacaca courts have been used for hundreds of years for domestic disputes involving property settlement and the like.”).

286. Interview with Pierre St. Hilaire, Legal Advisor, USAID, in Kigali, Rwanda (Aug. 28, 2001); GOV’T OF RWANDA, ORGANIZATION AND POWERS OF GACACA COURTS (on file with author).

287. R.H. Helmholtz, *The Early History of the Grand Jury and the Cannon Law*, 50 U. CHI. L. REV. 613, 613 (1983) (observing that “the modern grand jury traces its origins to the Assize of Clarendon, an enactment of King Henry II in 1166. The Assize called for inquiry to



cases against certain detained individuals.<sup>288</sup> Following a massive publicity campaign,<sup>289</sup> a nationwide election was held in October 2001 to select 260,000 local elders as judges (more than twice as many “judges” as accused) for the 11,000 Gacaca courts eventually to be convened.<sup>290</sup> In June 2002, Gacaca courts began operation in twelve select communities with additional courts scheduled to open across the country over the coming months.<sup>291</sup>

The explanation for the creation of the Gacaca presented here proceeds in two steps. Understanding these two steps requires separating national preferences—the set of fundamental preferences defined across States of the world—from national strategies—the particular transient policy goals that constitute the everyday currency of international politics.<sup>292</sup> First, domestic interest groups within Rwandan society are strongly in favor of accountability and have generated a national preference in favor of prosecution. Second, resource constraints drove the government to choose the Gacaca system as the particular strategy to achieve accountability.

It appears that there is a widely held preference for accountability and a widely held perception that justice is a prerequisite for reconciliation. A recent survey of over 1,500 Rwandans conducted by Johns Hopkins University found that nearly half the population fears a “repeated occurrence” of genocide<sup>293</sup> and is “overwhelmingly in favor” of reconciliation through accountability.<sup>294</sup> This fear of repeated cycles of violence could well be a root cause of the preference for accountability.

be made, by the oath of twelve men from every hundred and four men from every village, as to what persons were publicly suspected of robbery, murder, or theft or of receiving men guilty of those crimes.”).

288. See Mary Kimani, *Community Frees Four Genocide Suspects During Pilot Gacaca Justice Process*, INTERNEWS, May 30, 2001, at [http://www.internews.org/activities/ICTR\\_reports/ICTR\\_reports\\_may2001.htm](http://www.internews.org/activities/ICTR_reports/ICTR_reports_may2001.htm).

289. See Jules Marius Bishogoro, *The Final Stretch*, *Judicial Diplomacy: Chronicles and Reports on International Criminal Justice* (Oct. 2, 2001), at <http://www.diplomatiejudiciaire.com/UK/RwandaUK3.htm> (noting that the judicial election and preceding publicity campaign had cost the government of Rwanda U.S.\$2.5 million).

290. Jules Marius Bishogoro, *Massive Participation in Elections for Gacaca Judges*, *JUDICIAL DIPLOMACY: CHRONICLES AND REPORTS ON INTERNATIONAL CRIMINAL JUSTICE* (Oct. 5, 2001), at <http://www.diplomatiejudiciaire.com/UK/RwandaUK5.htm>.

291. Marc Lacey, *Kanombe Journal; After the Horror, Truth and Some Healing, Maybe*, N.Y. TIMES, June 20, 2002, at A4.

292. Moravcsik, *supra* note 261, (manuscript ch. 5, at 6 n.4) (observing: “States’ preferences . . . are by definition causally independent of and prior to specific interstate strategic interactions.”).

293. S. GASIBIREGE & S. BABALOA, *PERCEPTIONS ABOUT THE GACACA LAW IN RWANDA: EVIDENCE FROM A MULTI-METHOD STUDY 9* (Johns Hopkins Ctr. for Communication Programs Publ’n No. 19, 2001) (reporting that 43.5 percent of respondents expressed a “fear of repeated occurrences”).

294. *Id.* at 13.

According to one “opinion leader,” justice “will bring Rwandans closer together. It will bring about unity and reconciliation.”<sup>295</sup> Overall, 87 percent of the survey respondents were fairly or highly confident that the Gacaca program would “succeed in resolving the problems of trials” for the perpetrators of the 1994 genocide and 53 percent expressed high confidence that Gacaca would “promote sustainable peace in the country.”<sup>296</sup> Additional reports suggest upwards of 80 percent of the Rwandan population supports the Gacaca process, “at least in principle.”<sup>297</sup>

Demands for justice in Rwanda are particularly strong as they come from both victims and accused. Victims, as one participant in the drafting of Rwanda’s new constitution put it, find speedy justice “very important to reconciliation. Once the trials are carried out, we hope that there will be no further problems, because the truth will have been unearthed.”<sup>298</sup> Some victims link their personal demands for justice to the overall political process. As one young man who lost his parents in 1994 commented: “[W]e need to see justice, to see justice done, so we can live together again. This is a major political priority for me.”<sup>299</sup> Likewise, the accused and their families demand access to justice, particularly those with legitimate claims of innocence.<sup>300</sup> As one accused woman imprisoned (with her children) for killing a neighbor put it: “Seven years later I am still innocent. If the Gacaca will show [the authorities] my innocence, then let it come fast.”<sup>301</sup>

These sentiments suggest that the numerous interest groups within Rwanda are strongly in favor of accountability. For such preferences to be represented in State policy, however, the institutions of government must serve as a “transmission belt” between preferences and policy.<sup>302</sup> Contrast, however, Cambodia, where, despite strong domestic

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295. *Id.*

296. *Id.*

297. Daly, *supra* note 285, at 374; Foundation Hironnelle, *Rwandans Express Mixed Feelings on New Court System*, May 4, 2001, at <http://www.hironnelle.org>.

298. Aloys Hakizimana, Comments at the Conference on Constitutional Development, in Kibuye, Rwanda (Aug. 22, 2001), in *PROCEEDINGS OF THE CONFERENCE ON CONSTITUTIONAL DEVELOPMENT* 104 (William Burke-White et al. eds., 2002) (on file with author). The author served as the Special Rapporteur to the Legal and Constitutional Commission of the Government of Rwanda.

299. Interview with Anonymous Rwandan Genocide Survivor, in Kigali, Rwanda (Aug. 28, 2001).

300. Elizabeth Neuffer, *Kigali Dispatch: It Takes a Village*, *NEW REPUBLIC*, Apr. 10, 2000, at 18 (noting that the families of the accused are “push[ing] for . . . trial date[s] . . . [as] at least under *gacaca* the truth will come out”).

301. Interview with Anonymous Accused, in Ruhungeri, Rwanda (Aug. 29, 2001).

302. Moravcsik, *supra* note 261, (manuscript ch. 5, at 5).

preferences for justice a tribunal has yet to be established.<sup>303</sup> As in Cambodia, a small subset of the political elite, rather than a broad national polity, controls government policy. While Rwanda is by no means a perfect polyarchy,<sup>304</sup> nor even an ideal liberal State,<sup>305</sup> the Rwandan Government has made significant advances both in terms of representative government generally,<sup>306</sup> and the issue of justice more specifically.

Massive education campaigns on justice and reconciliation helped ensure that 82 percent of the respondents in the Johns Hopkins survey were familiar with Gacaca.<sup>307</sup> Such efforts have included a traveling play about Gacaca, weekly radio spots, radio talk shows, and Gacaca soccer matches.<sup>308</sup> Linked to this education campaign have been numerous consultations with the Rwandan people to ensure the government is familiar with their views.<sup>309</sup> The feedback between the people and the government on this issue has manifested itself most strongly in the broad-based election of Gacaca judges. Ninety percent of the population participated<sup>310</sup> by spending a day “in groups made up of ten neighboring households . . . to designate those persons in the group believed to be honest or wise” to serve as judges.<sup>311</sup> These judges act as intermediaries between the people and the governmental authorities, both in the prosecution of offenses and in the communication of ideas, views, and interests.

Efforts to make the government responsive to the people have largely succeeded; the Rwandan government has heard and internalized popular demands for justice. For example, the Chairman of the Legal and Constitutional Commission has recognized that the Gacaca was implemented because:

[T]he Rwandan people did not accept amnesty. Throughout the history of Rwanda, the government of the day has granted am-

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303. See William W. Burke-White, *Preferences Matter: Conversations with the Cambodian People on the Prosecution of the Khmer Rouge Leadership*, in *JUSTICE IN CAMBODIA: ACCOUNTABILITY AND THE KHMER ROUGE* (Beth van Schaack et al. eds., forthcoming 2003).

304. See DAHL, *supra* note 160, at 3.

305. See Slaughter, *supra* note 115.

306. The Rwandan government is in the process of drafting and consulting the population on a new constitution, guaranteeing broad representation and free elections.

307. GASIBIREGE & BABALOA, *supra* note 293, at 11.

308. Johns Hopkins Univ., Ctr. for Communication Programs, *Rwanda: Gacaca*, at <http://www.jhuccp.org/africa/rwanda/gacaca/htm> [hereinafter *Rwanda: Gacaca*].

309. For example, the author, as Rapporteur for the Legal and Constitutional Commission, is personally familiar with the efforts of the Commission, whose members have traveled across the country meeting with groups and communities to discuss the new constitution and its provisions relating to justice mechanisms. Likewise, the National Unity and Reconciliation Commission undertook “national exercises of consulting Rwandans on their unity and reconciliation, by engaging them in grassroots participatory discussions.” Inyumba, *supra* note 280.

310. *Rwanda: Gacaca*, *supra* note 308.

311. Bishogoro, *supra* note 290.

nesty, and throughout history, the government has been involved in the massacres and then granted amnesty . . . Amnesty encouraged impunity. For these reasons, [the people] wanted to try something else in Rwanda.<sup>312</sup>

Likewise, the government's chief prosecutor, Gerald Gahima explains the decision to hold perpetrators accountable through Gacaca based on domestic preferences:

We are asked why we didn't take the South African approach of amnesty . . . you can only do what is politically possible in your own society . . . . In the aftermath of genocide there was an overwhelming feeling that there must be accountability, people must be punished so it will not happen again.<sup>313</sup>

Rwandan President Paul Kagame has noted the importance of domestic politics<sup>314</sup> in the decision to "bring the thousands of genocide suspects to justice."<sup>315</sup> Thus, a national preference in Rwanda in favor of accountability developed as a result of the interests within Rwandan society and the ability of those interests to influence national policy through the representative institutions of the State.

The second step in this development was the decision to use the Gacaca system as the particular strategy to realize the national preference in favor of accountability. It is argued here that this strategic choice was largely driven by resource constraints. In the wake of the 1994 genocide, nearly one in fifty Rwandans was in prison.<sup>316</sup> With a significant portion of the able-bodied population dead, the additional burden imposed by such a high incarceration rate was simply not sustainable. Families of the detained often had to provide food and money for their incarcerated relatives and the State had to support the prisons on an already insufficient budget. The desperate need for labor in agriculture and reconstruction required many prisoners to work in groups in the communities around the prisons. Moreover, the government was subjected to

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312. Tito Rutaremara, Chairman, Legal and Constitutional Commission of Rwanda, Comments at the Conference on Constitutional Development, Kibuye, Rwanda (Aug. 22, 2001), reprinted in PROCEEDINGS OF THE CONFERENCE ON CONSTITUTIONAL DEVELOPMENT, *supra* note 298, at 99.

313. Victoria Brittain, *Time for Truth as Rwanda Strives for Reconciliation*, GUARDIAN, Apr. 6, 2001, at 14.

314. Interview with President Kagame, President, in Kigali, Rwanda (June 25, 2000).

315. Interview with President Kagame by Marc Hoogsteyns (Apr. 13, 2002) (on file with author), available at <http://www.rwanda1.com/government/president/interviews/2001/drcserious.html>.

316. Estimates suggested that upwards of 125,000 genocide suspects were incarcerated in the late 1990s, out of a total post-genocide population of approximately six million. Neuffer, *supra* note 300, at 18.

significant NGO criticism for horrific prison conditions<sup>317</sup> and the lack of adequate documentation for more than 40,000 detainees.<sup>318</sup> With vocal calls from international civil society and with the financial strain of high incarceration rates, the Rwandan government had no choice but to increase the effectiveness and speed of the domestic judiciary in prosecuting international crimes.

Existing judicial resources in Rwanda proved unable to meet this daunting task, despite a plan to create specialized domestic courts to hear only genocide and crimes against humanity cases.<sup>319</sup> At one point “it was estimated it would take between two and four centuries to try all those in detention.”<sup>320</sup> At first, the government believed the ICTR might offer a solution, yet it quickly became apparent to President Kagame and his advisors that the ICTR could not provide large-scale justice.<sup>321</sup> In Kagame’s words, the government needed “a better solution to this problem of bringing the thousands of genocide suspects to justice.”<sup>322</sup> As neither the domestic judiciary nor the international community had offered a workable solution, the Rwandan government had to consider more radical alternatives. Turning to the traditional model of Gacaca circumvents these resource constraints. The Gacaca system is relatively inexpensive, easy to operationalize on a large scale, and closely tied to the communities in which crimes occurred. Gacaca thus offered a strategy derived from national preferences and able to accommodate the limited means available to the Rwandan government.

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The central premise of this Part is that politics, and particularly the policy interdependence between the preferences of national actors in a variety of States, is essential to the enforcement of international criminal

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317. The author has visited prisons in Ngozi, Burundi (June 2000) and in Kibuye and Ruhengeri, Rwanda (Aug. 2001) and can personally attest to the overcrowding, unsanitary conditions, and hunger that mark many prisons.

318. See Report on the Situation of Human Rights in Rwanda Submitted by the Special Representative, Mr. Michael Moussalli, Pursuant to Commission Resolution 1999, Feb. 20, 2000, ¶ 135, U.N. Doc E/CN.4/2000/4125; see, e.g., AMNESTY INT’L, RWANDA, *supra* note 283, at 12 (noting “extremely poor prison conditions and inadequate access to medical care”); IPEP Report, *supra* note 281, ¶ 18.36, at 214 (describing “deplorable conditions” and acknowledging that “several thousand detainees died [in 1998 alone] from AIDS, malnutrition, dysentery or typhus”).

319. IPEP Report, *supra* note 281, ¶ 18.35, at 213.

320. *Id.* ¶ 18.37, at 214.

321. Press Conference, President Paul Kagame, *Kagame Urges Rwandans to Build a Better Future Learning from the Mistakes of the Past* (Apr. 6, 2002), at <http://www.rwanda1.com/government/president/interviews/2001/genocideweek.html>.

322. Interview with President Kagame by Marc Hoogsteyns, *supra* note 315.

law. While the political prospects for the creation of new international mechanisms of enforcement—such as the *ad hoc* tribunals—are limited, the opportunities for the creation of domestic and semi-internationalized enforcement bodies are promising. Certain political alignments are likely to give rise to the creation of semi-internationalized tribunals, as illustrated by the three case studies discussed here. First, domestic tribunals may emerge where political divides within an illiberal State's elite generate political benefits for powerful members of that elite who support international criminal justice. Second, where the U.N. serves as administrator of a territory in the wake of international crimes, the U.N. may establish such a mechanism. Third, semi-internationalized tribunals may be created where they shift policy interdependence and allow a vulnerable State to externalize the costs of prosecution vis-à-vis a more powerful neighbor onto the international community. Fourth, in liberal States strong preferences of domestic interests may result in a government policy of accountability. Finally, resource constraints may lead governments to pursue creative strategies for the enforcement of international criminal law.

None of these conditions may be necessary or sufficient for new domestic and semi-internationalized enforcement bodies to be created. But, where these conditions exist, the prospects for domestic enforcement of international criminal law appear high. Paying attention to the political contexts discussed here is essential, both to identify opportunities for the creation of new enforcement mechanisms and to spot potentially dangerous circumstances in which courts become so politicized they no longer serve as independent arbiters of the law.

### III. THE OPERATION OF INTERNATIONALIZED COURTS IN EAST TIMOR

If, as argued above, domestic courts—and more particularly, semi-internationalized domestic courts—are to become a significant enforcement mechanism of international criminal law, then a close analysis of the effectiveness and operation of such tribunals is necessary to determine how their usefulness can be enhanced in the future. In Part II the situation in East Timor was presented to illustrate the political circumstances in which countries establish domestic courts to enforce international criminal law. This Part builds on that presentation, providing a focused study, based on in-depth field research and on-site observation, of the operational successes and challenges faced by the Special Panels of the District Court in Dili, East Timor.

The form and structure of the Special Panels of the District Court of Dili have been described elsewhere,<sup>323</sup> but a few background facts should be recounted. Security Council Resolution 1272 established the U.N. Transitional Administration for East Timor (UNTAET).<sup>324</sup> Among the early acts of the SRSG was Regulation 2000/11, establishing the district courts of Dili and vesting them with “exclusive jurisdiction over serious criminal offenses, particularly Genocide, War Crimes, Crimes against humanity, and murder.”<sup>325</sup> In June 2000, the SRSG established Special Panels in the District Courts of Dili with “universal jurisdiction” over the serious offenses listed above. The Special Panels were to consist of one East Timorese judge and two international judges,<sup>326</sup> with the East Timorese judge named by the SRSG after consultation with an East Timorese Transitional Judicial Services Commission.<sup>327</sup> The first Special Panel began operation in January 2001 and a second Panel convened in November 2001.

With the foregoing general background, this Part engages in a thematic consideration of the principal successes and challenges facing the Special Panels in East Timor. The analysis is not intended to be exhaustive, but rather to focus on one country and highlight some of the areas in which semi-internationalized courts have been particularly effective and where they have fallen short.

### A. Areas of Success

#### 1. Physical & Judicial Reconstruction

Possibly the most obvious success of the Special Panels in East Timor is the reconstruction of the integrity and physical premises of the judicial system, literally from the ground up. When the U.N. administration arrived in Dili in 1999, most of the city had been burned. There were neither judicial institutions nor buildings from which to work.<sup>328</sup> In late 2001, a new courthouse opened in the center of Dili, with office space (including limited space for court-appointed defense counsel), direct-to-CD recording technologies (provided by a USAID grant), and

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323. See, e.g., Suzannah Linton, *Prosecuting Atrocities at the District Court of Dili*, 2 MELBOURNE J. INT'L L. 414 (2001) [hereinafter Linton, *Prosecuting Atrocities*]; Linton, *supra* note 200; Daryl Mundis, *Current Developments: New Mechanisms for the Enforcement of International Humanitarian Law*, 95 AM. J. INT'L L. 934, 942–45 (2001).

324. S.C. Res. 1272, *supra* note 205.

325. UNTAET Reg. 2000/11, *supra* note 108, ¶ 10.1.

326. *Id.* ¶ 22.1.

327. For a discussion of the process of locating and selecting East Timorese judges, including aerial dropping of advertisements across East Timor, see Strohmeyer, *supra* note 200, at 175–77.

328. Interview with Caitlin Reiger, Judicial System Monitoring Program, in Dili, East Timor (Jan. 18, 2002).

holding cells.<sup>329</sup> At the very least, the physical reconstruction stands as a powerful symbol of the renewed commitment to the rule of law.

Beyond the physical premises, the integrity of the judicial process has begun to be restored, with the Special Panels operating and hearing cases. In less than two years, sixteen judgments have been rendered<sup>330</sup>—a number that far exceeds the equivalent period for the ICTY and ICTR combined. A number of other crimes against humanity cases are now pending before the court.<sup>331</sup> At least some of the criminals from the 1999 atrocities have faced justice and a few victims have found catharsis in this process.<sup>332</sup> Justice is being done and, notwithstanding its many faults, the judicial system in East Timor “has come a long way.”<sup>333</sup>

## 2. Judicial Cross-Fertilization

One of the most significant contributions of the East Timorese Special Panels, both for East Timor and for the development of international criminal law more generally, is the cross-fertilization of law, precedent, and thought, facilitated by foreign judges sitting with their East Timorese counterparts on the bench. This internationalization exemplifies what Anne-Marie Slaughter has described as “judicial globalization,” whereby judges look, talk, and sometimes act “beyond the confines of national legal systems . . . [sharing] a deep sense of participation in a common global enterprise of judging.”<sup>334</sup> Judicial globalization in East Timor serves a dual function: first to ensure fair, unbiased, and informed judgments in cases before the court and, second, to develop capacity and expertise within the local judiciary. This cooperation, sharing, and teaching has been remarkably effective.

Internationalized panels have served an important purpose in ensuring impartial decisions based in international legal principles, while respecting and understanding local custom. During the period of Indonesian rule, East Timorese were excluded from government, leaving a void of local judicial experience upon Indonesian withdrawal in 1999. Even if

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329. Interview with Sylver Ntukamazina, Judge, Dili Special Panels, in Dili, East Timor (Jan. 19, 2002).

330. See Judicial System Monitoring Program, <http://www.jsmp.minihub.org/Trialsnew.htm>. The principal crimes against humanity case is Prosecutor v. Marques (Los Palos Case), Case No. 9/2000, Judgment (Dili Special Panel, Dec. 11, 2001), available at <http://www.jsmp.minihub.org/trials.htm>.

331. See, e.g., Prosecutor v. Sarmento (SAME Case), Case No. 18/2001, Indictment (Dili Special Panel, Aug. 7, 2001); Prosecutor v. da Silva (Lolotoe Case), Case No. 4/2001, Indictment (Dili Special Panel, Feb. 6, 2001).

332. Interview with Joaquim Fonseca, *supra* note 247.

333. JUDICIAL SYSTEM MONITORING PROGRAM, JUSTICE IN PRACTICE: HUMAN RIGHTS IN COURT ADMINISTRATION § 4.1 (JSMP Thematic Report No. 1, 2001) [hereinafter JUSTICE IN PRACTICE], available at <http://www.jsmp.minihub.org/Reports/JSMP1.pdf>.

334. Slaughter, *supra* note 73, at 1104.



local judges had been available, the politically charged situation after 1999 raised legitimate concerns about bias. The presence of international judges and particularly the ratio of two international to one East Timorese judge has avoided many potential claims of bias and provided a degree of expertise on the panels.<sup>335</sup>

Partnership with local judges (even with their limited experience) has facilitated the international judges' understanding of the East Timorese context and local traditions. Maria Natercia Gusmao Pereira, the East Timorese judge, was educated in Bali, Indonesia and is therefore familiar with the Indonesian Penal Code in effect in East Timor. Likewise, she is familiar with local customs. Judge Gusmao Pereira relates a story from the Carlos Suarez murder case, in which a claim of mitigating circumstances was based on an East Timorese belief in "black magic"—that the victim had placed a curse on the accused's two children. Judge Gusmao Pereira "assisted the Italian judge in understanding how this belief could exist in East Timor" and they collectively identified provisions of the applicable Indonesian Penal Code allowing them to take such belief structures into consideration.<sup>336</sup>

While international training sessions for local judges, primarily organized by the government of Portugal, have not proved particularly successful,<sup>337</sup> sitting on the bench with international colleagues has been a powerful educational tool. Judge Gusmao Pereira observes: "I have learned a great deal from the two international judges. I was never a judge before this and they have helped me think about particular arguments and principles."<sup>338</sup> From the international perspective, the Burundian Judge, Sylvester Ntukamazia, comments: "Judge Maria and I discuss things together. I am helping her to understand and interpret international law. This was the first time she had heard of crimes against humanity so we talked about that a lot together."<sup>339</sup> Education has been reciprocal. Judge Ntukamazia observes: "Judge Maria knows Indonesian law and I have learned about that. And I have learned about transitional situations, something that will make my job at home in Burundi easier as some similar crimes were committed there and now I

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335. Interview with Caitlin Reiger, *supra* note 328.

336. Interview with Maria Natercia Gusmao Pereira, Judge, District Court of Dili, in Dili, East Timor (Michael Anderson trans., Jan. 18, 2002).

337. The failure of these training classes is largely due to their being conducted only in Portuguese, a language the East Timorese judicial officers do not speak. Likewise, many of the training sessions have been scheduled while cases were in session, requiring judges and defense counsel to either miss court or to skip the training sessions.

338. Interview with Maria Natercia Gusmao Pereira, *supra* note 336.

339. Interview with Sylvester Ntukamazia, *supra* note 329.

think they could qualify as crimes against humanity and genocide.”<sup>340</sup> A possibly unintended effect of the use of international judges then is cross-fertilization of judicial thought and precedent both to and from the host State. Similar partnering of international and local personnel has also been a feature of the offices of the prosecutor<sup>341</sup> and public defender.<sup>342</sup>

### 3. The Office of the Prosecutor

Another success story of the East Timorese model is the Serious Crimes Unit—the office of the prosecutor under UNTAET rule and now in independent East Timor. Despite initial concerns about the effectiveness of the Serious Crimes Unit, after a reorganization in 2001, it has emerged as an effective and efficient body.<sup>343</sup> Responsibilities are gradually being shifted to the East Timorese General Prosecutor, Longunhos Montiero, who has indicated a desire to press ahead with priority crimes against humanity cases, rather than the simple murder cases that characterized most early indictments.<sup>344</sup> The Serious Crimes Unit consists of a number of international personnel, including British barristers, U.S. prosecutors, and civil law investigating judges, many of whom have experience at the ICTY or ICTR. While the East Timorese officers in the Serious Crimes Unit have significantly less experience, training from their international colleagues is now becoming part of the Serious Crimes Unit’s mission.<sup>345</sup>

In addition to a strong human resource base, the Serious Crimes Unit has significant finances at its disposal. It is funded from the UNTAET budget by assessed (mandatory) U.N. contributions and is, therefore, comparatively “blessed by resources.”<sup>346</sup> It has put those resources to use, hiring numerous translators and investigators as well as ensuring adequate access to road and helicopter transportation for investigation and transport of witnesses. This budget has been confirmed through at least May 2003 and effective operation is therefore expected to continue. With

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340. *Id.*; see also Interview with Sylvia de Bertodano, Dili Public Defender, in Amsterdam, Netherlands (Jan. 26, 2002) (De Bertodano is an English Barrister).

341. Interview with Stuart Alford, *supra* note 244.

342. Interview with Siphosami Malunga, Zimbabwe Public Defender, in Dili, East Timor (Jan. 17, 2002).

343. The Serious Crimes Unit was completely reviewed and restructured following the arrival of Dennis MacNamara, the new Deputy Special Representative, who was tasked with reforming the Serious Crimes Unit.

344. Interview with Longunhos Montiero, General Prosecutor, East Timor, in Dili, East Timor (Jan. 16, 2002). Montiero notes that most indictments to date had been for simple murder due to the difficulty of proving the crimes against humanity elements.

345. Interview with Stuart Alford, *supra* note 244.

346. *Id.*

both experienced personnel and sufficient resources, by March 2002 the Serious Crimes Unit had issued more than thirty-three indictments against eighty-two accused, including ten charges of crimes against humanity.<sup>347</sup> Moreover, in every case brought before the Dili District Court, the accused have been convicted on at least some counts.<sup>348</sup>

## B. Challenges and Difficulties

### 1. Judges and Judicial Resources

Despite the success of judicial cross-fertilization, locating and recruiting qualified judges (both East Timorese and international) has proved a significant challenge. While the international judges are clearly committed to their work in East Timor, none of them have significant experience in international law and many have no experience in criminal trials. Judge Ntukamazina, for example, was a junior magistrate judge in Burundi before applying to the U.N. for a judicial affairs officer position and then subsequently being appointed a Special Panels judge.<sup>349</sup> While he holds a Masters degree in law from the University of Bujumbura, he openly admits to having no experience in international criminal law prior to his arrival in East Timor.<sup>350</sup> Other judges and senior judicial appointees have come from Mozambique, Cape Verde, Italy, and Brazil, but, like Judge Ntukamazina, many lack significant experience in international criminal law despite UNTAET requirements for judicial appointees.<sup>351</sup> Two factors have contributed to this problem. First, salaries for judicial officers (low by Western standards) provide little motivation for highly qualified judges to leave stable careers for work in Dili. Second, the selection of judges may well have been motivated more by the UNTAET

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347. Mohammad Othman, Former Prosecutor General for East Timor, Remarks at the Amsterdam Centre for International Law Conference on Internationalized Criminal Courts and Tribunals (Jan. 25, 2002).

348. See Judicial System Monitoring Program, <http://www.jsmp.minihub.org/Trialsnew.htm> (last visited Feb. 5, 2003).

349. See Interview with Sylver Ntukamazina, *supra* note 329.

350. See *id.*

351. See Interview with Caitlin Reiger, *supra* note 328. UNTAET Regulation 2000/15 requires that "account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights." *On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offenses*, UNTAET Reg. 2000/15 § 23.2, U.N. Doc. UNTAET/REG/2000/15 (June 6, 2000); see also JUSTICE IN PRACTICE, *supra* note 333, § 3.1.1 n.32 (noting that pursuant to UNTAET Regulation 1999/3 all international judges are supposed to be vetted by the Transitional Judicial Services Commission, but to date none have been); Linton, *supra* note 200, at 228.

goal of ensuring geographic diversity of staff, rather than a direct consideration of the appropriate qualifications for the position.<sup>352</sup>

The limited judicial experience in international and criminal law is significantly exacerbated by the lack of available support resources. There are no judicial clerks or assistants as is common in most jurisdictions.<sup>353</sup> There is likewise no judicial library (though a few legal books have been collected).<sup>354</sup> Until December 2001, judges did not have personal Internet access, making any research almost impossible.<sup>355</sup> Judicial training sessions are often conducted in Portuguese, a language most of the judges do not speak.<sup>356</sup>

The lack of judicial resources has been manifest in the quality of jurisprudence. Judge Ntukamazina admits: "I don't have time or resources to do independent research. I go through the prosecution's submissions and what they say was done by the ICTY and ICTR. I try to check them, but don't have time to make my own research."<sup>357</sup> Not surprisingly, until the *Los Palos* crimes against humanity decision in early 2002, "no decision contained any reference to international jurisprudence."<sup>358</sup> Even in that case, according to the prosecutor, the judges "adopted arguments put forward by the prosecution and defense without their own legal inquiry."<sup>359</sup>

Jurisprudence on key legal issues is often questionable. For example, in determining the context of a systematic attack against a civilian population, the court in one case merely noted that the Indonesian plan to deport hundreds of thousands of East Timorese "do[es] not call for any formal evidence in light of what even the humblest and most candid man in the world can access."<sup>360</sup> While from a local perspective this may be

352. See Press Conference and Interview with Sergio Vieira de Mello, *supra* note 256 (referring to the importance of diversity in UNTAET and noting the 107 nationalities represented in the mission).

353. See Interview with Sylver Ntukamazina, *supra* note 329. While a number of Australian law graduates offered their services as legal assistants, the East Timorese Ministry of Justice refused to allow them to serve, apparently on grounds of bureaucratic difficulties and insurance risks.

354. See JUSTICE IN PRACTICE, *supra* note 333, § 3.1.2.

355. Interview with Sylver Ntukamazina, *supra* note 329.

356. Interview with Maria Natercia Gusmao Pereira, *supra* note 336.

357. Interview with Sylver Ntukamazina, *supra* note 329.

358. JUSTICE IN PRACTICE, *supra* note 333, § 3.1.1.

359. Interview with Stuart Alford, *supra* note 244.

360. Prosecutor v. Leki, Case No. 5/2000, Judgement (Dili Special Panel, June 11, 2001), available at <http://www.jsmp.minihub.org>; see JUDICIAL SYSTEM MONITORING PROGRAMME, PROSECUTOR V. JONI MARQUES AND 9 OTHERS, TRIAL REPORT § 3.2.1.2 (2002) [hereinafter MARQUES TRIAL REPORT], available at <http://www.jsmp.minihub.org/Resources.htm> (noting that in the *Los Palos* Case the Public Defenders did not contest that there was a "widespread and systematic attack . . . but merely disputed their clients knowledge of it"); see also Prosecutor v. Marques (Los Palos Case), Case No. 9/2000, Judgment (Dili

self-evident, the role of a court is to apply law to facts, something the Special Panels have not been able to do with any regularity. In determining whether the nexus to an armed conflict is a requirement for crimes against humanity, the court appears to have simply misunderstood existing law.<sup>361</sup> While commentators are correct to describe the Los Palos judgment as “a major achievement and an important contribution to jurisprudence internationally and within East Timor,”<sup>362</sup> the lack of judicial resources and expertise were clearly manifest in the quality of the judgment itself.

## 2. Applicable Law

A second area in which the Special Panels experienced difficulties relates to the applicable law in East Timor. UNTAET Regulation 1999/1 provided the applicable laws would be the laws of Indonesia as applied in East Timor “prior to 25 October 1999 . . . in so far as they do not conflict with the [international] standards referred to in section 2, the fulfillment of the [UNTAET] mandate, or the present or any other regulation . . . issued by the transitional administrator.”<sup>363</sup> Thus, Indonesian law applies as long as it conforms to international standards and is not superceded by UNTAET Regulations. While this convoluted specification of applicable law may have been necessary (as there was no other law to apply and international standards had to be observed), commentators have noted that it “proved rather difficult to apply as it did not actually spell out the laws or specifically identify the elements that were

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Special Panel, Dec. 11, 2001) The court’s findings were based largely on the U.N. International Commission of Inquiry Report, which was quoted at length in the judgment.

361. Significant attention is paid to finding that there was an armed conflict in East Timor as a necessary element for proving a crime against humanity. See *Marques*, Case No. 9/2000, Judgment ¶¶ 680–85. However, while the armed conflict nexus is included in the ICTY Statute, it is not included in UNTAET Regulation 2000/15, which is taken from the Rome Statute of the ICC. MARQUES TRIAL REPORT, *supra* note 360, § 3.2.1.2. Moreover, the *Tadic* case, a leading ICTY decision that relaxes the required nexus between crimes against humanity and international armed conflict, has not yet been cited by the court. MARQUES TRIAL REPORT, *supra* note 360, § 3.2.1.2. See *Prosecutor v. Tadic*, ICTY Case No. IT-94-1A, Judgment of the Appeals Chamber (Jul. 15, 1999); see also Guenael Mettraux, *Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda*, 43 HARV. INT’L L.J. 237 (2002) (defining the elements of crimes against humanity in ICTY jurisprudence).

362. MARQUES TRIAL REPORT, *supra* note 360, § 4.7.

363. UNTAET Reg. 1999/1, *supra* note 230, § 3.1. Section 2 refers to the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social, and Cultural Rights, the Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention Against Torture, and Other Cruel, Inhumane, or Degrading Treatment or Punishment, and the International Convention on the Rights of the Child. *Id.* § 2.

inconsistent with internationally recognized human rights standards.”<sup>364</sup> As Judge Gusmao Pereira candidly comments: “The hardest part for me was to interpret the law . . . the Indonesian, UNTAET, and international laws didn’t always fit.”<sup>365</sup> One public defender noted that these overlapping laws were a “cause of great confusion.”<sup>366</sup>

The challenge of determining the applicable law was exacerbated by often incorrect or unavailable translations. Again Judge Gusmao Pereira comments: “There is a language problem here. The Indonesian version [of many UNTAET documents] is often wrong, basically useless.”<sup>367</sup> Moreover, in many cases relevant Indonesian laws were simply unavailable or, in some cases, were rejected by the East Timorese as a remnant of Indonesian occupation.<sup>368</sup> In addition to applying law to extraordinarily difficult facts, under-resourced judges face the added burden of attempting to distill the law from numerous, often contradictory and sometimes unavailable sources.

The direct use of much of the Rome Statute in UNTAET Regulation 2000/15 provided a further challenge for judges in East Timor. While the Rome Statute is a useful starting point and represents an international consensus on the laws and structures of an international criminal court, it is, by its nature, a compromise designed for a well-funded, fully international court, operating where national courts are unable or unwilling to prosecute. Prosecutors in East Timor have found the Rome Statute useful as the elements of the crimes could be borrowed from the Preparatory Commission materials.<sup>369</sup> However, the wholesale adoption of the Statute may not have been appropriate for the East Timorese context, where physical constraints significantly limit the judiciary. Tailoring provisions of the Rome Statute to East Timorese circumstances, particularly the unavoidable limits on judicial capacity, might have been more appropriate.<sup>370</sup> For example, the lengthy and potentially confusing definition of

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364. Strohmeyer, *supra* note 200, at 174; *see also* Hansjörg Strohmeyer, *Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor*, 95 AM. J. INT’L L. 46, 59 (2001) (noting that this system of laws led to “considerable legal and political difficulties”).

365. *See* Interview with Maria Natercia Gusmao Pereira, *supra* note 336.

366. *See* Interview with Siphosami Malunga, *supra* note 342.

367. *See* Interview with Maria Natercia Gusmao Pereira, *supra* note 336.

368. *See* Strohmeyer, *supra* note 200, at 174.

369. *See* Interview with Stuart Alford, *supra* note 244; *see also* S.C. Res. 1272, *supra* note 205.

370. *See* Phakiso Mochochoko, Government of Lesotho, Address to the Amsterdam Centre for International Law Conference on Internationalized Criminal Courts and Tribunals (Jan. 26, 2002); *see also* Interview with Siphosami Malunga, *supra* note 342 (noting that the ICC “statute was created for different purposes and the provisions of the Rome Statute should have been adapted for local use”).

war crimes in the Rome Statute and in Regulation 2000/15 might not have been needed in East Timor.

### 3. Equality of Arms

The lack of equality of arms between prosecution and defense is a third area in which the Special Panels have failed to meet their mandate. The comparative lack of defense resources largely arises from fundamental differences in the way the prosecution (Serious Crimes Unit) and the public defense service are funded. Due to the mandate in Security Council Resolution 1272 to prosecute international crimes, the Serious Crimes Unit is funded directly from assessed U.N. contributions.<sup>371</sup> The trial chambers as well as the office of the public defender, however, is funded from the general budget of East Timor and must compete for funds with other government entities.<sup>372</sup> This has led to, and will presumably continue to cause,<sup>373</sup> significant disparities between prosecution and defense budgets.

At trial, these disparities have manifested themselves in significant ways. For most of 2001, six public defenders had to cover all cases in East Timor—both regular cases and those before the Special Panels.<sup>374</sup> Inadequate resources and personnel limitations in the office of the public defender have meant that one defender is often assigned to multiple defendants in the same trial.<sup>375</sup> In the *Los Palos* case, for example, three East Timorese public defenders had to represent five clients, while an additional three international public defenders represented the remaining three accused.<sup>376</sup> This problem is exacerbated when public defenders' contracts expire or when they are away for training sessions.

The resource disparities between prosecution and defense has restricted the ability of defendants to call witnesses. Prior to January 2002 no defense witnesses had been called in any cases.<sup>377</sup> This is, in part, due to the lack of UNTAET funds to pay witnesses' expenses up front and the fact that many potential witnesses remain in West Timor, beyond the court's subpoena power.<sup>378</sup> U.N. vehicles frequently have not been avail-

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371. See Interview with Stuart Alford, *supra* note 244.

372. See *id.*

373. For at least fiscal year 2002–03 the Serious Crimes Unit will continue to receive funding directly from the U.N. assessed budget. *Id.*

374. See Interview with Siphosami Malunga, *supra* note 342.

375. See MARQUES TRIAL REPORT, *supra* note 360, § 3.1.2.

376. See *id.*

377. See Interview with Siphosami Malunga, *supra* note 342; Interview with Jim Coy, *supra* note 260.

378. JUSTICE IN PRACTICE, *supra* note 333, § 3.4 (noting that while UNTAET Regulation 2000/30 provides for reimbursement, the "administration of such reimbursement has been a

able for the public defenders to investigate cases and locate witnesses. The lack of defense resources has been so severe that one public defender is considering appeals based on a claim of unfair trials.<sup>379</sup>

#### 4. Court Administration

The easiest problems to rectify relate to the administration of the East Timorese courts. Most of these problems are directly attributable to a lack of financial resources, not surprising considering that the total budget for the East Timorese government is about two-thirds of the ICTY's funding and the budget allocation for Special Panels is equivalent to that of the Dili Fire Brigade.<sup>380</sup> These resource limitations directly affect the proceedings of the court. For example, translation services are wholly inadequate. Judges have commented on the pressing need for interpretation—both in court and of documentary evidence.<sup>381</sup> Translation difficulties are exacerbated by the use of numerous languages. In the Los Palos trial, for example, six languages were spoken, often requiring the use of three separate translators for one conversation.<sup>382</sup> Even for relatively simple English-Indonesian translation, the number of available translators was simply inadequate; translators often had to work straight for eight-hour shifts, and defense counsel had to rely on the prosecution's interpreters to communicate with their own clients as no independent translators were available.<sup>383</sup> Likewise, no transcripts are available, a fact that significantly interferes with the right to an appeal.<sup>384</sup> While USAID funding allowed for the installation of a direct-to-CD recording system in the Special Panel courtroom, the lack of a trained technician caused sporadic operation. Moreover, judges were unable to access relevant portions of the CD recordings and so relied instead on

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recurring problem"). The Serious Crimes Unit has taken to reimbursing witness expenses out of pocket, a solution not available to most public defenders. *Id.*

379. See Interview with Siphosami Malunga, *supra* note 342. The basis of his claim may lie in article 14(3)(e) of the International Covenant on Civil and Political Rights, binding law in East Timor, pursuant to UNTAET Regulation 1999/1, which provides a right to examine witnesses. See UNTAET Reg. 1999/1, *supra* note 230, § 2. Despite his intent to appeal, the UNTAET Human Rights Officer contends that trials are fair, though defense concerns are valid. See Interview with Jim Coy, *supra* note 260.

380. Othman, *supra* note 347.

381. Interview with Maria Natercia Gusmao Pereira, *supra* note 336.

382. These languages include Bahasa Indonesian, English, Tetun, Portuguese, Makasa, and Fataluku. For a discussion of the challenges of interpretation in the Los Palos trial, see MARQUES TRIAL REPORT, *supra* note 360, § 3.2.4.

383. *Id.*

384. UNTAET Regulation 2000/11 requires written or recorded notes of proceedings. UNTAET Reg. 2000/11, *supra* note 108, § 26.1. The need for adequate transcripts has been found integral to the right of appeal in the United States and the United Kingdom, among others.



notes taken by the presiding judge on a laptop computer.<sup>385</sup> Most of these problems could presumably be solved with adequate funding. In the ICTY, for example, LiveNote software allows simultaneous translation in both written and audio form for English, French, and Bosnian/Serbian/Croatian.

An additional challenge of court administration is that trials rarely follow a prescribed schedule. During the author's visit to East Timor, judges went on an unanticipated week long strike.<sup>386</sup> Such disruption and unpredictability make it extremely difficult for the local population to observe the judicial process. Even when judicial proceedings are announced, they are often poorly publicized and, on occasion, East Timorese are excluded from the courthouse by guards.<sup>387</sup> While the problems of scheduling and access were rectified by judicial order during the *Los Palos* case, they have hindered the restorative and reconciliatory functions of the Special Panels.<sup>388</sup>

A third problem in court administration is a general lack of internal management and oversight. The Special Panels have no registry or clerk of court to coordinate schedules, trials, and witnesses. This lack of internal administration led to unlawful detention by UNTAET during the run-up to the *Los Palos* case, when several of the accused's detention orders lapsed. When this came to light in mid-January 2001, the Special Panel issued new arrest warrants for accused already in custody.<sup>389</sup> The issuance of new arrest warrants was subsequently overruled by the Court of Appeals.<sup>390</sup> The net effect, that "several of the accused were unlawfully detained at least from 30 August to 19 October 2000," could have been avoided with better management, organization, and oversight.<sup>391</sup>

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385. MARQUES TRIAL REPORT, *supra* note 360, § 3.2.5.

386. The East Timorese judges were striking because they sought lifetime appointments after their two year provisional appointment. *See* Interview with Maria Natercia Gusmao Pereira, *supra* note 336. Yet, the SRSG refused, commenting that this was a decision that should be made by the East Timorese government after independence on May 20, 2002. Press Conference and Interview with Sergio Vieira de Mello, *supra* note 256.

387. *See* JUSTICE IN PRACTICE, *supra* note 333, § 4.1.

388. *See* MARQUES TRIAL REPORT, *supra* note 360, § 3.2.3 (noting that "several East Timorese people were not allowed into the court building by the security personnel as they did not have U.N. identity cards"). When the presiding judge became aware of this situation, he ordered the guards to allow the observers to enter the building. Based on the author's observations of the new courthouse in Dili, the problems of public exclusion have been largely rectified.

389. *See id.* § 3.1.1.

390. *See* Prosecutor v. Bosco, Case of Appeal No. 2/2000 (Dili Special Panel).

391. MARQUES TRIAL REPORT, *supra* note 360, § 3.1.1.

### 5. Cooperation with Indonesia

The final challenge that has limited the effectiveness of the Special Panels is the need to secure cooperation from Indonesia. Despite a Security Council resolution “stress[ing] the need for cooperation between Indonesia . . . and UNTAET,” the Indonesian government has been largely unresponsive of the Special Panel’s work. Defendants, witnesses, and key evidence are often in Indonesian West Timor, beyond the subpoena power of the Dili courts.<sup>392</sup> While UNTAET and Indonesia have entered into a Memorandum of Understanding,<sup>393</sup> calling for mutual judicial cooperation, and while negotiations between UNTAET and Indonesia have been frequent, cooperation remains limited. UNTAET has little authority or ability to enforce the Memorandum of Understanding or to secure the transfer of individuals and evidence from Indonesia. This lack of international cooperation has frustrated both prosecution and defense efforts.<sup>394</sup> As one public defender notes, “without subpoena power, the courts will only ever get the small fish.”<sup>395</sup>

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Before concluding this Part, a few brief observations are appropriate about the similarly situated internationalized courts in Kosovo, which have faced equivalent challenges and to which much of the above analysis applies.<sup>396</sup> Security Council Resolution 1244 provided the U.N. Mission in Kosovo (UNMIK) with the authority of “performing basic civilian administrative functions,” including the operation of the judicial system.<sup>397</sup> Under U.N. supervision, a new judiciary has been constructed, consisting of one supreme court in Pristina as well as five district courts in Pristina, Mitrovica, Gjilan, Prizren, and Pec, with fifty-five local judges and prosecutors initially appointed.<sup>398</sup> Due, however, to perceived

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392. See Interview with Longunhos Montiero, *supra* note 344.

393. See Memorandum of Understanding Between the Republic of Indonesia and the United Nations Transitional Administration in East Timor Regarding Cooperation in Legal, Judicial and Human Rights Related Matters, *supra* note 258 (providing for mutual assistance in taking evidence, serving documents, executing arrests, and transferring persons).

394. See Linton, *Prosecuting Atrocities*, *supra* note 323, at 456 (noting that “Indonesia has not transferred any of the suspects for whom the Special Panel has issued arrest warrants”).

395. Interview with Siphosami Malunga, *supra* note 342.

396. See Christopher Karphammar, Former Judge of the District Court of Mitrovica, Address to the Amsterdam Centre for International Law Conference on Internationalized Criminal Courts and Tribunals (Jan. 25, 2002).

397. S.C. Res. 1244, *supra* note 233, § 11(b).

398. See AMSTERDAM CTR. FOR INT’L LAW, INTERNATIONALIZED CRIMINAL COURTS AND TRIBUNALS: PRACTISE AND PROSPECTS, COLLECTION OF DOCUMENTS AND MATERIALS 9–10 (2002).

and real ethnic bias, UNMIK Regulation 2000/6 provided for the appointment of international judges with the authority to choose particularly sensitive cases.<sup>399</sup> Although plans for a special court to hear crimes against humanity cases have been abandoned,<sup>400</sup> as of January 2002, eight international judges and six international prosecutors were actively working in regular Kosovar domestic courts and efforts were underway to recruit twice that number.<sup>401</sup> While the internationalized courts in Kosovo have reported generally successful operation, many of the challenges facing East Timor discussed above are equally applicable in Kosovo.

Certainly in East Timor and presumably in Kosovo as well, internationalized courts present a mixed record. Cases are being investigated; decisions are being rendered; justice is being done. However, personnel shortages, resource limits, managerial failures, and power constraints have restricted the work of the Special Panels and have raised real questions about the quality of justice. Judges and defense counsel alike note the fundamental paradox of the Special Panels in East Timor: “[T]he world has expectations for us of an international tribunal, with none of the resources and support.”<sup>402</sup>

The larger point is that most of the problems and challenges discussed above are easily solved. They are caused by capacity constraints and misunderstandings, not by willful violations. Additional resources, careful staff recruitment, and good management would alleviate most, if not all, of the difficulties the East Timorese Special Panels have experienced. As an East Timorese public defender put it: “[T]his is an ambitious experiment, which, with a little effort and support, would succeed.”<sup>403</sup> The overriding lesson from the case study of the East Timorese Special Panels, then, is that internationalized courts can work if, and only if, they are given the sufficient resources and support. Semi-

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399. See *On the Appointment and Removal from Office of International Judges and International Prosecutors*, UNMIK Reg. 2000/6, U.N. Doc. UNMIK/REG/2000/6 (2001).

400. E-mail from Brigitte Rath, Judicial Affairs Officer, OSCE Mission in Kosovo (Dec. 14, 2001) (on file with author).

401. AMSTERDAM CTR. FOR INT’L LAW, *supra* note 398, at 9. For more details on the internationalized courts in Kosovo, see *Report of the Secretary-General on the United Nations Interim Mission in Kosovo* ¶¶ 48–52, U.N. Doc. S/2001/926 (2001). See also RULE OF LAW DIVISION, OSCE MISSION IN KOSOVO, REP. 2, THE DEVELOPMENT OF THE KOSOVO JUDICIAL SYSTEM (Dec. 17, 1999), available at <http://www.osce.org/kosovo/documents/reports/justice> (covering the period); DEP’T OF HUMAN RIGHTS AND RULE OF LAW, OSCE MISSION IN KOSOVO, REVIEW OF THE CRIMINAL JUSTICE SYSTEM IN KOSOVO, available at <http://www.osce.org/kosovo/documents/reports/justice> (reports covering Feb. 2001–Feb. 2002).

402. Interview with Siphosami Malunga, *supra* note 342. A similar theme was aired by Judge Ntukamazina. Interview with Sylver Ntukamazina, *supra* note 329.

403. Interview with Siphosami Malunga, *supra* note 342.

internationalized courts are far less expensive than international tribunals, but they are not free. If the U.N. has learned these lessons, there is reason to hope that the internationalized courts now being established in Sierra Leone<sup>404</sup> will overcome many of these difficulties and function more effectively. To be successful, however, these semi-internationalized courts will need to be part of a cooperative global system of justice from which they may draw the necessary resources, funds, and personnel. The following Part considers such a system in detail.

#### IV. A COMMUNITY OF COURTS

The decade of the 1990s was a period of significant advancement for international criminal law: individuals were held accountable; important decisions were rendered; law was clarified and codified. The challenge that lies ahead is the development of an extensive, effective, and efficient means for enforcement of international criminal law.

If the argument and observations in the preceding Parts of this Article are correct, a particular vision of a system of international criminal law is forming. In this system, the bulk of international criminal law enforcement will occur at a quasi-national, rather than supranational level. As the Introduction to the Princeton Principles on Universal Jurisdiction sets forth, “the primary burden of prosecuting . . . perpetrators of [international] crimes will . . . reside with national legal systems.”<sup>405</sup> While the ICC will undoubtedly have a place in this system, the principle of complementarity ensures that national courts will form the front line for prosecution of international crimes.<sup>406</sup> Moreover, the realities of global politics suggest that, while the prospects for the creation of new supranational tribunals are poor, there are numerous political openings for the creation of national and semi-internationalized enforcement mechanisms. Although these mechanisms are far from perfect, with appropriate support and assistance they have great potential.

The best way to conceptualize the emerging system of international criminal law enforcement is as a community of courts.<sup>407</sup> The courts comprising this system are interactive, interdependent, and interconnected.<sup>408</sup> They are not, in William Aceves’s words, merely “a series of

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404. See Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Jan. 16, 2002 (on file with author).

405. PRINCETON PRINCIPLES, *supra* note 74, at 24.

406. See generally El Zeidy, *supra* note 16.

407. Abram Chayes, Remarks at the Theme Plenary Session: Implementation, Compliance and Effectiveness, in 91 AM. SOC’Y INT’L L. PROC. 50, 56 (1997) (describing this phenomenon as a “dense network of organizations and relationships”).

408. See *supra* Part I.

parallel systems . . . separately applicable within the various nations of the world.”<sup>409</sup> Rather, these enforcement mechanisms are overlapping, mutually supportive and mutually dependent. Their jurisdictions intersect. They apply a similar body of law. They draw on each other’s jurisprudence.<sup>410</sup> As Anne-Marie Slaughter describes it, the new system consists of “horizontal and vertical government networks . . . [in] a three-dimensional web” of interaction.<sup>411</sup> These networks include courts engaged in the common enterprise of ensuring accountability through the rule of law. They are a “community of courts.”<sup>412</sup>

This Part explores this community of courts and the relationships between them that bring order to the system. It first considers how enforcement of international criminal law differs from the standard international law or international relations enforcement models. The vertical and horizontal relationships within this dispersed enforcement system are then analyzed. From them, basic principles which regulate dispersed enforcement of international law can be distilled. Finally, this Part turns to the primary actors within the system—an epistemic community of international criminal law judges.

#### A. Enforcement: A Two Level Analysis

Unlike most fields of international law, the primary obligations imposed by international criminal law are on individuals, not on States.<sup>413</sup> In many ways, the central purpose of international criminal law is to deter and punish individuals who commit international crimes. To that end, international criminal law directly regulates individual behavior, in ways far more similar to domestic criminal law than to traditional international law. Only the secondary obligations of international criminal law are on States. Through a variety of legal instruments, States are required to suppress primary violations by individuals and to exercise jurisdiction over individual perpetrators of international crimes. Because obligations

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409. William J. Aceves, *Liberalism and International Legal Scholarship: The Pinochet Case and the Move Toward a Universal System of Transnational Law Litigation*, 41 HARV. INT’L L.J. 129, 138 (2000).

410. In East Timor, for example, the submissions of the Prosecution in the *Los Palos* case relied heavily on ICTY jurisprudence, which was also consulted by the judges. See *Prosecutor v. Marques (Los Palos Case)*, Case No 9/2000, Judgment (Dili Special Panel, Dec. 11, 2002). Likewise in the *Kunarac* Case, the ICTY drew on national criminal law to determine the elements of rape in international law. See *Prosecutor v. Kunarac*, ICTY Case No. IT-96-23-T & IT-96-23/1-T, Judgment (Feb. 22, 2001).

411. SLAUGHTER, *supra* note 272, (manuscript ch. 4, at 2).

412. See Helfer & Slaughter, *supra* note 2, at 372; Slaughter, *supra* note 2, at 187.

413. See Slaughter & Burke-White, *supra* note 70, at 13–16 (arguing that “[i]nternational law now protects citizens against abuses of power by their governments. It imposes individual liability on government officials who commit grave . . . crimes. It must now impose direct obligations on individuals . . .”).

in international criminal law are directed at two different subjects—both individuals and States—traditional compliance models fall short. Understanding compliance with international criminal law requires analysis at both the individual and State levels. Such dual-level analysis has important implications both for international criminal law and for other areas in which international legal rules regulate both individuals and States, such as international economic law and international environmental law.

Analyzing compliance on both the individual and State level requires reframing the literature on the enforcement of international law. Most of this literature focuses only on why States comply with international law and how States can be forced to do so. To date, little attention has been paid to the dynamics of enforcement and compliance where primary obligations regulate individuals and only secondary obligations regulate States.

In 1968, Louis Henkin wrote: “[A]lmost all nations observe almost all the principles of international law and almost all of their obligations almost all of the time.”<sup>414</sup> For Henkin, it is nations which “generally observe law.”<sup>415</sup> In their theory of compliance, Abram and Antonia Chayes offer a managerial model of why States comply with “formal” treaties.<sup>416</sup> Likewise, Downs, Rocke, and Barsoom counter the managerial model by proposing a carrot-and-stick approach to generating compliance. They too operate within the traditional paradigm of State compliance with obligations targeted at States themselves.<sup>417</sup>

Both Chayes and Chayes and Downs, Rocke, and Barsoom define compliance as fulfillment of obligations vis-à-vis other States and think of enforcement as ways States can generate compliance by other States.<sup>418</sup> In international criminal law, however, the primary obligations of individuals to refrain from committing international crimes must be separated from the secondary obligations of States to suppress and punish crimes. As the nature of obligations on the individual and State levels is distinct, different theories of compliance may be needed at each level.

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414. LOUIS HENKIN, *HOW NATIONS BEHAVE* 47 (2d ed. 1979).

415. *See id.* at 48.

416. ABRAM CHAYES & ANTONIA CHAYES, *THE NEW SOVEREIGNTY* 1 (1993).

417. George W. Downs et al., *Is the Good News About Compliance Good News About Cooperation?*, 50 *INT’L ORG.* 379, 383 (1996).

418. *See* CHAYES & CHAYES, *supra* note 416, at 17–18; Downs et al., *supra* note 417, at 386 (arguing that “the punishment must hurt the transgressor state . . . the specific mechanism by which states punish violations is less relevant to the relationship between the depth of cooperation and enforcement than is the magnitude of enforcement”).

### 1. The Individual Level

The primary obligations of international criminal law are at the individual level. International legal instruments require individuals to refrain from international crimes such as genocide, war crimes, and crimes against humanity. Individuals comply with these primary obligations when they do in fact refrain from such acts. Enforcement of international criminal law at the individual level occurs when courts (domestic or international) punish violations of such primary obligations.

The primary obligations for individuals to refrain from international crimes are extremely specific. The Statutes of the ICC, ICTY and ICTR, and the UNTAET Regulation defining international crimes in East Timor all provide unambiguous descriptions of criminal behavior.<sup>419</sup> Such precise obligations leave little room for deviation. While there will be debate as to whether the bombing of television stations in Belgrade, convoys in Afghanistan, guerillas in Chechnya, or individuals in Yemen violate international law, it is clear that individuals must not cross into a narrow and carefully demarcated zone of internationally prohibited conduct. Moreover, the primary obligations of international criminal law do not allow any derogation. Those who do cross the line into the zone of proscribed behavior are clearly and absolutely in violation of their international legal duties. Given that these obligations on the individual level are primary and aimed directly at preventing prohibited conduct, any violations of international criminal law may “unravel” the regime itself.<sup>420</sup> The deliberate commission of international crimes cannot be reconciled with a regime of international criminal law.

The framework of legalization put forward by Kenneth Abbott and coauthors provides a useful means of characterizing the nature of international criminal law obligations at the individual level. Abbott and coauthors evaluate legalization of a set of rules based on the degree of obligation, precision, and delegation. Applying these criteria first to individual obligations in international criminal law, there is a high degree of what Abbott and coauthors deem “obligation.” Individuals are bound by specific sets of rules. Second, these obligations are extremely precise. To accord with the principle of *nullum crimen sine lege*, the various instruments of international criminal law must “unambiguously define the conduct they require, authorize, or proscribe.”<sup>421</sup> Third, at the level of

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419. Genocide, for example, is defined in the Rome Statute as “any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group.” Rome Statute art. 6.

420. CHAYES & CHAYES, *supra* note 416, at 20.

421. Abbott et al., *supra* note 195, at 401; *see also* Rome Statute art. 22 (“The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguo-

individual obligations, courts—both domestic and supranational—have been delegated the authority to enforce the rules of international law. To use Abbott's terms, with respect to the primary individual obligations of international criminal law, "parties [have] agree[d] to binding third-party decisions on the basis of clear and generally applicable rules."<sup>422</sup>

The obligations imposed by international criminal law on individuals can thus be characterized as "hard legalization," with high levels of obligation, precision, and delegation. At the individual level, strict compliance is required. The leaders of the Khmer Rouge cannot reconcile the extermination of three million people with the obligation to refrain from international crimes nor can the Hutu perpetrators of crimes in Rwanda reconcile the slaughter of the Tutsi with such obligations. At the individual level, international criminal law does not and cannot tolerate even the slightest defection. These hard obligations and an extraordinarily narrow zone of acceptable compliance suggest a convergence around a precise set of rules that various judicial mechanisms will uniformly enforce against individual transgressors.

In the context of hard, primary obligations on individuals, Chayes and Chayes's managerial approach to compliance may be neither viable nor appropriate. The basic principle of managerial compliance is that most violations are not willful.<sup>423</sup> The commission of genocide, war crimes, and crimes against humanity, however is a "premeditated and deliberate violation."<sup>424</sup> Chayes and Chayes admit that their managerial compliance model may not extend to situations in which violations are deliberate. Because managerial compliance is inadequate to ensure the primary obligations of international law are met, effective mechanisms to enforce international criminal law against individual violators are needed. While the preferences and identities that drive individuals to commit international crimes may be shifted over time, Downs and coauthors are correct to note the crucial role of enforcement mechanisms in ensuring immediate compliance.<sup>425</sup> The most effective means of preventing individuals from committing international crimes is the sure knowledge that they will face justice, either before domestic or supranational courts, if they transgress the law. National courts are the most effective mechanisms to enforce individual compliance with international criminal obligations. As Anne-Marie Slaughter suggests: "[T]he

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ity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.").

422. Abbott et al., *supra* note 195, at 415.

423. See CHAYES & CHAYES, *supra* note 416, at 10 (noting that "only infrequently does a treaty violation fall into the category of a willful flouting of legal obligation").

424. *Id.* at 9.

425. See Downs et al., *supra* note 417, at 391.



global rule of law depends on the domestic rule of law.”<sup>426</sup> Likewise, William Aceves notes the “benefits from the institutional framework that already exists at the national level to enforce the rule of law.”<sup>427</sup> The existence and effectiveness of national courts depends on the secondary obligations of States to exercise jurisdiction over individual violators.

## 2. The Interstate Level

While the primary obligations of international criminal law require individuals to refrain from committing international crimes, States face secondary obligations to criminalize such behavior, to have the necessary domestic mechanisms to exercise jurisdiction over violators, and, in many cases, to affirmatively exercise that jurisdiction.<sup>428</sup> States can and do comply with these secondary obligations in a variety of ways, including: passing appropriate domestic legislation, granting ordinary courts jurisdiction over international crimes, establishing specialized courts, and vesting jurisdiction in an international tribunal. The various treaties and customary rules from which these secondary obligations arise do not impose on States a specific set of required behavior. At the State level, unlike at the individual level, there is a broad “zone within which behavior is accepted as adequately conforming.”<sup>429</sup> States are given a great deal of leeway to determine how they seek to comply. While some treaties require domestic criminalization of particular conduct, most leave the choice of forum to the discretion of the State. However States do so, compliance with their obligations yields mechanisms through which States can enforce international criminal law against individual perpetrators. Unfortunately, there is also significant

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426. Anne-Marie Slaughter, *A Liberal Theory of International Law*, 94 AM. SOC'Y INT'L L. PROC. 240, 246 (2000).

427. Aceves, *supra* note 74, at 173.

428. The obligation to criminalize individual violations can be found, for example, in the Genocide Convention, according to which States must enact “the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide.” Genocide Convention, *supra* note 140, art. 5. The State obligation to exercise jurisdiction over individual perpetrators of international crimes can be found, for example, in the “extradite or prosecute” requirement of the Torture Convention and the grave breaches provisions of the Geneva Conventions, which obligate States to “undertake any legislation necessary to provide effective penal sanctions” for grave breaches and to “search for persons alleged to have committed such grave breaches and . . . bring [them] before its own courts.” Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 146, 6 U.S.T. 3516, 3616, 75 U.N.T.S. 287, 386; *see also* Convention Against Torture and Other Cruel, Inhumane, or Degrading Treatment or Punishment, Dec. 10, 1984, art. 5(2), 1465 U.N.T.S. 85, 114 (“Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph I of this article.”).

429. CHAYES & CHAYES, *supra* note 416, at 17.

noncompliance—many States have failed to enact the necessary domestic legislation to exercise international criminal jurisdiction.<sup>430</sup> Yet, as these courts are part of a community, noncompliance by one State does not threaten the overall regime—other States and international institutions can step in to take its place.

There is a second distinction between compliance at the individual and State levels. At the State level, failure to comply “will not necessarily unravel the regime itself.”<sup>431</sup> The obligations of States to exercise jurisdiction over violators are merely secondary obligations. This is not to say they are unimportant, but their purpose is to ensure that individuals comply with the primary obligation not to commit international crimes. Thus, the failure of States to comply with their obligations is once removed from the purpose of the primary obligations. Moreover, at the State level, overlapping and concurrent jurisdiction ensures that, even where one State fails to comply with its obligations to exercise jurisdiction, other States and supranational institutions will be able to do so. These other States and institutions can then step in and punish the perpetrators of international crimes, thereby ensuring respect for the primary individual obligation to refrain from the commission of international crimes.

Applying the rubric of legalization to international criminal law at the State level brings some important characteristics of the system into sharper focus. First, in terms of obligation, international criminal law at the State level undeniably consists of powerful (arguably *jus cogens*) obligations—“states . . . are bound by a . . . set of rules or commitments” to enforce international criminal law.<sup>432</sup> Second, in terms of precision, State obligations are relatively imprecise. They do not unambiguously define the conduct they require, authorize, or proscribe.”<sup>433</sup> In fact, the international legal instruments establishing State obligations with respect to international criminal law allow States to exercise jurisdiction over individual violators in any number of ways. The variance in State practice demonstrated throughout this Article—including reliance on national courts, international tribunals, military commissions, and semi-internationalized courts—speaks to the wide range of acceptable compliance.

Third, at the State level, there is little or no delegation to or empowerment of a higher authority to assure compliance. Delegation requires that “third parties have been granted authority to implement, interpret

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430. See generally WELLER & BURKE-WHITE, *supra* note 63.

431. *Id.* at 20.

432. Abbott et al., *supra* note 195, at 401.

433. *Id.*

and apply the rules.”<sup>434</sup> Whereas at the individual level national and international tribunals have been given the authority to apply the primary rules of international criminal law to individuals, at the State level there is no higher authority delegated the power to force State compliance. Though it is theoretically possible that a case could be brought before the ICJ based on a State’s failure to exercise jurisdiction over an international criminal, given the structural nature of the ICJ and the lack of pressing State interest in this issue, such a case seems unlikely.

On a spectrum between hard obligations and anarchy, according to Abbott’s framework of legalization, interstate international criminal law falls somewhere in the middle. The State level obligations of international criminal law are somewhat soft. This is not to say that the obligations themselves are not based in hard sources of law such as treaties and custom, but rather to point out that the obligations on States are relatively imprecise and some degree of defection is tolerated.<sup>435</sup> States thus have significant leeway in how they comply with their obligations under international criminal law and some level of defection, though by no means preferable, can be accommodated.

The implications of the flexibility of international criminal law obligations on interstate relations are significant. While some have “dismissed” soft obligations as an irrelevant “factor in international affairs,” soft obligations may well offer “more effective ways to deal with uncertainty” than traditional hard obligations.<sup>436</sup> Soft obligations cannot be ignored: After all, many of these obligations implement an underlying substantive *jus cogens* norm. Procedural soft obligations allow States greater flexibility to interpret and conform to these obligations within the context of their domestic circumstances, thereby expanding the zone of compliance. Soft obligations thus respect the legitimate differences between States while still furthering the overall goals of international criminal law.<sup>437</sup>

Soft obligations also allow States to experiment and improvise mechanisms of compliance—such as the semi-internationalized courts discussed previously. As Michael Dorf and Charles Sabel explain in their argument for “democratic experimentalism,” “the freedom of maneuver accorded local jurisdictions . . . and the obligations of mutual regard [for

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434. *Id.*

435. Kenneth W. Abbott and Duncan Snidel claim that “soft law begins once legal arrangements are weakened along one or more of the dimensions of obligation, precision, and delegation.” Kenneth W. Abbott & Duncan Snidel, *Hard and Soft Law in International Governance*, 54 INT’L ORG. 421, 422 (2000).

436. *Id.* at 422, 423.

437. See SLAUGHTER, *supra* note 272 (manuscript ch. 4, at 42) (arguing that the principle of legitimate difference “reflects a desirable diversity of ideas about how to order an economy or society”).

fundamental rules] that are its precondition . . . both favor exploratory problem solving and become the more effective for it.”<sup>438</sup> Over time States may develop and implement more effective approaches to compliance than the drafters of hard obligations could have foreseen. This is what Anthony Appiah describes as “universalistic cosmopolitanism: a celebration of difference that remains committed to the existence of universal standards.”<sup>439</sup>

The soft character of State obligations in international criminal law also informs the means by which compliance can be secured. Downs and coauthors present a model that requires a higher authority with the power to force States to meet their international legal obligations. Such a model is neither effective nor appropriate in international criminal law where there is no central enforcement authority, where obligations themselves lack precision, and where compliance by some group of States is sufficient to suppress international crimes.<sup>440</sup> In such cases, managing—rather than imposing—compliance may be a more fruitful strategy. As Chayes and Chayes argue, ensuring transparency, engaging in dispute settlement, building capacity, and effectively using persuasion are the most effective means of increasing State compliance with international criminal law.<sup>441</sup> These strategies can assist States to develop compliance mechanisms that meet State obligations to exercise jurisdiction over international criminals, while fitting within the domestic context and constraints of the particular State in question.

While outright defection from the regime of international criminal law—such as the U.S. repudiation of the ICC—is to be condemned, deviation from the regime can be managed. Those who claim that the Special Panels in East Timor or the Rwandan Gacaca deviate from the international criminal law regime must realize that deviation is seldom willful, but has arisen due to resource constraints.<sup>442</sup> The appropriate response, according to Chayes and Chayes, would be “financial assistance, to defray the incremental costs of compliance for developing countries.”<sup>443</sup> As discussed above, with sufficient financial and judicial assistance, most of the problems with the current prosecutions in East Timor could be resolved and many of the concerning aspects of the Rwandan Gacaca courts could be avoided. Even when States do

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438. Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 322 (1998).

439. Anthony Appiah, *The American University in the Age of Globalisation*, Lecture at Oxford University (2002).

440. See generally Downs et al., *supra* note 417.

441. CHAYES & CHAYES, *supra* note 416, at 22–27 (discussing the components of the managerial compliance model).

442. For a discussion of such deviation, see *supra* Part III.

443. CHAYES & CHAYES, *supra* note 416, at 15.

intentionally defect from the regime—such as the United States has done—the goals of international criminal law are not directly threatened, as other States can step in and exercise jurisdiction themselves.

In fact, the management of different approaches to compliance may offer a net positive. Conflict, deliberation, argument, and contention can lead to better outcomes.<sup>444</sup> Anne-Marie Slaughter refers to a kind of “positive conflict,” which Albert Hirschman claims can yield “the valuable ties that hold modern democratic societies together.”<sup>445</sup> The iterative discourse of discussion and negotiation in the process of creating enforcement mechanisms may well strengthen the overall system of international criminal law. The Cambodian understanding of international criminal law today is very different than it was in 1998, primarily because of the processes of negotiation with the U.N.<sup>446</sup> Likewise, the trial and error of various approaches to international criminal law enforcement will likely inform future agreements between States to create such courts. The internationalized court in Sierra Leone, for example, is a far stronger institution because U.N. negotiators learned from their efforts in Cambodia and East Timor.<sup>447</sup>

Moreover, the managerial model of compliance facilitates a kind of socialization, allowing the norms of international criminal law to become embedded in the domestic political system. Management of obligations and the processes of socialization can change self-conception and national identity of individuals and States. For example, the preferences of the Rwandan people, discussed above, may have shifted over time as Rwandan identity was socialized and reconstructed after the genocide. Anne-Marie Slaughter explains that “a socialized individual [or State] may want something intensely, but will not seek it if doing so would contravene prevailing social norms and result in social opprobrium.”<sup>448</sup> Taking a slightly different approach to the concept, Harold Koh describes the “transnational legal process, whereby global norms of international . . . law are debated, interpreted, and ultimately internalized

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444. See MICHAEL IGNATIEFF, *HUMAN RIGHTS AS POLITICS AND IDOLATRY* 4 (Amy Gutman ed., 2001).

445. SLAUGHTER, *supra* note 272 (manuscript ch. 5, at 42); ALBERT O. HIRSCHMAN, *A PROPENSITY TO SELF-SUBVERSION* 235 (1995).

446. See *supra* Part III.

447. See Alison Smith, Remarks at the Amsterdam Centre for International Law Conference on Internationalized Criminal Courts and Tribunals (Jan. 25, 2002); Alison Smith, A Response to “A ‘Special Court’ for Sierra Leone’s War Crimes” (Aug. 15, 2001), <http://www.globalpolicy.org/security/issues/sierra/court/2001/critique.htm> (describing some of the lessons learned in creating the Sierra Leone tribunal).

448. SLAUGHTER, *supra* note 272 (manuscript ch. 5, at 38).

by domestic legal systems.”<sup>449</sup> Critiquing socialization, Downs, Danish, and Barsoom describe it as a “transformational approach . . . believed to generate increasingly greater commitment and deeper cooperation through a process of iterative State-to-State negotiation that promotes identity convergence.”<sup>450</sup> This is, of course, a deeply constructivist approach. It assumes, to quote Alexander Wendt, that “world politics is ‘socially constructed’” and that social “structures shape actors’ identities.”<sup>451</sup> Particularly in cases of national reconstruction, the management of legal obligations and the socialization of actors may lead to the norms of international criminal law becoming deeply embedded in the domestic political system, through domestic laws, constitutional provisions, or lasting domestic enforcement institutions.

The soft character of State obligations in international law informs our understanding of the emergent community of courts. Within the soft framework of State obligations, States will comply with international criminal law by exercising jurisdiction over individual violators in any number of ways. They may empower their own courts to hear international criminal law cases, create semi-internationalized courts, or delegate authority to an international tribunal. While States are unlikely to be forced to comply with these obligations, their compliance can be effectively managed. This will require commitment to transparency, persuasion, and, particularly, capacity building. Thereby, the norms of international criminal law may become embedded in the domestic systems of many States. What will result is a rich diversity of enforcement mechanisms through which States comply with their obligations to exercise jurisdiction over international criminals. In so doing, States will ensure that individuals comply with their own primary obligations of international criminal law—to refrain from the commission of international crimes.

Recognizing the soft character of State obligations also helps us better conceptualize the interrelated community of courts that make up the system of international criminal law. As the interstate obligations to create such enforcement mechanisms are soft and the zone of acceptable compliance broad, we will see a system with a significant variety in the

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449. Koh, *supra* note 84, at 1399; *see also* Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623 (1998).

450. George W. Downs et al., *The Transformational Model of International Regime Design: Triumph of Hope or Experience?*, 38 COLUM. J. TRANSNAT'L L. 465, 465 (2000). Downs and coauthors argue that “at the micro-foundational level, the assumption that the horizontal interaction that generates value changes at the small-group level will operate the same way and to the same extent at the state level ignores many differences between the two.” *Id.* at 507.

451. Alexander Wendt, *Constructing International Politics*, 20 INT'L SECURITY 71, 71–72 (1995).

form, structure, and jurisdictional scope of enforcement mechanisms. Some States will fail to create them at all. Other States will create courts and tribunals with sweeping reach. Supranational organizations will step in where national courts fail. At the individual level, however, hard law and an extraordinarily narrow zone of acceptable compliance suggest convergence around a precise set of obligations that various judicial mechanisms—created based on interstate obligations—will uniformly enforce against individual transgressors. In other words, the members of this community will exhibit great variety in the types of enforcement mechanisms States create, but legal rules enforced by these courts will be remarkably similar and stringently enforced.

### B. *Relationships in the Community*

The emerging community of courts is largely self-organizing and self-regulating. Though some of the principles that regulate the community are found in the Rome Statute, the community itself lacks any controlling or regulating authority. Therefore, the relationships and interactions among these courts are essential to the effectiveness of the emerging system of international criminal justice. National courts with all of their rich diversity (including the semi-internationalized courts discussed above) will be the front line enforcement mechanisms of international criminal law. The horizontal connections in the community of international criminal law enforcement are relationships between national courts. The vertical connections within the community are the relationships between supranational enforcement mechanisms—such as the ICC or the ICTY—and national courts. While enforcement rests primarily on the horizontal, national level, the vertical dimension serves as an important backstop when national courts are unable to act. This Section explores how interdependence and interaction on the horizontal and vertical planes create a community of courts.

#### 1. Horizontal Relationships

The guiding principle regulating the horizontal relationships between courts in this system is that of subsidiarity. The term is borrowed from the Treaty of the European Union, according to which the European Community will only act outside its exclusive competence where “the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.”<sup>452</sup> The

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452. TREATY OF AMSTERDAM AMENDING THE TREATY ON EUROPEAN UNION, THE TREATY ESTABLISHING THE EUROPEAN COMMUNITIES AND CERTAIN RELATED ACTS, Oct. 2, 1997, title II, art. 3(b), O.J. (C 340) 1 (1997) [hereinafter TREATY OF AMSTERDAM]; *see also*

French Ministry of Foreign Affairs explains that subsidiarity requires governance to “be close to the citizens, entrusting the implementation of programmes to local authorities.”<sup>453</sup> According to George Bermann, subsidiarity demands that action “be taken at the lowest level of government at which particular objectives can adequately be achieved.”<sup>454</sup> In the context of the system of international criminal law, subsidiarity means that enforcement will occur as close to the affected populations as considerations of justice and fairness will allow.

As applied, subsidiarity will regulate the overlapping and conflicting jurisdictions of national courts. The principle will lead most prosecutions to be located on the territory where the international crimes occurred. The benefits of this will be substantial. First, international criminal law will be able to harness the power exercised by national governments.<sup>455</sup> National courts and law enforcement agencies already have the ability to apprehend suspects, to subpoena witnesses and evidence, and to enforce their judgments. Since the majority of suspects, witnesses, and evidence presumably will be on the territory where the crimes occurred, courts in that State are best positioned to apprehend those suspects and access that evidence. Moreover, national courts and specialized national adjudicatory mechanisms created to deal with international crimes are the only bodies with the sheer capacity to address the overwhelming number of cases that may arise after an internal conflict.

From a normative perspective, national courts in the State where crimes occur are the preferable enforcement mechanisms. The proximity of these courts to the events, evidence, and witnesses makes them best qualified to understand the context and circumstances of the case.<sup>456</sup> Moreover, from the perspective of restorative justice, local courts have a significant advantage. As Martha Minow summarizes, “[r]estorative justice emphasizes the humanity of both offenders and victims. It seeks repair of social connections and peace rather than retribution against the offenders.”<sup>457</sup> Restoring social connections means touching the lives of

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Case T-29/92, *Vereniging van Samenwerkende prijsregelende Organisaties in de Bouwrijerheid v. Comm'n*, 1995 E.C.R. II-289, 331.

453. French Ministry of Foreign Affairs, Commentaries on Subsidiarity, <http://www.diplomatie.fr/frmonde/euro/eu05.gb.html> (last visited Feb. 5, 2003).

454. George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331, 338 (1994).

455. See SLAUGHTER, *supra* note 272 (manuscript ch. 6, at 50–51).

456. See Neil J. Kritz, *Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights*, LAW & CONTEMP. PROBS., Autumn 1996, at 127, 133 (1996) (noting that “domestic courts can be more sensitive to the nuances of local culture”).

457. MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS* 92 (1998). See generally Elizabeth Kiss, *Moral Ambition Within and Beyond Political Constraints: Reflections on*



victims. For example, whereas most Rwandans are only vaguely familiar with the ongoing proceedings before the ICTR a few hundred miles away in Arusha, Tanzania, over 90 percent of the population participated in the elections of the local Gacaca courts.<sup>458</sup> This personal involvement in the judicial process is crucial to the cathartic and restorative qualities of judicial proceedings. Neil Kritz observes, “[T]he effectiveness and local impact” of reconciliatory mechanisms is “undoubtedly enhanced by . . . physical presence in the territory.”<sup>459</sup> Finally, locating prosecutions close to home is most likely to advance the socialization or transnational judicial process created by international justice. Norms are more easily internalized by individuals who are closely connected to the norm creation processes.<sup>460</sup>

National courts also offer the normative benefit of psychological proximity and hence domestic legitimacy. The sense of connection between the national population and the judicial process is far more likely where domestic courts are involved. Supranational enforcement mechanisms risk being seen as “an instrument of hegemony for powerful states.”<sup>461</sup> National enforcement mechanisms are far more likely to be perceived as legitimate in affected communities than are their supranational counterparts. As José Alvarez observes, “If Rwandan society shares comparable notions of judicial legitimacy, it stands to reason that having judges who come from the local community may itself be determinative of the legitimacy of these processes.”<sup>462</sup> Likewise, Jonathan Charney observes that alternatives may be chosen for international dispute settlement such that a tribunal can be structured in a way that respects local “cultural factors.”<sup>463</sup> Finally, the use of national courts in the prosecution of international crimes increases the likelihood of open debate and discussion within the domestic polity, enhancing the “public deliberation [crucial to] . . . creating legitimacy for the undertaking.”<sup>464</sup>

While the ideal approach to international criminal law enforcement would be to locate courts as close to the victims and events as possible,

*Restorative Justice*, in TRUTH V. JUSTICE 68, 79 (Robert I. Rotberg & Dennis Thompson eds., 2000).

458. Bishogoro, *supra* note 290.

459. Kritz, *supra* note 456, at 131.

460. See generally Wendt, *supra* note 451.

461. See Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT’L L. 7, 30 (2001). Akhavan observes: “The ICTR has often been faulted for its remoteness from the Rwandese people. Its geographical location . . . makes it visibly distant.” *Id.* at 25.

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

463. Jonathan I. Charney, *Is International Law Threatened by Multiple International Tribunals?*, 271 HAGUE ACAD. INT’L L. 101, 133 (1998).

464. MINOW, *supra* note 457, at 55.

this is not always practicable or appropriate. Other States must intervene when and where States fail to comply with international obligations to vest their courts with the power to hear such cases, are unable to create specialized international courts, purposefully avoid prosecution and investigation, or simply lack the capacity to prosecute. The first part of such intervention should probably be managerial. Nonterritorial States need to determine the root cause of the territorial State's failure to prosecute and to ascertain whether such failure is due to misunderstandings or capacity constraints. Where such misunderstandings or capacity constraints are the problem, such as in Rwanda, horizontal foreign assistance—both judicial and financial—would be an appropriate response.<sup>465</sup>

When, however, a State's failure to prosecute is willful or when problems cannot be resolved through foreign assistance alone, then the right and duty to exercise jurisdiction passes to the courts of other States or to supranational institutions. Such concurrent jurisdiction fully conforms with the principle of subsidiarity: Institutions more distant from the affected population can intervene when those of the territorial State are unable to achieve the overall goals of prosecution. In a horizontal network, a variety of other courts, beyond the territorial State, may well have jurisdiction over the case. Under standard principles of jurisdiction, the courts of the perpetrator's or victim's nationality would have concurrent jurisdiction and the right to prosecute would pass across the horizontal plane to alternative national forums.

There will be circumstances in which all three of these forums—the territorial State, the perpetrator's national State, and the victim's national State—are unable to prosecute. In such cases, any other court in the community would be able to intervene and exercise jurisdiction. The first consideration in determining which other members of the community of courts should exercise jurisdiction will turn on which State apprehends the suspect, though the Pinochet case indicates that the apprehending State may simply be acting on a warrant issued by the prosecuting State.<sup>466</sup> Without explicitly mentioning subsidiarity, the Princeton Principles on Universal Jurisdiction—the aforementioned guidelines on the exercise of universal jurisdiction—call on States to balance a number of criteria in deciding whether to extradite or prosecute. These criteria include “the place of commission of the crime,” “the nationality connection of the victim to the requesting state,” and “any other

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465. Kritz, *supra* note 456, at 148 (observing, “the best scenario would be for the international community to provide appropriate assistance to enable a society emerging from mass abuse to deal with the issues of justice and accountability itself”).

466. See Aceves, *supra* note 74, at 163 (discussing Spain's extradition request for Pinochet).

connection between the requesting state and the alleged perpetrator, the crime, or the victim.”<sup>467</sup> While the Principles do not rank these considerations, the commentaries indicate that “almost without exception, the territorial principle was thought to deserve precedence” because “the criminal defendant should be tried by his ‘natural judge.’”<sup>468</sup> Where prosecution is solely under the universality principle, jurisdictional conflicts should thus be resolved in accordance with the principle of subsidiarity. This may require States to exercise restraint and to extradite an accused to a State with a closer tie to the crime as long as prosecution by the requesting State conforms to basic norms of fairness and justice.

Subsidiarity is fully compatible with liberal theories of international law. Liberal international law theory derives from liberal international relations theory, a set of positive assumptions about how State interactions drive international outcomes. Liberal international relations theory assumes “individuals and private groups” within a State are the “fundamental actors in international relations.”<sup>469</sup> Subsidiarity locates prosecutions in institutions as close to these fundamental actors as the interests of justice will allow. Liberal international law theories see the “primary function of public international law . . . [as] influenc[ing] and improv[ing] the functioning of domestic institutions.”<sup>470</sup> By keeping prosecutions as close to the location of the crime and affected communities as possible, subsidiarity enhances the effectiveness of judicial action and enhances the democratic connections between individuals and the institutions that govern them.

A final horizontal interaction within the community of courts arises from the cross-citation and application of law by courts of different nations. Recent studies document “constitutional cross-fertilization” whereby courts of one State inform their constitutional decisions through the jurisprudence of the courts of other States.<sup>471</sup> This trend is even more common in international criminal law, where States apply the same substantive body of law. For example, the British House of Lords in the Pinochet Case cites to the Israeli decision in the case of Adolph Eichmann<sup>472</sup> and, in the Eichmann case, the Israeli Supreme Court cites frequently to the decisions of the Nuremberg Tribunal and to the national war crimes prosecutions under Control Council Law 10 after World

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467. PRINCETON PRINCIPLES, *supra* note 74, at 32 (Principle 8: Resolution of Competing National Jurisdictions).

468. *Id.* at 53 (Commentary to Principle 8).

469. Moravcsik, *supra* note 114, at 516.

470. Slaughter, *supra* note 426, at 246.

471. *See, e.g.*, Slaughter, *supra* note 73, at 1104.

472. *See Regina v. Bow St. Metro. Stipendiary Magistrate, Ex parte Pinochet Ugarte*, 38 I.L.M. 579, 590 (H.L. 1999).

War II.<sup>473</sup> In so doing, the courts of one State borrow from and cite to the courts of other States, not as binding precedent, but as the articulation of common principles by similarly situated judges in a global community of courts.

## 2. Vertical Relationships

In this global community of courts, vertical relationships regulate the interactions between national and supranational courts.<sup>474</sup> Though vertical, these relationships should not be seen as strictly hierarchical (as in the relations between a district and appellate court in the United States) or even as federal (as in the relationship between a state supreme court and the U.S. Supreme Court), but again as part of a community of courts with different levels of international involvement and different degrees of distance from the crimes. The German Federal Constitutional Court describes similar vertical interdependence with the European Court of Justice (ECJ) as a “cooperative relationship” in which both courts are engaged in a similar enterprise, but in which the ECJ has “responsibility for the entire area of the Community.”<sup>475</sup> Thinking of this vertical interdependence as a cooperative relationship is useful for it emphasizes the fact that both national and supranational institutions will have to take account of one another, respect one another, and defer to one another when appropriate.

The guiding principle governing these vertical relationships is that of complementarity, enshrined in the admissibility criteria of the Rome Statute discussed in some detail above.<sup>476</sup> In short, complementarity requires the ICC to restrain from exercising jurisdiction unless national courts are unwilling or unable to prosecute.<sup>477</sup> National courts exercise primary jurisdiction, with supranational institutions stepping in only when national courts fail or defer. Complementarity and subsidiarity fit together neatly. Both emphasize keeping prosecution local where possible. Complementarity governs the allocation of jurisdiction between the supranational and the national level, while subsidiarity determines the location of prosecution within the national level.

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473. See Attorney Gen. of Israel v. Eichmann (Isr. S. Ct. 1962), reprinted in 36 I.L.R. 277 *passim*.

474. See Slaughter, *supra* note 73, at 1103–04. See generally Helfer & Slaughter, *supra* note 2.

475. BVerfGE 73, 339 (387); see also Dieter Grimm, *The European Court of Justice and National Courts: The German Constitutional Perspective After the Maastricht Decision*, 3 COLUM. J. EUR. L. 229, 235 & n.20 (1997).

476. See *supra* Section I.A.

477. See Rome Statute art. 17.

A regime of complementarity has two powerful effects: changing incentives and bolstering capacity. First, complementarity encourages action by national institutions. Complementarity shifts incentives by changing the default option from impunity to supranational prosecution. Prior to the existence of the ICC, for example, a State would face the choice of prosecuting at home or allowing impunity. Given the political costs of domestic prosecution, many States chose the option of impunity. With the ICC acting under the complementarity principle, the same State would instead face the choice between national prosecution and supranational prosecution. In that circumstance, having some control over the proceedings and locating the trial in their own courts might well be a preferred outcome. Second, complementarity bolsters capacity in two ways. Under a regime of complementarity, supranational courts become available where national courts fail to act. Moreover, the experience and resources at the supranational level trickle down to the national level, providing national courts with precedent, personnel, and political cover.

An important and yet unresolved question in this allocation of jurisdiction is how often the vertical relationships should be invoked and the forum of prosecution shifted on the vertical plane from a national to a supranational forum. Some have argued that “the complementarity regime of the Rome Statute is probably too strong”<sup>478</sup> and supranational courts such as the ICC should play a greater role. The accuracy of these claims turns on the interpretation of “unwilling” and “unable,” the two core tests for complementarity embodied in the Rome Statute. The Rome Statute leaves a great deal of discretion as to the meaning of these terms to the Court, and thus the frequency with which international courts will assume jurisdiction.<sup>479</sup> As Madeline Morris observes, “the ICC Treaty articulates no principles or policies to govern . . . decision making on fundamental issues.”<sup>480</sup>

Thinking of national and supranational judicial mechanisms as part of a community of courts in a “cooperative relationship” helps guide all parties as to when supranational institutions should exercise jurisdiction. For this community of courts to operate effectively, the interpretation of “unwilling” and “unable” has to provide flexibility. The obvious case of supranational prosecution envisioned by the Rome Statute is where national courts lack the capacity or the political will to prosecute and supranational institutions must step in.

There are at least two additional circumstances in which supranational prosecutions are particularly appropriate and in which domestic

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478. Kaul, *supra* note 24, at 59.

479. See generally El Zeidy, *supra* note 16.

480. Morris, *supra* note 19, at 177.

courts should refrain from prosecution to allow supranational adjudication. First, the “Milosevic exception”: Where a globally renowned despot is tried for international crimes, the world at large may have an interest in supranational prosecution. In such cases a purely domestic trial might have dangerous political repercussions that threaten the stability of a transitional State. Second, the “Kunarac exception”: Where a case is of groundbreaking precedential value, a supranational court may yield better jurisprudence.<sup>481</sup> In such cases, experience and judicial resources may be required in order to ensure the codification of crucial areas of international criminal law. For example, Dragoljub Kunarac, a low-level commander of Serb paramilitaries, was tried before the ICTY for numerous counts of rape as a crime against humanity. As the first prosecution of rape as a crime against humanity,<sup>482</sup> the *Kunarac* case set an important precedent in an emerging area of international law. In domestic law such groundbreaking cases tend to reach the highest court through appeals procedures. In international law, however, the ICC has no appellate jurisdiction from national cases. In this situation, deference to the ICC by national courts may be appropriate.<sup>483</sup> In these two scenarios, domestic courts—even if able to prosecute—should cooperate with the ICC, restraining their exercise of jurisdiction and deferring to supranational courts.<sup>484</sup> If this system of complementarity on the vertical plane is to work, the “unwilling” clause of the Rome Statute must be interpreted to allow supranational adjudication where domestic courts deem themselves unwilling to prosecute because they believe supranational institutions would be more effective in the particular case.

Adequate resolution of jurisdictional conflicts through vertical relationships will depend upon close cooperation and collaboration between national and supranational courts.<sup>485</sup> It will be incumbent on the judges of supranational bodies to convince their national colleagues that they are all part of the same judicial enterprise, “fellow professionals in a

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481. See *Prosecutor v. Kunarac*, ICTY Case No. IT-96-23-T & IT-96-23/1-T, Judgement (Feb. 22, 2001).

482. See *Prosecutor of the Tribunal Against Dragoljub Kunarac and Radomir Kovac*, Third Amended Indictment, ICTY Case No. IT-96-23-PT (Dec. 1, 1999) (charging Kunarac with “Rape, a crime against humanity punishable under article 5(g) of the Statute of the Tribunal”).

483. Similarly, the *Akayesu* case before the ICTR charging and convicting the accused of genocide, set an important precedent and would be an obvious example of a case that should be heard by a supranational court under the “Kunarac exception.” See *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgement (Sept. 2, 1998).

484. See *Morris*, *supra* note 19, at 199 (noting that there are certain cases in which “negotiations” should be used “in forestalling national prosecutions”).

485. *In re Application of Euromepa, S.A.*, 51 F.3d 1095, 1101 (2d Cir. 1995) (Judge Calabresi describing this type of relationship as an “ongoing dialogue between the adjudicative bodies of the world community”).

profession that transcends national borders.”<sup>486</sup> Such relationships are not built through the ratification of a treaty, but rather by ongoing contact, cooperation, trust building, and mutual respect. Anne-Marie Slaughter observes that the positive relationship between the ECJ and national courts in Europe required “convincing national judges of the desirability of using the ECJ. Through seminars, dinners, regular invitations to Luxembourg, and visits . . . the ECJ judges put a human face on the institutional links they sought to build.”<sup>487</sup> The future judges of the ICC should follow in the footsteps of their ECJ counterparts by building relationships with national courts. If the ICC is to become an effective body and have a meaningful caseload, these relationships must be fostered. Social interactions and seminars in The Hague as well as good jurisprudence will be essential.

Borrowing by national courts of supranational jurisprudence is the final element of the vertical interactions within this community of courts. In East Timor, Judge Sylver Ntukamazia “frequently relies on the ICTY and ICTR.”<sup>488</sup> Likewise, Stuart Alford, one of the international prosecutors in East Timor, consults the Rome Statute Preparatory Commission materials and the “judgments of the two *ad hoc* tribunals.”<sup>489</sup> While these sources are not binding precedent in East Timor, there is an implicit assumption among many national judges and legal officials that supranational institutions with their comparatively limitless resources and greater international criminal law experience will reach sound, well-reasoned decisions. These decisions should, therefore, carry great weight. These then are soft relationships, created through respect and persuasive judicial reasoning, rather than through formal hierarchy. Yet, even soft linkages can ensure a relative uniformity of law. As Guenaël Mettraux explains, “[c]rimes against humanity has now come of legal age . . . The ICTY [has] played a crucial role in this transformation . . . Whereas national courts sometimes relied upon distinctively domestic definitions of this offense” the tribunal has ensured a common jurisprudence.<sup>490</sup> Given the importance of uniformity and the need to further codify international criminal law, vertical interactions between courts are crucial, as is deference to supranational courts for cases in which new legal questions are raised. Even where entire cases are not deferred to the ICC, there is nothing in the Rome Statute which would prohibit, for example, a national court submitting a question of law to the ICC. This is

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486. Slaughter, *supra* note 73, at 1124.

487. Anne-Marie Burley [now Slaughter] & Walter Mattli, *Europe Before the Court: A Political Theory of Legal Integration*, 47 INT'L ORG. 41, 62–63 (1993).

488. Interview with Sylver Ntukamazina, *supra* note 329.

489. Interview with Stuart Alford, *supra* note 244.

490. Mettraux, *supra* note 361, at 238.

comparable, at the domestic level, to the certified question process used by U.S. federal courts in ascertaining state law where there are “unsettled questions of state law.”<sup>491</sup> Similarly, national courts of the European Union Member States can refer interpretative questions to the ECJ, thereby ensuring a relatively uniform interpretation of EU law among Member States.<sup>492</sup> The situation would remain, nonetheless, one of deference out of respect and interdependence, and not of subordination or hierarchy.

### C. *The Common Enterprise of Judging*

The primary actors in this community of courts are judges. Judges determine how courts interact vertically and horizontally. Thinking of judges as key actors within a global community of courts transforms the nature of their job and, possibly, even their self-identity. Many international criminal law judges already see themselves as part of a global process of accountability. When Patricia Wald, a former judge on the U.S. Court of Appeals for the District of Columbia, sat on the bench of the ICTY, she was no longer specifically serving the United States, but rather the global pursuit of justice.<sup>493</sup> Likewise, when Sylver Ntukamazia hears cases in East Timor, he is not working merely for East Timor or his home State of Burundi: “[M]y goal is an international move toward justice.”<sup>494</sup> Identities of international judges thus shift from a purely domestic focus to dual loyalty to both national and international judicial processes. This is a modern version of Georges Scelle’s “*dédoublement fonctionnel*”—international jurists have a truly double function and double identity, both domestic and international.<sup>495</sup> Anne-Marie Slaughter argues that such judges have both an “internal and external face” and should “see themselves as representing a larger transnational or even global constituency” in light of a “global public interest.”<sup>496</sup>

In this context, international criminal law judges and officials become what Peter Haas refers to as an epistemic community, “a network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge

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491. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 76–79 (1997). While the process of certified questions is part of a federal system—which the community of courts is not—the concept itself could well be applicable.

492. TREATY OF AMSTERDAM art. 234.

493. See Wald, *supra* note 56.

494. Interview with Sylver Ntukamazia, *supra* note 329.

495. Georges Scelle, *Le Phénomène Juridique de Dédoublement Fonctionnel*, in RECHTSFRAGEN DER INTERNATIONALEN ORGANISATION 324 (Walter Schatzel & Hans-Jürgen Schlochauer eds., 1956).

496. SLAUGHTER, *supra* note 272 (manuscript ch. 6, at 22).



within that domain or issue-area.”<sup>497</sup> They share a set of “normative and principled beliefs” in the rule of law as well as the “common policy enterprise” of accountability.<sup>498</sup> Seeing themselves as an epistemic community with shared values and methods may help generate the mutual respect and coordination essential to the successful operation of the emerging community of courts. While, in Haas’s model, epistemic communities provide “information and advice” to decision makers, here the epistemic community of international judges has been delegated the power to make policy through judicial decisions. Thus the power and influence of this community of judges “in shaping patterns of international policy coordination,” is great.<sup>499</sup>

If international criminal law judges are actively aware of belonging to a larger epistemic community, they may be more able to serve and assist one another in countless ways. As argued above, managing State compliance with international obligations requires the provision of assistance and capacity building. Who better to do so than the judges themselves? Horizontally, this assistance could involve more internationalized domestic courts sharing judges. This is the basis of the East Timor, Sierra Leone, and Cambodian models. Self-aware cooperation is inherent in the recent offer of the government of India to send a judge to Cambodia even if agreement with the U.N. is not reached.<sup>500</sup> Vertically, this self-aware cooperation might involve sending judges with experience in supranational courts to national courts. Judge Sylver Ntukamazia in East Timor remarked on his desire “to bring an ICTY judge to sit on the panel here.”<sup>501</sup> Likewise, Patricia Wald, the former U.S. judge at the ICTY, expressed a willingness to serve on the bench in a national court hearing war crimes cases, such as the Special Panels in East Timor.<sup>502</sup> The ICC might well consider an outreach program where its judges were seconded out to national courts for particular cases.<sup>503</sup> Such judge-to-

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497. Peter M. Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 INT’L ORG. 1, 3 (1992).

498. *Id.*

499. *Id.* at 35.

500. His Excellency Sok An, Senior Minister In Charge of the Office of the Council of Ministers, President of the Task Force for Cooperation with Foreign Legal Experts and Preparation of the Proceedings for the Trial of Senior Khmer Rouge Leaders, Presentation to the Stockholm International Forum: Truth, Justice And Reconciliation (Apr. 23–24, 2002) (thanking “the Prime Minister of the Republic of India who has just pledged to send a judge” to Cambodia).

501. Interview with Sylver Ntukamazina, *supra* note 329.

502. See Wald, *supra* note 56; Interview with Patricia Wald, Former Judge, ICTY, in Cambridge, Mass. (Feb. 7, 2002).

503. Such programs were noticeably absent in the early years of the ICTY and ICTR. David Tolbert argues that the ICTY suffered from a “strategic failure in that [it] has not had much impact on the development of courts and justice systems in the region.” David Tolbert,

judge contacts and assistance could strengthen the vertical and horizontal interactions, improve the quality of justice rendered, enhance the capacity of national courts, and generate respect and cooperation among the epistemic community of judges. As judges come to see themselves as part of a common community—the bearers of dual national and international obligations—they will enhance the global pursuit of accountability.

### CONCLUSION

Undeniably, international criminal law has come of age. There now exists a clear set of rules of proscribed conduct and a body of jurisprudence articulating and applying those rules. We are now witnessing the development of a system of international criminal law enforcement. This new system challenges basic notions of public international law enforcement, merging international and domestic institutions in the creation of a highly interconnected, independent global community of courts. The relationships within this community are the key to the success of the system.

Enforcement of international criminal law begins with politics. States must create or delegate authority to adjudicatory bodies—domestic and supranational—for international criminal law to have bite. The creation of supranational mechanisms began at Nuremberg, was rekindled in the 1990s with the creation of the two *ad hoc* tribunals, and reached fruition in July 2002 with the entry into force of the Rome Statute of the ICC. Likewise, enforcement by national institutions began with the Israeli trial of Adolph Eichmann, was fostered through laws allowing the exercise of universal jurisdiction, and was embodied in the Pinochet case.

A careful analysis of the politics underlying the creation of international criminal law enforcement mechanisms anticipates that supranational courts will have only a limited role and future enforcement of international criminal law will largely occur at the national level. *Ad hoc* tribunals were likely a phenomenon of the 1990s and the ICC's mandate is limited. However, political opportunities for the creation of enforcement mechanisms at the domestic level are numerous. First, as in Cambodia, cleavages within political elites may foster the creation of courts to hear international criminal cases. Second, U.N. administration, such as in East Timor and Kosovo, may yield semi-internationalized

courts. Third, the externalization of political costs vis-à-vis powerful neighbor States, as in the relationship between East Timor and Indonesia, may also support the creation of such adjudicatory bodies. Finally, demands for justice among domestic interest groups—as in Rwanda—may push liberal and quasi-liberal States to enforce international criminal law and resource constraints may yield innovative new approaches. For political reasons, then, the future system of international criminal law is likely to be predominantly horizontal, comprised of a variety of different domestic and semi-internationalized courts. As the East Timor situation demonstrates, such courts will, undoubtedly, face numerous challenges. But these challenges can be overcome with sufficient outside assistance and cooperation within the growing community of courts.

By its very nature this community of courts is decentralized, interdependent, self-organizing, and nonhierarchical. Yet, for the system to be effective, it requires order. Such order, and the power it implies, comes from relationships and from shared information. This community of courts must be self-aware and must build trust and understanding amongst an epistemic community of international judges.

The relationships among courts in this community possibly can be guided by grand principles including those of accountability, subsidiarity, and legitimate difference. In such a framework, States and domestic polities must enforce international criminal law, but should be given the flexibility to tailor institutions to their own domestic circumstances<sup>504</sup> and a “margin of appreciation” within which to fulfill their obligations.<sup>505</sup>

The successful organization and relations of this community of courts will require the articulation and application of general overarching norms to guide courts and judges alike. In the more immediate term, however, narrower norms, closely tailored to the operation of a community of courts, are needed. In a system in which information is power<sup>506</sup> and in which compliance at the interstate level can be managed through collaborative guidance and assistance,<sup>507</sup> regulatory norms and implementation guidelines will enhance the effectiveness of the overall system. To that end, a code of conduct for the enforcement of international criminal law—particularly at the national level—would prove an extraordinarily powerful tool.

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504. See generally Anne-Marie Burley [now Slaughter], *Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine*, 92 COLUM. L. REV. 1907 (1992).

505. *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) at 22.

506. See generally SLAUGHTER, *supra* note 272 (manuscript ch. 5).

507. CHAYES & CHAYES, *supra* note 416, at 22–26.

In the past decade, codes of conduct have emerged as an important means of regulating the international system.<sup>508</sup> They are effective in part because they are “voluntary norms . . . selected by individual actors.”<sup>509</sup> Dorf and Sabel have described such codes as “rolling best practices rules” whereby best practices are identified and complied with by a community of actors.<sup>510</sup> As soft law, a code of conduct can deal with uncertainty and the changing nature of the system over time.<sup>511</sup> Such a code should give substance to due process rights such as the presumption of innocence, the right to speedy adjudication, the right to representation, the right to confront evidence, and the right to appeal.<sup>512</sup> It should specify how equality of arms—the balance of resources between prosecution and defense—can be achieved. It should create mechanisms for vertical and horizontal exchange of law and judges within the system. Given that many national courts, such as those in Cambodia, Kosovo, East Timor, and Rwanda, will depend on outside aid and capacity building, this code of conduct could become a benchmark for the provision of aid, leading to convergence around and uniform implementation of the basic principles of the code.

While the development of such a code of conduct for international criminal law enforcement offers important future potential, the most immediate challenge is to recognize this emerging community of courts as a global system of international criminal justice. Rather than separate

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508. Codes of conduct and similar types of soft law have proliferated in the past decade, particularly in economic and environmental areas.

509. Slaughter, *supra* note 426, at 243.

510. Dorf & Sabel, *supra* note 438, at 350.

511. See Abbott & Snidel, *supra* note 435, at 422–23.

512. Each of these concepts is generally accepted as part of international customary law and articulated in, among others, the American Convention on Human Rights, the Banjul [African] Charter of Human and Peoples' Rights, the Cairo Declaration on Human Rights in Islam, and the European Convention. On the presumption of innocence, see American Convention on Human Rights: “Pact of San José, Costa Rica,” Nov. 22, 1969, art. 8(2), 1144 U.N.T.S. 123, 147 (entered into force July 18, 1978); Banjul Charter on Human and Peoples' Rights art. 7(1)(b), OAU Doc. CAB/LEG/67/3, 21 I.L.M. 58, 60 (entered into force Oct. 21, 1986); Cairo Declaration on Human Rights in Islam, Aug. 5, 1990, art. 19(e), available at <http://www1.umn.edu/humanrts>; European Convention, *supra* note 97, 213 U.N.T.S. at 228. On the right to a speedy trial, see American Convention, *supra*, arts. 7(5),(6), 1144 U.N.T.S. at 146, 147; Banjul Charter, *supra*, arts. 6, 7(1)(d), 21 I.L.M. at 60; Cairo Declaration, *supra*, art. 19(e); European Convention, *supra* note 97, arts. 5(3)-(5), 213 U.N.T.S. at 226–28. On the right to counsel of choice, see American Convention, *supra*, art. 8(2)(d),(e), 1144 U.N.T.S. at 147; Banjul Charter, *supra*, art. 7(1)(c), 21 I.L.M. at 60; Cairo Declaration, *supra*, art. 19(e); European Convention, *supra* note 97, art. 6(3)(c), 213 U.N.T.S. at 228. On the right to confront evidence and witnesses in a public forum, see American Convention, *supra*, art. 8(2)(f), 1144 U.N.T.S. at 148; Banjul Charter, *supra*, art. 7(1)(c), 21 I.L.M. at 60; Cairo Declaration, *supra*, art. 19(e); European Convention, *supra* note 97, art. 6(3)(d), 213 U.N.T.S. at 228. On the right to an appeal, see American Convention, *supra*, art. 8(2)(h), 1144 U.N.T.S. at 148; Banjul Charter, *supra*, art. 7(1)(a), 21 I.L.M. at 60.

*ad hoc* attempts to enforce international law, this community of courts at the supranational and, particularly, at the national level, is an interdependent system engaged in a common enterprise. This realization will require self-awareness among judges and recognition by lawyers that they are part of a larger community. Such a realization, and the cooperation, resource exchange, and intellectual cross-fertilization it implies, may greatly enhance the effectiveness of international criminal law enforcement.

The community of courts outlined here may help bridge the growing divide between the United States and Europe, which manifests itself particularly in relation to the ICC.<sup>513</sup> Compatible with the Bush administration approach, this community locates the primary right to exercise international criminal justice in the domestic courts of the local State. In line with the European approach, it stresses the important, but limited role of supranational bodies as a backstop for their domestic counterparts. Such supranational bodies change the incentives facing domestic actors, encouraging them to enforce international law at home. This system is compatible with Pierre Prosper's argument that "we should be . . . helping the [local] States to develop the justice mechanisms necessary" to prosecute international crimes.<sup>514</sup> In fact, the system will be greatly benefited if Prosper's unofficial proposal for U.S. aid to domestic courts engaged in international criminal justice becomes a reality.<sup>515</sup> Such aid could well solve the problems currently facing East Timor explored in Part III. Yet, for the system to function well, the United States must accept and acknowledge that supranational adjudicatory bodies will be involved in giving national courts powerful new incentives to act and backing them up where they fail. If the United States cannot move in that direction, the community of courts will be compromised by the absence of one crucial State.

Thomas Buergenthal, a judge for the International Court of Justice, has observed that "the proliferation of international tribunals can . . . have adverse consequences."<sup>516</sup> While he is right that there are reasons to

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513. The recent passage by a U.S. House of Representatives Committee of the American Servicemembers' Protection Act would authorize the President to invade the Netherlands to rescue any American who comes before the ICC. See American Servicemembers' Protection Act of 2001, H.R. 1794, 107th Cong. (2001). But see Adam Clymer, *House Panel Approves Measures to Oppose New Global Court*, N.Y. TIMES, May 11, 2002, at A3 (noting Representative Delay's comment that "'it was not a serious question' that the bill might require the [United States] to invade the Netherlands").

514. Pierre-Richard Prosper, Remarks at the Harvard Colloquium on International Affairs (Apr. 13, 2002) (on file with author).

515. *Id.*

516. Thomas Buergenthal, *Proliferation of International Courts and Tribunals: Is It Good or Bad?*, 14 LEIDEN J. INT'L L. 267, 272 (2001).

be concerned, if international criminal law enforcement is seen as a community of courts engaged in a common enterprise, connected by vertical and horizontal relationships, many of his concerns can be overcome. Order is needed. General principles of international constitutional magnitude and specific best practices in a proposed code of conduct for international criminal law enforcement can provide the information and guidance needed for a self-regulating system. Such a system, such a community of courts, may offer an important solution to the challenges of international criminal law and for enforcement of international law more generally.