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"Double Edged Tribunals:

The Political Effects of International Criminal Tribunals"**

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ABSTRACT

The paper analyzes the potential for international criminal tribunals to impact domestic political outcomes in the states over which they exercise jurisdiction. Drawing on both methodologies of international law and political science, the paper develops a typology of "pathways of influence" through which international tribunals and foreign courts exercising universal jurisdiction have "political effects" on national governments. The paper considers catalytic & moral hazard effects, legitimating & de-legitimating effects, cost-externalization effects, and stabilizing and destabilizing effects. The paper proceeds to test these pathways of influence and resultant political effects across a series of short case studies including the impact of the ICTY in Bosnia & Herzegovina, the English and Spanish proceedings against Pinochet in Chile, and the ICC in Uganda and DR Congo. The paper is extracted from a larger book manuscript.

Double Edged Tribunals: The Political Effects of International Criminal Tribunals

Chapter II traced the rise of a system of multilevel global governance in international criminal law enforcement in theoretical terms by considering changes in the nature of international law and the key institutions within this system, as well as their legal and political influences on one another. Chapter III then offered a detailed analysis of the legal process which has resulted in a wide distribution of concurrently empowered domestic and international courts to enforce international criminal law. The result, as Chapter III concluded, is a deeply interconnected system of institutions at different levels of authority engaged in cooperative and, at times, even coordinated, international criminal law enforcement.

The discussion of the global governance system thus far has argued that the institutions enforcing international law are connected by and influence one another through a set of discrete soft legal, hard legal, and political effects. The very existence of the effects is evidence of the interconnected dynamic of the system. Chapter II defined hard legal and soft legal effects. This chapter turns its focus to political effects, the heretofore understudied, but extremely potent, influences of international and foreign courts on national courts and domestic governments. It is argued that these political effects are the critical development afforded by the operation of a multilevel global governance system and that they drive the system dynamic.

This chapter uses the literature and methods of political science to examine the actual operation of political effects within the multilevel global governance system. Whereas Chapters II and III offered the theoretical and legal background to the development of a global governance system and the institutions which generate hard legal, soft legal, and political effects, this chapter looks to the politics of how such forces influence the behavior of institutions and governments. While the legal framework for a multilevel global governance enforcement system laid out in Chapters II and III provides a critical foundation for the analysis of political interactions in this chapter, the methodology and approach here are very different. Rather than looking to questions of title to jurisdiction or the domestic competence of courts, as Chapter III did, this chapter applies international relations and comparative political analysis to the system in an effort to develop and test a typology of pathways of political influence within the system.

Whereas the larger argument of this dissertation is that international criminal law enforcement now occurs through a deeply interconnected system of multilevel global governance, this chapter offers a more specific argument, namely, that political effects, discernable from their legal counterparts, operate within the system. The existence of such effects represents a substantial innovation in our present understandings of international criminal courts and tribunals, for it recognizes that they have political as well as legal influences; that they are not only legal bodies, but also political ones.

As used in this dissertation, the term political effects refers to *the influences of courts on other courts, target states and interest groups within those states that result, not from ultimate decisions on the law, but from shifts in preferences and power distributions caused by the threat of adjudication or embedded incentives for domestic actors.* The critical distinction between such political effects and the traditional legal effects of an international court is that political effects may occur without any final decision on the law and without the resolution or even adjudication of the substantive claims before the court.

The chapter's lengthy discussion of political effects within the system is warranted for five key reasons. First, the very existence of political effects confirms the system dynamic proposed in Chapter II. Second, political effects are the most significant forces linking courts and tribunals within the larger global governance system. Third, political effects can and do fundamentally alter the policies and actions of domestic courts and national governments. Fourth, political effects may hold an important potential to enhance the effectiveness of international criminal law enforcement and may even offer new approaches to the challenges of international law enforcement more generally. Finally, political effects have been heretofore largely unrecognized and not subject to systematic study in existing literature.

In recognizing the political effects of international courts and tribunals, this chapter suggests that such institutions are, in fact, double-edged. They can and do alter the behavior of other courts and national governments, not just through their jurisprudence, but also through political processes.[1] Such recognition may well result in changes to the way international courts are viewed and view themselves. When using such effects, courts begin to look more like autonomous political agents in the international system than like strictly legal institutions. For some this may be a controversial or even dangerous proposition with troubling implications for the legitimacy of law itself. Yet, these political effects do exist and have become far more prominent as international criminal law enforcement has moved toward a system of multilevel global governance. As much as some might like to, these effects can no longer be denied or ignored.

The chapter begins by developing a theoretical account of the operation of political effects within the global governance system. It seeks both to further distinguish legal and political effects and to offer an account of the leverage points through which international and foreign tribunals can influence the courts and governments of other states. It then derives a typology of discrete pathways of influence through which such effects occur and hypothesizes a set of political effects that can result from each proposed pathway of influence. Part II of the chapter proceeds to test this typology and the hypothesized political effects through a series of mini-case studies. It confirms the basic argument that political effects do, in fact, operate within the system and can be an extremely potent force for altering the policies and behavior of states and sub-state actors. Part III explores the potential for these political influences to enhance the overall effectiveness of the international criminal law enforcement system, concluding that, while the intentional use of political effects may push courts and tribunals beyond their traditional comfort zones, the strategic employment of such effects has systemic efficiency-enhancing potential.

I. THEORIZING POLITICAL EFFECTS IN A SYSTEM OF MULTILEVEL GLOBAL GOVERNANCE

As Chapter III demonstrated, the global governance enforcement system now consists of a number of courts and tribunals situated at different layers of the international system. Each of these institutions—be it a national court or an international tribunal—can generate political effects. Such effects arise where a foreign or international court has a concurrent claim to jurisdiction over a particular legal case with a national court. As a result of this concurrent jurisdiction, the foreign tribunal has political leverage over the domestic court and even over the policies of national governments.

A. Differentiating Political and Legal Effects

Chapter II drew a distinction between soft legal, hard legal, and political effects within the global governance system. The more extensive account of political effects undertaken in this chapter requires a detailed specification of the meaning of the term political effects and a more thorough differentiation of these political effects from purely legal effects.

It is by no means novel to suggest that courts within a common system affect one another and may even influence the executive branch of their respective states. In many countries, the rules of precedent mean the decisions of a higher court will be binding on lower courts[2] and, thus, higher courts will have direct

[1] These institutions are, in effect, double-edged. The term "double-edged" is drawn from Peter Evans, Harold Jacobson, and Robert Putnam who use it in their book entitled DOUBLE-EDGED DIPLOMACY: INTERNATIONAL BARGAINING AND DOMESTIC POLITICS (Peter B. Evans et al. eds., 1993). Their idea, in Andrew Moravcsik's words, is that a "statesman's strategies reflect a simultaneous 'double-edged' calculation of constraints and opportunities on both the domestic and international boards." Andrew Moravcsik, *Introduction to Integrating International and Domestic Theories of International Bargaining*, *in* DOUBLE-EDGED DIPLOMACY, *supra*, at 3, 17.

[2] The relevant principle in the common law is that of *stare decisis*. The term derives from the maxim "stare decisis et non quieta movere." BLACK'S LAW DICTIONARY 1406 (6th ed. 1990). For a discussion, see generally PERCY HENRY WINFIELD, THE CHIEF SOURCES OF ENGLISH HISTORY 148 *passim* (1925). As Justice Douglas has observed, "there will be no equal justice under law if a negligence rule is applied in the morning but not in the afternoon." William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949); *see also* James C. Rehnquist, Note, *The Power that Shall Be Vested in a Precedent: Stare Decisis, the Constitution and the Supreme Court*, 66 B.U. L. REV. 345, 347 (1986) (providing an overview of *stare decisis* doctrine).

legal impacts on their lower counterparts. Even without binding legal precedent, courts within a federal system may have a persuasive influence on one another.[3] Either way, the subsequent jurisprudence of a lower court often conforms to that of the higher court's prior decision. These are classic examples of legal effects.

International law, however, knows no similar role for precedent. The decisions of international courts are generally only binding on the parties before the court in the particular case.[4] Yet, international tribunals—particularly the ICJ—do have persuasive force. The legal pronouncements of the ICJ are often invoked as authoritative statements of the law by other tribunals.[5] Even in these cases, it is the legal holding of the international court that impacts the decisions of other tribunals. These are soft legal effects, as described in Chapter II, and arise through cross-citation or the persuasive weight of judicial decisions. Courts will only have a persuasive influence on one another to the degree they conceive of themselves as part of a shared enterprise of global justice.[6] Without a common sense of place and purpose, such courts would have little reason to cite to one another.[7] As international law has become more systemic, these legal effects have become more important.

Significant scholarly attention has been paid to how the decisions and jurisprudence of international courts produce a legal impact on other courts or domestic governments. These discussions usually grapple with the question of state compliance, asking when or under what circumstances states will comply with the legal decisions of international tribunals.[8] In some cases it is relatively easy to identify the formal legal effects of international courts. For example, in circumstances where an international decision has a direct domestic impact, the result is akin to the binding precedents of common law domestic systems. Within the EU, the decisions of the ECJ are directly applicable in member states. They can either be implemented by national courts or have a direct impact on national governments.[9] The result is that individuals can directly invoke rights conferred by the ECJ in national courts which are required to apply them. Or, if they fail to do so, national governments will face binding review at the international level.[10]

Even in international courts where decisions do not have direct effect, international legal scholars have drawn on institutionalist or liberal theories of international relations to explain how the legal decisions of

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[3] One example of such persuasive influence from the area of administrative law is *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), which found that decisions of the Administrator under the Fair Labor Standards Act are "not controlling upon the courts by reason of their authority," but noting that "[t]he weight of such a judgment . . . will depend upon . . . all those factors which give it power to persuade." *Id.* at 140; *see also* Jed I. Bergman, *Putting Precedent in its Place: Stare Decisis and Federal Predictions of State Law*, 96 COLUM. L. REV. 969, 989–92 (1996) (using *stare decisis* as a means of predicting state law).

[4] Article 59 of the Statute of the International Court of Justice makes clear that "the decision of the Court has no binding force except between the parties and in respect of that particular case." Statute of the International Court of Justice art. 59, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993, *reprinted in* 55 YALE L.J. 1318, 1329 (1946).

[5] *See* MOHAMED SHAHABUDDEEN, PRECEDENT IN THE WORLD COURT 1-10 (1996) (considering the role of precedent at the ICJ).

[6] *See generally* Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103, 1120 (2000) (discussing the globalization of judicial networks).

[7] The current U.S. House of Representatives has taken this view, passing legislation according to which "it is the sense of the House of Representatives that judicial determinations regarding the meaning of the laws of the United States should not be based in whole or in part on judgments, laws, or pronouncements of foreign institutions unless such foreign judgments, laws, or pronouncements are incorporated into the legislative history of laws passed by the elected legislative branches of the United States or otherwise inform an understanding of the original meaning of the laws of the United States." H.R. Res. 568, 108th Cong. (2004). *See also* Antonin Scalia, *Keynote Address: Foreign Legal Authority in the Federal Courts*, 98 AM. SOC'Y INT'L L. PROC. 305, 305 (2004) (arguing against the use of foreign materials in U.S. courts); *cf.* Steven Breyer, *Keynote Address*, 97 AM. SOC'Y INT'L L. PROC. 265, 265 (2003) (suggesting appropriate, though limited, circumstances for the use of foreign legal materials in U.S. courts).

[8] *See, e.g.*, Colter Paulson, *Compliance with Final Judgments of the International Court of Justice Since 1987*, 98 AM. J. INT'L L. 434, 434 (2004) (noting that "[u]nderstanding how states comply with judgments of the Court is essential to understanding its role in the settlement of disputes").

[9] *See* Case 26/62, N.V. Algemene Transport- en Expeditie Onderneming Van Gend & Loos v. Nederlandse Administratie der Belastingen, 1963 E.C.R. 1, 12, 1963 C.M.L.R. 105, 129 ("[T]he Community constitutes a new legal order . . . for whose benefit the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only the member-States but also their nationals. Community law, therefore, . . . not only imposes obligations on individuals but also confers on them legal rights."). For a more detailed discussion, see, for example, Lawrence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication,* 107 YALE L.J. 273, 309–11 (1997). For a more general treatment of direct effect, see J.H.H. Weiler, *A Quiet Revolution: The European Court of Justice and Its Interlocutors*, 26 COMP. POL. STUD. 510, 521 (1994); P.P. CRAIG & G. DE BÚRCA, EU LAW: TEXTS, CASES, AND MATERIALS (3d ed. 2002).

[10] *See generally* Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1, 1-20 (2005) (discussing how the European context of a political community may be a special case and suggesting that the independence of the tribunal is unrelated to or may in fact undermine its effectiveness).

international tribunals can influence state behavior. One set of explanations focuses on a state's long term interest in preserving the regime in question and its consequent willingness to accept short term costs of compliance in pursuit of these longer term goals.[11] A second set of arguments has focused on the significant reputation costs of defection from a court's legal decision.[12] A third approach looks to the way international decisions may empower particular groups within the state who can then alter political outcomes at the domestic level.[13] Constructivist legal scholars, in contrast, have offered explanations of an international court's legal effect based on how the court's jurisprudence may reshape values, [14] beliefs, and identities of national governments.[15]

Beyond these precedent-based or persuasive legal influences, domestic courts and tribunals have also been recognized to have purely political impacts on their own governments. Sometimes these influences are the direct result of a conversation between the judicial and legislative branches of government. For example, a decision of the US Supreme Court invalidating a domestic law may result in the legislature passing a new statute.[16] More significantly, a decision by one court may fundamentally reshape a political debate, alter the policy options available to the executive branch, or change the costs and benefits of policy choices for a government. The clearest example of such effects in US domestic practice is *Brown v. Board of Education,*[17] the school desegregation case in which the Supreme Court was truly "at the bar of politics."[18] As Alexander Bickel explained:

> Given the force and determination of the southern opposition [to desegregation] and its acute understanding of the 'uses of the decisions of courts,' the principle of integration could be saved only by the active engagement of northern opinion in the political war . . . it was for them [the political branches] to make the court's decision their rule of political action.[19]

In other words, the rule of the court itself influenced, informed, and reshaped an ongoing political debate.

As international criminal law enforcement has moved from individualized cases of adjudication toward a shared system of enforcement, the kinds of political effects previously only seen within a national government have become possible. To date, however, the focus of theoretical inquiry into the effects of international courts has been largely on their legal impact. Yet, international courts and tribunals are now very much part of a larger political system.[20] E.H. Carr aptly wrote: "politics and law are indissolubly inter-

[11] *See, e.g.*, *id.* at 20 (observing that states will comply with judgments when "cost of compliance is less than the future benefits of continued use of adjudication").
[12] *See, e.g.*, Andrew T. Guzman, *The Cost of Credibility: Explaining Resistance to Interstate Dispute Resolution Mechanisms*, 31 J. LEGAL STUD. 303, 304 (2002) (suggesting these costs may be sufficiently high that states will avoid recourse to tribunals in the first place).
[13] *See* Anne-Marie Slaughter & Kal Raustiala, *International Law, International Relations and Compliance*, *in* HANDBOOK OF INTERNATIONAL RELATIONS (Walter Carlsnaes, Thomas Risse & Beth A. Simmons eds., 2002); ABRAM CHAYES & ANTONIA CHAYES, THE NEW SOVEREIGNTY 1 (1993) (proposing a managerial theory of compliance); *see also* Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INT'L ORG. 513, 513 (1997) (providing a theoretical account that explains such sifts in domestic interest group representation and power).
[14] Thomas Franck has asserted that international legal decisions may have an independent "compliance pull." *See* THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS (1990) (suggesting that international decisions may generate a legitimacy that pulls states toward compliance with them).
[15] Harold Koh has described a "transnational legal process" whereby international norms come to permeate the domestic system and shift behavior. Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 183–86 (1994).
[16] For an example of such judicial review, see *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 137 (1803).
[17] 347 U.S. 483 (1954).
[18] *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 1 (1962).
[19] *Id.* at 267.
[20] A great number of legal scholars have examined this relationship. *See e.g.*, HANS J. MORGENTHAU, POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE 177–78 (McGraw-Hill brief ed. 1993) (1948) (arguing that law is an epiphenomenon of power); Harold D. Lasswell & Myres S. McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest,* 52 YALE L.J. 203 (1943) (developing the "international legal process" approach); Myres S. McDougal, *International Law, Power and Policy: A Contemporary Conception,* 82 RECUEIL DES COURS 137, 157 (1953) (drawing on empirical data and political science insights); RICHARD A. FALK, THE STATUS OF LAW IN INTERNATIONAL SOCIETY (1970) (focusing on the systemic needs of an international community); 1 ABRAM CHAYES, THOMAS EHRLICH & ANDREAS F. LOWENFELD, INTERNATIONAL LEGAL PROCESS: MATERIALS FOR AN INTRODUCTORY COURSE, at xiii–xv (1968) (considering to what extent law can affect international affairs); LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY, at ix (2d ed. 1979) (suggesting that "law is a major force in world affairs" through submerged rules); Stanley Hoffmann, *International Systems and International Law, in* THE INTERNA-

twined . . . . Law, like politics, is a meeting place for ethics and power."[21] Similarly, Kenneth Abbott and Duncan Snidal observed, "International politics and international law are not alternate realms, but are deeply intertwined."[22] In fact, in some cases at least, international law and politics are causally related. As Slaughter observed, international law may "push the behavior of states toward outcomes other than those predicted by power and the pursuit of national interest."[23]

Separating a court's political effects from its legal influences requires a more explicit definition of "political." The approach taken here draws on a Weberian understanding of the political. Max Weber defined politics as "striving for a share of power or for influence in the distribution of power, whether it be between states or between the groups of people contained within a single state."[24] For Weber, an issue is political if "the distribution, preservation or transfer of power plays a decisive role" in its resolution or operation. [25] For him, political questions are distinct from legal questions, for the latter operate "by virtue of the belief in the validity of legal statute and the appropriate judicial competence founded on rationally devised rules."[26]

The political effects at the heart of the system of global governance are political in the Weberian sense in that they directly "influence the distribution of power between and within political formations."[27] When exerting political effects, the courts and tribunals within this system become political actors by altering the power of other institutions within the system and the incentives of actors within those institutions or in national governments.

To avoid confusion, it is worth pointing out what is not meant by "political" here. One meaning of political relates to systemic power politics, particularly military power. This approach sees politics as dependent on the distribution of power defined as material capacity in the international system.[28] While systemic international politics may be important to the establishment of international courts, the distribution of military capacity has little relevance to the actual impact of an international court on target states or other courts.[29] A second popular meaning of political not intended here is the idea that something is political when it directly furthers a state's perceived national interest. It is this understanding of the political that led Posner and Yoo to warn, "independent tribunals pose a danger to international cooperation because they can render decisions that conflict with the interests of state parties."[30] Neither of these meanings of the political is invoked here.

TIONAL SYSTEM 205, 205 (Klaus Eugen Knorr & Sidney Verba eds., 1961) (suggesting that law is both a reflection of and an influence on political order); ROBERT O. KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY 8–10 (1984) (suggesting the effect of law on politics through a functional theory of regimes); ORAN R. YOUNG, INTERNATIONAL COOPERATION: BUILDING REGIMES FOR NATURAL RESOURCES AND THE ENVIRONMENT (1989) (applying international regime theory to environmental cooperation).

[21] EDWARD HALLETT CARR, THE TWENTY YEARS' CRISIS, 1919–1939, at 177–78 (1939).

[22] Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, *in* LEGALIZATION AND WORLD POLITICS 37, 71 (Judith Goldstein et. al. eds., 2001).

[23] Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205, 206 (1993). For a broader treatment, see KEOHANE, *supra* note 20.

[24] MAX WEBER, *The Profession and Vocation of Politics*, *in* WEBER: POLITICAL WRITINGS 309, 311 (Peter Lassman & Ronald Speirs eds., 1994).

[25] *Id.*

[26] *Id.* at 312.

[27] WEBER, *supra* note 24, at 316.

[28] As Kenneth Waltz explains, international outcomes depend on "forces that are at play on the international level, and not at the national level." Kenneth N. Waltz, *Reductionist and Systemic Theories*, *in* NEOREALISM AND ITS CRITICS 47, 60 (Robert O. Keohane ed., 1986). As Legro and Moravcsik frame it, political realism assumes that "interstate bargaining outcomes reflect the relative cost of threats and inducements, which is directly proportional to the distribution of material resources," often in the form of military power. Jeffrey W. Legro & Andrew Moravcsik, *Is Anybody Still a Realist?*, INT'L SECURITY, Fall 1999, at 5, 17.

[29] Realists would, of course, disagree. As Hans Morgenthau suggests, international law "delivers the enforcement of the law to the vicissitudes of the distribution of power between the violator of the law and the victim of the violation. . . . [C]onsiderations of power rather than law determine compliance and enforcement." MORGENTHAU, *supra* note20, at 266, 268.

[30] Posner & Yoo, *supra* note 10, at 7. Posner and Yoo base this argument on the nature of the win sets for both states involved in an international judicial process. They observe: "There may be a range of possible outcomes that the states would jointly accept as an alternative to impasse or war; jargon refers to this range as the 'win set' between the two states' reservation prices. States, therefore, will use international adjudication only if the tribunal, over time, provides an accurate (or politically sensitive) judgment within the win set." *Id.* at 20–21.

One danger of the relatively broad Weberian definition of politics employed herein is that it runs the risk of being overly inclusive. It may capture other effects that are not, in fact, related to the operation of a court. Analysis of a court's purely legal effects can often avoid this danger as there is only one causal variable—the legal holding of the court—at play.[31] Political effects raise a broader array of potential causal and intervening variables. In other words, there may well be correlations between a tribunal's existence and state behavior that are not causally related. It is not possible to fully correct for these external influences within the scope of this study. This dissertation employs three techniques to suggest something more than mere correlation between the existence of a tribunal and its observed political effects on the behavior of other courts and states.

First, this study focuses on target states and courts, namely those states and their respective national tribunals, whose citizens or interests are being adjudicated by a foreign or international court. These should be cases in which the foreign tribunal has maximum political leverage and in which it is less likely that spurious intervening variables may be responsible for the observed behaviors. Second, the study is limited by a narrow time horizon, only examining situations in which the observed behavior of the target state or court directly follows a foreign tribunal's exercise of jurisdiction or focus of attention. Third, the study offers micro-causal pathways that, it is hypothesized, result in the observed behaviors. Such pathways—even if not conclusive proof of the operation of political effects—provide a theoretical account of their operation.

It should also be noted that this study treats state interest as variable. The critical distinction between this approach and, say, that adopted by Posner and Yoo, is that a state's interests, and even the systemic distributions of power, are not fixed.[32] By contrast, the approach taken here suggests that courts within the enforcement system can actually alter the interests of states through political as well as legal effects.[33]

B. Toward a Theory of Political Effect

Having distinguished more fully between legal and political effects, this section offers a theoretical account of how a foreign or international court can exert political effects. Political effects come in two different forms: court-to-court effects and court-to-government effects. Court-to-court effects occur when the existence of a foreign tribunal with concurrent jurisdictional claims alters the behavior of another court or the preferences of its officials. Court-to-government effects arise when the existence of the foreign court results in policy changes by a national government or preference shifts among key governmental officers. Though the actors in each case are different, the modalities of political effects in both cases are sufficiently similar that a common theory explains both types of effects.

In developing a theory of political effects, particularly those effects that catalyze the activation of a domestic judiciary, it is necessary to start with a baseline model of individual courts enforcing international criminal law independently. The decisions of tribunals to exercise jurisdiction will, of course, depend on the particular structure of the judiciary in question. Assuming the court has jurisdiction, such decisions will generally turn on the independent calculations of the prosecutor and, where the prosecutor is not independent, the willingness of officials in the executive branch to allow a prosecution to proceed. Similarly, the policy choices of a national government will depend on the incentives facing key actors within that government.

The global governance enforcement model suggests that the existence of a foreign court with concurrent jurisdictional entitlements can act as an intervening variable that alters either the decisions of a national prosecutor to initiate a case or the incentive structures of officials within a national government with respect to the policy choices in question. In this model, the foreign court is able to effectively alter the

[31] Posner and Yoo admit that the "overall success of the treaty regime" aspect of their definition is problematic because "everything else is never equal" and it is not possible to correct for these outside influences. *Id.* at 29.
[32] *See id.* at 41–44 (suggesting that the independence of the tribunal is unrelated to or may in fact undermine its effectiveness).
[33] *Id.*

power structure within the target court or government and often change the observed policy output. A theory of political effects then must provide a means for a foreign court with concurrent jurisdiction to intervene in the decisions of actors in the target institutions and governments.

A range of leverage points could allow a court to have such an effect.[34] These leverage points could be said to act as causal mechanisms, or "analytical constructs that provide hypothetical links between observable events."[35] This chapter seeks neither to provide a parsimonious account of political effect nor to prove that a particular causal mechanism is at work. Instead, the purpose here is to offer a coherent explanation of the processes that may allow foreign or international courts to exert political effects.

The disaggregated model of the state—a hallmark of the global governance perspective discussed in Chapter II—is essential to identifying causal mechanisms for the operation of political effects. Such a disaggregated model draws largely on liberal theories of international politics. It takes as its starting point two basic propositions about the nature of the international system. First, it presupposes that states are in fact disaggregated and that their constituent entities can operate in a quasi-autonomous fashion in international affairs.[36] This means that courts, legislatures, and various departments of the government may be influenced directly by events on the international stage and, similarly, may have an independent influence on international outcomes.[37] Hence, states relate to the international system not as unified "billiard balls,"[38] but as permeable conglomerations of actors and institutions.

The second assumption of this theoretical account is that domestic political interactions are central to a state's policies on the international level. Liberal international relations theory explains the centrality of domestic politics based on three core assumptions about the nature of international affairs.[39] First, liberal theory assumes that individuals and groups within states are the primary actors in international affairs and seek to fulfill their own differentiated preferences.[40] Second, it claims that governments represent some subset of the domestic polity whose preferences are articulated in state policy.[41] Finally, it assumes that "policy interdependence"—the way state preferences relate to one another—will ultimately determine international outcomes.[42] This is a "bottom-up" theory in which individuals hold preferences, some of which are then articulated in state policy and some of which interact across borders, resulting in international outcomes.

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[34] For discussion of causal mechanisms, see Andrew Bennett & Alexander L. George, Case Study Methods and Relevant Issues in the Philosophy of Science 11 (2005) (unpublished manuscript, on file with author). The debate over the nature of causal mechanisms is one that crosses disciplines. The causal mechanisms concept originated with sociologist Robert Merton, who defined mechanisms in 1968 as "social processes having designated consequences." ROBERT KING MERTON, *The Self-Fulfilling Prophecy*, *in* SOCIAL THEORY AND SOCIAL STRUCTURE 43–44 (Free Press enl. ed. 1968). It has subsequently been taken up by political scientists and sociologists. *See, e.g.*, JON ELSTER, NUTS AND BOLTS FOR THE SOCIAL SCIENCES 1 (1989); Arthur L. Stinchcombe, *The Conditions of Fruitfulness of Theorizing About Mechanisms in Social Science*, 21 PHIL. SOC. SCI. 367, 367 (1991).

[35] PETER HEDSTRÖM & RICHARD SWEDBERG, SOCIAL MECHANISMS: AN ANALYTICAL APPROACH TO SOCIAL THEORY 13 (1998).

[36] *See, e.g.,* Anne-Marie Slaughter, *The Real New World Order*, FOREIGN AFF., Sept./Oct. 1997, at 183, 184 ("The state is not disappearing, it is disaggregating into its separate, functionally distinct parts. These parts—courts, regulatory agencies, executives, and even legislatures—are networking with their counterparts abroad, creating a dense web of relations . . . ."). For a more detailed discussion, see ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 1 (2004).

[37] This approach is a fundamental break with the realist view of states as "billiard balls" that interact as units. *See* ARNOLD WOLFERS, DISCORD AND COLLABORATION: ESSAYS ON INTERNATIONAL POLITICS 19–24 (1962) (arguing that international politics should best treat states as unified entities); *see also* Waltz, *supra* note 29.

[38] *See* ARNOLD WOLFERS, DISCORD AND COLLABORATION: ESSAYS ON INTERNATIONAL POLITICS 19–24 (1962) (arguing that states act as unified entities).

[39] This approach has been best articulated by Andrew Moravcsik. *See, e.g.*, Moravcsik, *supra* note 13; *see also* MICHAEL W. DOYLE, WAYS OF WAR AND PEACE: REALISM, LIBERALISM, AND SOCIALISM 52-69 (1997) (developing a normative variant of liberal international relations theory).

[40] *See* Moravcsik, *supra* note 13, at 516 (arguing that "individuals and private groups . . . who organize exchange and collective action to promote differentiated interests under constraints imposed by material scarcity, conflicting values, and variations in social influence").

[41] The second core assumption of positive liberal theory is that states and political institutions "represent some subset of domestic society, on the basis of whose interests state officials define state preferences and act purposively in world politics." *Id.* at 518. Put differently, the state is not an independent actor, but rather a representative institution that serves as a "'transmission belt' by which the preferences and social power of individuals and groups in civil society enter the political realm and are eventually translated into state policy." Andrew Moravcsik, *Liberal International Relations Theory: A Scientific Assessment*, *in* PROGRESS IN INTERNATIONAL RELATIONS THEORY 159, 165 (Colin Elman & Mirian Fendius Elman eds., 2002).

[42] This concept is termed "policy interdependence" and refers to the fact that "the configuration of independent state preferences determines state behavior." Moravcsik, *supra* note 13, at 520.

These two propositions—the disaggregating of the state and the centrality of domestic politics—yield a coherent theoretical account of how foreign or international courts can have political effects on target states or institutions. The existence of a foreign tribunal with concurrent jurisdiction can result in political pressure at three critical leverage points identified by liberal theory as central to state policy and international outcomes. The first leverage point is that the foreign tribunal can alter the perceived interests of particular individuals and groups within the target state. The tribunal's existence can change how individuals formulate or calculate their own interests. The foreign tribunal may validate one of an individual's many potential competing interests, leading to an articulation of that interest in the individual's behavior. The threat of a possible down-stream decision by the foreign tribunal may shift an individual's payoff calculations and thereby change the interests he or she chooses to pursue. Likewise, the existence of the tribunal may reinforce or alter particular norms and values, shifting the individual's sense of identity and interests.[43] Where the individual in question has policy control—say a prosecutor or governmental official—the shifting interests caused by the existence of the foreign tribunal may result in immediate policy changes. Where the individual is simply a citizen, shifts in his or her preferences may percolate through the representative governmental institutions of the target state and, if widely held, alter state behavior.[44]

The second leverage point at which a foreign tribunal can have political effects is by empowering or disempowering particular groups, agencies, or governmental entities within a target state. If state policy depends, at least in part, on which groups or individuals within the state are represented by the government or the relative strength of particular institutions within that government, shifts in representation and institutional power can alter outcomes. A foreign court may be able to change domestic power distributions by altering the perceived legitimacy of particular actors and policies. For example, the existence of a foreign court or threats by such a court to exercise jurisdiction may de-legitimate actors within the target government that have sought to prevent the domestic exercise of jurisdiction. Similarly, a foreign court's concurrent jurisdiction may empower certain governmental entities—such as the domestic judiciary—within the target state at the expense of other entities—such as the executive—by buttressing its claims to independence, resources, or freedom of action. Finally, the foreign court may be able to use its own legitimacy as a "bully pulpit" on the international stage to alter the distribution of power and authority within the target state. It could, for example, draw attention to the failure of national institutions to exercise jurisdiction or the illegality of the policies of the domestic government. Each of these strategies may change the power distribution within the target government and can, thereby, alter the behavior of the target state.

The third and final point of potential political leverage at which an international court can have a political effect on target states is by altering the policy interdependence of state preferences. Again, the concept of policy interdependence refers to the fact that the preferences of a state may create "costs and benefits … for foreign societies" and that the calculation of these costs across national borders will affect international outcomes.[45] The existence or attention of a foreign court may alter the calculation of costs and benefits of a particular policy for the target state and for other states in the system, making the pursuit of those preferences more or less desirable. For example, the threat of a potential adverse decision down stream by a foreign adjudicatory forum may cause other states in the system to view a target state's policies as more costly and therefore assert greater interstate pressure on that state to change its behavior.

In some ways, each of these three causal mechanisms of political effects operates in the shadow of legal effects. A foreign tribunal can alter the incentives facing individuals, the representative structures of the target state, or the interdependence of particular policies in part because of its potential for an ultimate legal adjudication. The threat of that potential adjudication by the foreign forum provides leverage for

[43] This is a deeply constructivist micro-causal explanation for individual preferences that is very hard to test. For more detailed discussion, see ALEXANDER WENDT, SOCIAL THEORY OF INTERNATIONAL POLITICS [pincite] (1999). Elements of this approach are implicit in Harold Koh's "transnational legal process." *See* Koh, supra note 15**,** ***passim***. For a discussion of its application in the human rights literature, see THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE (Thomas Risse-Kappen, Stephen C. Ropp & Kathryn Sikkink eds., 1999).

[44] While the term "representative institutions" is used here, those institutions need not be democratic. It may be that in a particular governmental system, the only interests that matter are those of a particular dictator or group of oligarchs. However**,** the net result in shifts in those particular individuals' preferences has the same effect on state behavior.

[45] Moravcsik, *supra* note 13, at 520.

actors in the target state to change their policies or for national courts to exercise jurisdiction as a way of either avoiding or preempting adjudication by the foreign forum.

Within any one state, the potential for legal adjudication by domestic courts has long been seen as a source of political pressure in the shadow of the law. This pressure is most direct on the parties to a particular dispute. Hence, a great number of legal cases settle on the courthouse steps.[46] Less directly, the potential for formal legal adjudication will often lead to private negotiations or compensation regimes even where no formal legal proceeding has been brought.[47] The operation of political effects in the global governance enforcement system takes the shadow of the law a step further. The actors targeted by such effects are neither litigants in an ongoing proceeding nor even private citizens bargaining in relation to legal norms. Rather, they are officials of governments or courts, but they still fall within the shadow of a foreign tribunal.

C. Key Determinants of Political Effect

The theory of political effect developed above suggests that certain key factors will determine whether or not a foreign court will exert political effects on a target state or institution. As political effects are largely based on the potential threat of adjudication by a foreign court, whether they arise will depend on perceptions of the likelihood of eventual legal adjudication. Likewise, as political effects alter the interest calculation of actors in the target state or court, their influence will also turn on how permeable these governments or institutions are to external pressures.[48]

The perceived likelihood of adjudication by the foreign tribunal is itself a function of a number of variables. First among these is the foreign tribunal's jurisdiction. Jurisdiction is the formal gatekeeper that determines whether a case can be brought before the tribunal at all. Where the foreign tribunal lacks jurisdiction and has no meaningful possibility of acquiring it, political effects are expected to be minimal. In contrast, where the foreign court has jurisdiction, there is potential for the operation of political effects. The significance of the distribution of jurisdictional capacity discussed in Chapter III is, thus, that a range of foreign courts now have concurrent jurisdictional claims and are far more likely to wield political effects.

The breadth of jurisdiction, both in terms of the number of states and the number of substantive areas over which the court has jurisdiction, is also a significant factor in calculating the potential for adjudication and, hence, the likelihood of political effects. Given the limited resources of any court, the more focused its jurisdiction—say it is limited to a small group of states or to one particular substantive area of law—the greater the likelihood of eventual adjudication of a particular issue or act that falls within that jurisdiction. Hence, the greater the likelihood the court will have a political effect on those issues or actors. Conversely, courts with broad jurisdictional mandates have a greater range of potential cases and, given capacity limitations, it is less likely that any particular case will actually be adjudicated. For example, the ICTY—with jurisdiction limited to a core set of international crimes and a narrow territory—is more likely to exert strong political effects on international criminal matters than the International Court of Justice, which potentially could have jurisdiction over any international dispute between any two states in countless substantive areas of law.

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[46] *See* William F. Coyne, Jr., *The Case for Settlement Counsel*, 14 OHIO ST. J. ON DISP. RESOL. 367, 398 (1999) (noting that "[c]ases settle every day, some of them on the courthouse steps").

[47] *See* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 950-960 (1979) (applying the shadow effect of potential legal adjudication to settlements of divorce cases). The basic logic comes from Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960). *See also* ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 1 (1994) (suggesting the law may be less important in determining private dispute settlements); Eric A. Feldman, *The Tuna Court: Law and Norms in the World's Premier Fish Market*, 94 CAL. L. REV. 2006 (discussing dispute resolution in the Tokyo Fish Market).

[48] Other factors may also be important, such as the perceived legitimacy of the foreign court and the willingness of that court to publicize its actions.

A second determinant of the likelihood of adjudication is the accessibility of the court in question. Accessibility refers to who can bring a case to the international tribunal and, consequently, the chances of any particular dispute reaching adjudication. The greater the access to the court, the more likely a case will actually be heard. Assuming the tribunal has sufficient capacity, if individuals have access to the court, the shear number of potential case-initiators drastically increases, resulting in more cases and a greater chance any particular claim will reach a judicial forum.[49] A higher likelihood of adjudication, in turn, allows a court to assert a greater political effect even in the absence of the particular case being heard.

In the area of international criminal law, access is usually given only to a prosecutor either of an international or a domestic court. A prosecutor's independence may often increase the perceived likelihood of adjudication because that prosecutor is not directly constrained by the political interests of a state.[50] Where the prosecutor has made clear a policy of prosecuting extraterritorial crimes, the perceived likelihood of adjudication will again increase. Where the prosecutor has left his or her strategy vague, but has significant independence, political effects are also possible because it is more difficult for foreign actors to make *ex-ante* calculations of whether the prosecutor will pursue a particular case. [51]

A third determinant of the likelihood of adjudication, and hence, the possibility of courts exerting political effects, is that court's past history of the exercise of extraterritorial jurisdiction over international crimes. Political effects often turn on the perceived likelihood of prosecution as calculated by actors in the target state. A meaningful track record of extraterritorial prosecutions is likely to enhance the perception that more such prosecutions will follow. The domestic courts of states which have a demonstrated past history of the exercise of extraterritorial jurisdiction—such as Spain,[52] Switzerland,[53] Denmark,[54] Germany, [55] the Netherlands, Austria,[56] and Belgium[57] (at least prior to the most recent amendments to the War Crimes

[49] For a discussion of the effects of access, see Helfer & Slaughter, *supra* note 10, at 294-295**.**

[50] For a discussion of prosecutorial independence at the ICC, see Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT'L L. 510, 512-516 (2003).

[51] In certain national systems, access to criminal tribunals may be broader than solely the discretion of the prosecutor. In systems that adopt a *partie civile* system, for example, "victims may initiate cases before an investigating judge." Steven R. Ratner, *Belgium's War Crimes Statute: A Post Mortem*, 97 AM. J. INT'L L. 888, 889 (2003). Belgium has adopted this approach. *See* CODE DE PROCÉDURE PÉNALE (C.P.P.) art. 63 (Belg.); *see also* Christine Van den Wyngaert, *Belgium*, *in* CRIMINAL PROCEDURE SYSTEMS IN THE EUROPEAN COMMUNITY 1, 16–18 (Christine Van den Wyngaert et al. eds., 1993). Where a *partie civile* system operates, the broader access to the court again enhances the likelihood of adjudication and, thus, increases the potential for a court to wield political effects.

[52] *See, e.g.*, Prosecutor v. Ricardo Miguel Cavallo, Audiencia Nacional, Criminal Chamber, 13 Dec.. 2000, No. 331/99 (Spain) (relating to an alleged genocide in Rwanda).

[53] *See, e.g.*, Fugence Niyonteze v. Public Prosecutor, Tribunal militaire de cassation (Military court of appeals) [27 Apr. 2001] para. 13 (Switz.); *see also* Luc Reydams, International Decision, Niyonteze v. Public Prosecutor, 96 AM. J. INT'L L. 231 (2002) (describing the prosecution of a Rwandan for grave breaches of the Geneva Conventions—he was convicted and sentenced to life in prison, but on appeal the sentence was reduced to fourteen years); Marco Sassòli, *Le génocide rwandais, la justice militaire suisse et le droit international* [*Rwandan Genocide, Swiss Military Justice and International Law*], 12 REVUE SUISSE DE DROIT INTERNATIONAL ET EUROPÉEN 151 (2002) (Switz.) (example of the Swiss exercise of universal jurisdiction). In another Swiss case, a Bosnian was tried in Switzerland for violations of the Geneva Conventions, but was eventually acquitted for lack of evidence. For a discussion, see Andreas R. Ziegler, International Decision, In re G., 92 AM. J. INT'L L. 78, 80–82 (1998).

[54] *See, e.g.*, Director of Public Prosecutions v. T, Østre Landsret [Eastern High Court], 25 Nov. 1994 (Den.) (prosecution in Denmark of a Croatian for grave breaches of the Geneva Conventions of 1949 resulting in an eight year sentence); *see also* Mary Ellen O'Connell, *New International Legal Process*, 93 AM. J. INT'L L. 334, 341–42 (1999) (discussing the case).

[55] *See, e.g.*, Public Prosecutor v. Novislav Djajić, Bayerisches Oberstes Landesgericht [BayObLGZ] [Supreme Court of Bavaria] 23 May 1997, No. 20/96 (F.R.G.) (relating to a prosecution in Germany for war crimes in Bosnia resulting in a five year prison sentence); Public Prosecutor v. Nikola Jorgić, Oberlandesgericht Düsseldorf [OLG Düsseldorf] [Higher Regional Court], 26 Sept. 1997, No. IV-26/96, *appeal dismissed* Bundesgerichtshof [BGH] [Federal Court of Justice] 30 Apr. 1999, No. 215/98F (F.R.G.); *see also* Christoph J.M. Safferling, International Decision, Public Prosecutor v. Nikola Djajić, 92 AM. J. INT'L L. 528, 528 (1998) (providing an overview of the Djaijic case); Sean D. Murphy, *Progress and Jurisprudence of the International Legal Tribunal for the Former Yugoslavia*, 93 AM. J. INT'L L. 57, 65 (1999). Another precedent setting case in Germany is Public Prosecutor v. Duško Tadić, Bundesgerichtshof [BGH] [Federal Court of Justice] 13 Feb. 1994, No. 100/94 (F.R.G.). The Tadić case was eventually transferred to the International Criminal Tribunal for the Former Yugoslavia (ICTY). *See* Prosecutor v. Duško Tadić, Case No. IT-94-1-D, Decision of the Trial Chamber on the Application by the Prosecutor for a Formal Request for Deferral (8 Nov. 1994), *available at* http://www.ejil.org/journal/Vol6/No1/art11.html .

[56] Prosecutor v. Duško Cvjetković, Oberster Gerichtshof [OGH] [Supreme Court] 13 July 1994, No. 150s99/94 (Austria). This is a case brought by Austria in 1994 for crimes in Bosnia. The Austrian Supreme Court affirmed the reliance on universal jurisdiction since extradition was not available in the case, which is a prerequisite to the exercise of jurisdiction in Austria. *Id.* The case was eventually dismissed for lack of evidence. Prosecutor v. Duško Cvjetković, Landesgericht Salzburg [LG Salzberg] [trial court] 31 May 1995, No. 150s99/94 (Austria). For more details, see Axel Marschik, *The Politics of Prosecution: European National Approaches to War Crimes*, *in* THE LAW OF WAR CRIMES: NATIONAL AND INTERNATIONAL APPROACHES 65, 79–81 (Timothy L.H. McCormack & G.J. Simpson eds., 1997).

[57] Prosecutor v. Vincent Ntezimana, Cour d'assises [criminal trial court] Brussels, [27 June 2000], Journal des Procès No. 310 (Belg.) (convicting a Rwandan national, for violations of the Geneva Conventions during the genocide in Rwanda); *see also* Case Concerning the Arrest Warrant of

Act)—are the most likely to wield such political effects. While a great number of national governments have delegated extraterritorial jurisdiction to their courts, as discussed in Chapter III, the national courts of many states have never used those jurisdictional entitlements to prosecute international crimes. As it would require a significant change in government policy or prosecutorial decisions for the courts of such countries to exercise jurisdiction, it is far less likely that their domestic courts will have political effects. Similarly, new supranational courts with a clear mandate for the prosecution of international crimes—such as the ICC—will initially be perceived as highly likely to prosecute and thus have significant political effects. Such courts will have a narrow window during which to prove that they will, in fact, exercise their jurisdiction or their potential for political effects may quickly dissipate.

Beyond the likelihood of adjudication, a second important variable in determining the impact of political effects is the permeability of the target state or institution. The more receptive a court or target government is to external influences, the greater the likelihood it will be influenced by the political effects of foreign courts. Some government officials are more susceptible to outside pressures either because of their own beliefs or their vulnerability to external forces. Similarly, some types of states are more responsive than others. Open societies, for example, may be most susceptible to pressures from international or foreign courts because their citizens and institutions may have more direct contact with the foreign court. States with extremely strong domestic institutions and embedded values may be best positioned to resist foreign pressures and thus less susceptible to these political effects.

Often weak states will be most permeable to political effects and less able to resist their influences. A 2004 report by the Commission on Weak States and US National Security defines weak states as those whose "[g]overnments are unable to do the things that their own citizens and the international community expect from them…and provide institutions that respond to the legitimate demands and needs of the population."[58] In short, weak states lack robust domestic institutions and a track record of effective governance. Weak states and their domestic institutions are often most permeable to outside influences because they may lack the legitimacy, historical independence, or political power to resist external pressures. Foreign tribunals can often step in and fill the legitimacy vacuum, as political effects reverberate within domestic governance structures.[59]

In contrast with weak states that may be particularly susceptible to the political effects of international or foreign tribunals, the most powerful states and those with very strong domestic institutions may, to some degree, be immune from such effects. The United States, for example, has sought to exclude itself from the jurisdiction of many international tribunals and, as a result, such tribunals are likely to have little or no political effect on the United States. As a consequence, to some degree, such powerful states are in part excluded from the global governance enforcement system and the system may be unbalanced or biased against weaker states. It is worth noting however, that even relatively powerful states, such as the United

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11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 32 (14 Feb.), *available at* http://www.icj-cij.org/icjwww/idocket/iCOBE/icobejudgment/icobe_ijudgment_20020214.PDF (finding that "the issue against Mr. Abdulaye Yerodia Ndombasi of the arrest warrant of 11 April 2000, and its international circulation, constituted violations of a legal obligation of the Kingdom of Belgium towards the Democratic Republic of the Congo, in that they failed to respect the immunity from criminal jurisdiction and the inviolability which the incumbent Minister for Foreign Affairs of the Democratic Republic of the Congo enjoyed under international law").

[58] JEREMY W. WEINSTEIN, JOHN EDWARD PORTER & STUART E. EIZENSTAT, CENTER FOR GLOBAL DEVELOPMENT, ON THE BRINK, WEAK STATES AND U.S. NATIONAL SECURITY: A REPORT OF THE COMMISSION FOR WEAK STATES AND U.S. NATIONAL SECURITY 6 (2004), available at http://www.cgdev.org/doc/books/weakstates/Full_Report.pdf.

[59] For a discussion of vulnerability in this context, 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 . . . . "). 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. The fact that political effects will be most pronounced in relation to weak states is in sharp contrast to the purely legal effects of international courts, which will often be of greater significance in strong or well developed states. International courts are best able to harness the already existent institutions of strong states to implement international legal decisions and thereby effect changes in state behavior. *See e.g.*, Helfer & Slaughter, *supra* note 10, at 284 (noting that "[t]he power of a court to compel litigants to appear before it and to comply with the resulting judgment stems in part from its ability to harness the coercive power of the state"). While it may be true that the purely legal impact of an international court will be greatest in strong states, the political shadow of such courts is likely to be more important in weak states.

Kingdom, have accepted the jurisdiction of many international courts and are likely to feel the political effects of such institutions.

The first set of factors outlined above—namely those related to the likelihood of adjudication of a case—derive from the nature of the court itself. Differentiating international courts in terms of their political effects is thus primarily a function of the likelihood of adjudication. The second set of factors—those relating to institutional permeability—are largely determined by the structure of the target state or institution. Permeability factors, while significant in observed outcomes, are therefore best treated as silent constants in examining the potential of any court to exert a political effect.

International criminal law enforcement institutions differ considerably along the key variables controlling political effects derived from the likelihood of ultimate adjudication—breadth of jurisdiction, access, and history of adjudication. Chart 4-1 predicts the perceived likelihood of political effects for courts enforcing international criminal law. The chart assumes that the court has jurisdiction over the state, individual, or subject matter in question. The jurisdiction variable codes for the breadth of jurisdiction, both in terms of the number of states over which the court has jurisdiction and the substantive areas within the court's power. The access variable codes courts for the number of potential case initiators and their relative independence. The history variable takes into account whether or not the court has exercised extraterritorial jurisdiction in the past. While national courts are grouped together in the table, their political effects vary considerably as these courts have different levels of access and very different histories. The chart treats permeability as a constant. The ICJ—though not formally a part of the international criminal law enforcement system—is included as a baseline.

The chart suggests that dedicated international criminal tribunals and hybrid tribunals focused on a particular state ought to have the most significant political effects. Such courts tend to have very targeted jurisdiction and independent prosecutors, making the likelihood of adjudication, and thus the potential for political effects, high. National courts exercising universal jurisdiction are only expected to have meaningful political effects where they have highly independent prosecutors and a past track record of extraterritorial prosecution. These hypotheses with regard to foreign courts' propensities for political effects are born out by the empirical observations and examples provided in the second part of this chapter.

Chart 4-1: Anticipated Political Effects of International Courts and Tribunals

Tribunal	**Breadth of Jurisdiction**	**Ease of Access**	**History of Exterritorial Jurisdiction**	**Potential for Political Effect**
ICJ	Wide	Low (state only)	High	Low
Ad hoc and *special* criminal tribunals	Narrow	Independent Prosecutor (High)	High	High
National courts exercising extraterritorial jurisdiction	Wide	Independent Prosecutor	Medium	High
	Wide	Dependent Prosecutor	Low	Low
Hybrid tribunals	Narrow	Independent Prosecutor	High (where they operate)	High
ICC[60]	Narrow	*Proprio Muto*	N/A (new court)	High

[60] The International Criminal Court is unique in that states and the Security Council can refer cases to the Court or the Prosecutor can initiate cases on his own accord. Where cases are referred by other states parties, the Prosecutor then decides whether to launch an investigation. Where cases are initiated by the Prosecutor under his *proprio muto* powers, his decisions must be reviewed by a Pre-Trial Chamber before the case can be formally opened. *See* Rome Statute of the International Criminal Court art. 14(1), 17 July 1998, U.N. Doc. A/CONF.183/9, 37 I.L.M. 999 (1998) [hereinafter Rome Statute] ("A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes."). The prosecutor need not, however, pursue such cases. *See id.* art. 15(1) ("The Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court.").

II. THE POLITICAL EFFECTS OF FOREIGN AND INTERNATIONAL TRIBUNALS: PATHWAYS OF INFLUENCE

This section moves beyond the theoretical discussion of Part I and considers the actual operation of political effects in the system of international criminal law enforcement. The section seeks to derive a set of specific pathways of influence from the potential causal mechanisms hypothesized above through which international and foreign courts can exert political effects. A typology of pathways of influence is developed, each of which gives rise to concrete and identifiable political effects. Detailed examples and mini-case studies are used to illustrate the operation of these effects and test—at least preliminarily—the argument that such political effects now operate within a global governance system of international criminal law enforcement.

Four basic pathways of political of influence link foreign or international tribunals with national courts and domestic governments. The first major pathway of influence shifts the incentives facing key domestic actors. This pathway produces two distinct political effects: catalytic effects and moral hazard effects. The second pathway of influence alters domestic power structures. This pathway results in legitimating and de-legitimating effects. The third pathway of influence changes the transnational balance of power. This pathway gives rise to a primary political effect of cost-externalization. The fourth pathway pressures actual perpetrators of international crimes and can result in stabilization and destabilization effects. Chart 4-2 illustrates these pathways and their resultant political effects.

Chart 4-2: Pathways of Influence and Resultant Political Effects

Pathway of Influence	**Types of Political Effects**
Shifting incentives of domestic actors	Catalytic & moral hazard effects
Changing domestic power structures	Legitimating & de-legitimating effects
Altering the transnational power balance	Cost-externalization effects
Pressuring criminal perpetrators	Stabilizing and destabilizing effects

A. Shifting the Incentives of Domestic Actors

The first pathway of influence through which foreign or international tribunals wield political influence is by shifting the incentives facing domestic actors, often policy makers within the national government of the target state. Through this pathway, the foreign or international tribunal with concurrent jurisdictional entitlements can influence a number of issues related to the prosecution of international crimes, including decisions to exercise jurisdiction and undertake judicial reform efforts. This pathway can result in either catalytic or moral hazard effects.

i. The Catalytic Effect

By shifting the incentives of domestic actors, a foreign or international tribunal with concurrent jurisdiction can catalyze the activation of domestic justice mechanisms that would otherwise not be used. This catalytic effect arises when there is a domestic legal process that could be utilized, should the domestic government or a national prosecutor decide to do so, but the costs of domestic action are deemed by the state or prosecutor to outweigh the benefits thereof. The existence of an international tribunal, however, can provide structural incentives that shift this cost-benefit calculation and result in the utilization of a domestic process or the reform of domestic institutions to make such a process available.

The existence of the foreign or international tribunal may catalyze action at the national level by altering incentives for national officials to use their own institutions. The basic assumption underlying this effect is that states generally prefer to adjudicate matters domestically, rather than allow a foreign court over

which they have little or no control to act in their stead.[61] The existence of the foreign tribunal with concurrent jurisdiction makes adjudication elsewhere a meaningful possibility. For officials of a national government who might otherwise block domestic proceedings because of potential adverse political consequences, a domestic prosecution may seem far less dangerous than a foreign proceeding. By actually putting to use dormant domestic mechanisms of adjudication, national governments are generally better able to influence the adjudicatory process, or, at least, moderate the negative repercussions of an adverse decision. Moreover, national officials can claim domestic processes as their own, rather than face the sovereignty costs of having an invasive international court rule on issues that would otherwise remain domestic. Moreover, by acting themselves, rather than allowing a foreign court to proceed, domestic prosecutors may protect their own reputations and enhance the credibility of their office. The existence of a foreign court with concurrent jurisdiction can alter the preferences of both national government officials and state prosecutors to activate domestic judicial institutions.

The catalytic effect shifts the political win-sets available to the national government and thereby makes possible domestic action that previously could not be achieved. Robert Putnam's work on two-level games is indicative here. Putnam conceives of international negotiations as "two-level games," in which politicians simultaneously negotiate on domestic and international game boards.[62] Applied to the slightly different context of an international court potentially exercising jurisdiction, Putnam's core insight is that "strategic moves at one game-table facilitate unexpected coalitions at the second table."[63] To put it more concretely, a national government official's use of domestic institutions is often constrained by "what domestic constituencies will" accept.[64] The existence of an international tribunal can change what those domestic groups are willing to accept by, once again, altering the cost-benefit analysis facing domestic actors.[65] With the threat of international action, domestic constituencies may be willing to accept a national prosecution that they would have previously resisted. The result is that the foreign tribunal's "international strategies can be employed to change the character of domestic constraints."[66] The result may be a newfound ability to activate domestic institutions in the global governance enforcement system.[67]

This catalytic effect is often most pronounced where it is embedded in the structural architecture of the system itself through the kinds of hard legal effects discussed in Chapter II. Hard legal relationships allocating authority among courts can, for example, condition the exercise of international jurisdiction on the failure of the national government to use its own judicial processes. This is the case in the complementarity regime of the Rome Statute. [68] The fact that international jurisdiction is conditioned on domestic inaction gives national courts the first mover advantage and the option of acting themselves to prevent international intervention. The perceived costs of inaction by a national government will be increased by the knowledge that the foreign court may intervene if domestic courts do not prosecute first.

The ICC has recognized the theoretical possibility that complementarity may encourage domestic prosecutions. In the words of the Prosecutor, "the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success."[69] In cases based on the exercise of

[61] This logic lies behind Posner and Yoo's assertion that dependent tribunals will be more effective in that they are more likely to reach outcomes that meet the state's preexisting interests. *See* Poser & Yoo, *supra* note 10**.**
[62] Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427, 434 (1988).
[63] Putnam, *supra* note 62, at 460.
[64] Moravcsik, *supra* note 2, at 15.
[65] This is not dissimilar to Gourevitch's second image reversed claim that "[t]he international system is not only a consequence of domestic politics and structures but a cause of them." Peter Gourevitch, *The Second Image Reversed: The International Sources of Domestic Politics*, 32 INT'L ORG. 881, 911 (1988).
[66] Moravcsik, *supra* note 2, at 15.
[67] This expands the potential available win-sets for the national government. Here "win-set" is defined as "the set of potential agreements that would be ratified by domestic constituencies." *Id.* at 23.
[68] *See* Rome Statute, *supra* note 61, art. 17. Enumerated examples of unwillingness in the statute include where "the national decision was made for the purpose of shielding the person concerned from criminal responsibility" or where the "proceedings were not or are not being conducted independently or impartially." *Id.* art. 17(2).
[69] Louis Moreno-Ocampo, Statement Made at the Ceremony for the Solemn Undertaking of the Chief Prosecutor of the International Criminal Court (16 June 2003), *available at* http://www.icc-cpi.int/library/organs/otp/030616_pace.pdf. Similarly an expert paper published by the Office of the Prosecutor notes that "the complementarity regime serves as a mechanism to encourage and facilitate the compliance of States with their

universal jurisdiction by the domestic institutions of a third state, rules of criminal procedure or clear statements of prosecutorial policy could give priority to the institutions of the national or territorial state and, thereby, generate a catalytic effect.[70]

One clear example of the ICC's catalytic effect is the recent effort in Sudan to establish a domestic court to prosecute certain international crimes committed in Darfur. In the wake nearly 180,000 deaths during what has been described by the former US Secretary of State Colin Powell as a "genocide,"[71] in March 2005, the UN Security Council referred the situation to the ICC.[72] Although Sudan is not a party to the Rome Statute, the Security Council vested the international tribunal with concurrent jurisdiction with Sudanese courts. On 6 June 2005, ICC Prosecutor Luis Moreno O'Campo announced that he would begin an investigation of the situation in Sudan.[73]

Immediately after the Prosecutor's announcement, the Sudanese government objected to any ICC prosecution of Sudanese nationals and announced that it would establish a domestic tribunal to prosecute approximately 160 individuals suspected of international crimes in Darfur.[74] The Sudanese Minister of Justice Ali Mohamed Osman Yassin publicly argued that the Sudanese domestic court would be a "substitute to the International Criminal Court."[75] Given the timing of the creation of the new Sudanese domestic court and the government's rhetoric, the new institution appears to be a direct response to the ICC's investigation.[76]

While UN Special Representative of the Secretary-General for Sudan, Jan Pronk, described the new court as "positive," there is real concern as to whether it will undertake genuine prosecutions or merely act as a legal shield to ICC activities.[77] Whatever its eventual impact, the new Sudanese court appears to have been a result of the ICC's catalytic impact. The ICC's present investigation of crimes in the DR Congo offers another example of the Court's catalytic effect and will be discussed in more detail in the case study of the ICC in the DR Congo presented in Chapter VI.

A number of other courts and quasi-legal bodies have hard legal relationships with national institutions similar to that found in the ICC statute and likewise generate embedded catalytic effects for national judiciaries. In various human rights courts, the requirement that individuals exhaust local remedies before proceeding to an international forum may have a similar result by giving states—and particularly their domestic courts—an incentive to reach conclusions acceptable to the international institution so as to avoid international review of the case.[78] For such exhaustion requirements to provide meaningful catalytic

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primary responsibility to investigate and prosecute core crimes." Office of the Prosecutor of the International Criminal Court, Informal Expert Paper: The Principle of Complementarity in Practice, *available at* http://www.icc-cpi.int/library/organs/otp/complementarity.pdf.

[70] The Princeton Principles of Universal Jurisdiction are indicative of this prioritization. While they do not directly give primacy to any particular state's courts, they list a number of criteria for the exercise of universal jurisdiction and place territoriality and nationality at the top of that list along with treaty obligations. *See* PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION art. 8 (Stephen Macedo ed., 2001), *available at* http://www.princeton.edu/~lapa/unive_jur.pdf

[71] Glenn Kessler and Colum Lynch, *U.S. Calls Killings in Sudan a Genocide*, WASH. POST , 10 Sept. 2004, at A1.

[72] S.C. Res. 1593, ¶ 1, U.N. Doc. S/RES/1593 (31 Mar. 2005). For a discussion of the situation in Sudan, see INTERNATIONAL CRISIS GROUP, AFRICA REPORT NO. 89, DARFUR: THE FAILURE TO PROTECT 1 (2005).

[73] *See* Press Release, International Criminal Court, The Prosecutor of the ICC Opens Investigation in Darfur (6 June 2006), http://www.icc-cpi.int/press/pressreleases/107.html

[74] IRINnews.org, SUDAN: Darfur War-Crime Suspects Won't Go to ICC, Government Says (4 Apr. 2005), *available at* http://www.irinnews.org/print.asp?ReportID=46436.

[75] IRINnews.org, SUDAN: National Courts to Try Suspects of War Crimes (15 June 2005), *available at* http://www.irinnews.org/report.asp?ReportID=47654.

[76] *See Sudan Reiterates Opposition to Try Darfur Suspects Before ICC*, SUDAN TRIB., 18 Oct. 2005.

[77] *Id.* The activities of the new tribunal are thus likely to result in an admissibility challenge before the ICC Pre-Trial Chamber.

[78] The First Optional Protocol to the International Covenant on Civil Rights provides for review of individual cases by the Human Rights Committee only after all local remedies have been exhausted. *See* International Convent on Civil and Political Rights, Optional Protocol art. 2, 16 Dec. 1966, 999 U.N.T.S. 171 (entered into force 23 Mar. 1976). Similarly, article 35 of the European Convention on Human Rights provides that The Court may only deal with the matter after all domestic remedies have been exhausted." Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* 4 Nov. 1950, 213 U.N.T.S. 221 [hereinafter European Convention on Human Rights]. Similarly, the court can only hear cases referred by the Commission when the Commission has acknowledged a failure to reach a friendly settlement of the dispute. *See* European Convention on Human Rights art. 47.

influence, however, the foreign court or reviewing institution—for example, the UN Human Rights Committee[79]—must have real authority to reverse a national decision or assume jurisdiction in the case itself. All too often, reviewing bodies in human rights cases lack such authority and, therefore, the catalytic potential of the exhaustion requirements is not realized.

Each of these catalytic devices provides a structural incentive for national judiciaries to act first, before a foreign tribunal steps in.[80] By embedding preferences for domestic adjudication with the threat of international review into the architecture of the international system, these mechanisms shift the incentives facing domestic actors, rendering the exercise of national jurisdiction possible.

ii. The Moral Hazard Effect

A second political effect, the moral hazard, also arises through the same pathway of influence. As generally used, a moral hazard refers to the tendency of insurance to encourage individuals to engage in behavior that is riskier than efficiency would demand. Here, the international court can provide a similar form of "insurance," allowing the national government to pursue a sub-optimal policy by not using its own domestic judiciary. Again, the existence of the foreign tribunal alters the cost-benefit calculation facing national leaders when deciding whether to utilize domestic judicial institutions. In contrast to the catalytic effect, in which the foreign tribunal encourages an exercise of national jurisdiction, the moral hazard effect results in national officials having greater incentive to abstain from domestic prosecutions.

The logic driving the moral hazard effect is again rooted in the incentives facing national officials. Before the existence of the foreign tribunal, the only possibility for judicial resolution of a case was an exercise of jurisdiction by national courts. Domestic institutions would be used if the benefits of a judicial resolution were greater than the financial and political costs thereof. Once the foreign tribunal gains concurrent jurisdiction, however, there is a second opportunity for judicial resolution—namely, prosecution by the foreign court. With the possibility of international prosecution, the benefit of judicial resolution can be achieved with minimal or no domestic costs by allowing the international court to act and abstaining from domestic prosecution. A national government may now choose to delay or defer domestic action, assuming that the foreign court will act in its stead.

The moral hazard effect is the inverse of the catalytic effect. While the catalytic effect assumes national governments would rather prosecute domestically than allow international intervention, the moral hazard effect recognizes that context specific factors, such as the political or financial costs of prosecution, may lead national governments to prefer foreign action in some cases. The new incentive structure generated by the existence of the foreign court may then result in a failure to exercise national jurisdiction, even where institutions were available domestically.

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[79] For a discussion of the UN Human Rights Committee, see Office of the United Nations High Commissioner for Human Rights, Introduction to the Human Rights Committee, http://www.unhchr.ch/html/menu2/6/a/introhrc.htm.

[80] The dispute settlement provisions of the North American Free Trade Agreement provide another example of the catalytic effect, albeit from a different subfield of international law. The 1988 Canadian-American Free Trade Agreement (CAFTA) and the more recent North American Free Trade Agreement (NAFTA) both contain provisions for the establishment of international panels to review the legality of administrative decisions with respect to antidumping and countervailing duty obligations. *See* Canada–United States: Free Trade Agreement, U.S.-Can., art. 1904(1), 22 Dec. 1987–2 Jan. 1988, 27 I.L.M. 281 (stating that "the Parties shall replace judicial review of final antidumping and countervailing duty determinations with bi-national panel review"); North American Free Trade Agreement, U.S-Can.-Mex., art. 1904, 17 Dec. 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA] (providing that "each Party shall replace judicial review of final antidumping and countervailing duty determinations with bi-national panel review"). Whereas the key element of institutional design in the Rome Statute that catalyzes domestic action is complementarity, in the case of the CAFTA panels, it is a particular remand procedure. When the panels rule on administrative decisions, they can remand decisions back to the issuing agency with guidance on acceptable outcomes. *See id.* art. 1904(9). Like the Rome Statute's complementarity regime, this remand procedure gives the domestic institutions an incentive to act first and reach rulings that will not be overturned upon international review. Judith Goldstein has conducted an extensive study of the effects of these panels under CAFTA and found that they not only enhance compliance by increasing the costs of defection but also catalyze changes in the operation of domestic political and bureaucratic systems. *See generally* Judith Goldstein, *International Law and Domestic Institutions: Reconciling North American "Unfair" Trade Laws*, 50 INT'L ORG. 541, 546 (1996).

Obviously, there is a normative choice to be made about which prosecutions should occur. From a pure efficiency maximizing standpoint, however, this effect produces a sub-optimal outcome. Though criminal perpetrators may still be prosecuted by the foreign court, that prosecution is likely to be less efficient than domestic prosecution would have been and may not fulfill many of the key goals of international criminal justice. The real financial costs of international prosecution are generally higher than those of a domestic proceeding. Access to victims, witnesses, and evidence may be limited. Potential for restorative justice may be curtailed. The resources of the foreign court may be unnecessarily diverted from other prosecutions. The result, then, is a moral hazard, whereby the foreign court shifts incentives in a way that undermines the efficiency of the international criminal justice system.

The moral hazard effect may manifest itself in a variety of ways, depending on the structural relationship between the domestic and foreign tribunals. Where the foreign tribunal is a domestic court of another state exercising universal jurisdiction, the national court of the target state may simply delay proceedings in a wait-and-see strategy. Where the foreign tribunal is an international court with primary jurisdiction, such as the ICTY, the national government might take no action, claiming that, if the case were of any merit, the international tribunal would have initiated proceedings. Finally, if the foreign tribunal is an international court with complementary jurisdiction, such as the ICC, the national government could refer the situation to the foreign tribunal, rather than utilizing its own domestic institutions. In each case, the government of the territorial state shifts the financial and political costs of prosecution to the international institution or foreign state and effectively becomes a free-rider.

A clear example of the moral hazard effect is evidenced by the ICC investigation in Uganda. In January 2004, Ugandan President Museveni referred the situation in Uganda, with reference to the crimes committed by the Lord's Resistance Army (LRA), to the ICC, pursuant to Article 14 of the Rome Statute that provides for referrals by states parties.[81] While the historical background to the Uganda case is beyond the scope of this inquiry,[82] the LRA began a campaign of violence in the late 1980s, seeking to overthrow President Museveni's government and targeting the largely civilian Alcholi people.[83] During 2002 alone, the LRA is reported to have abducted upwards of 2,000 children for sexual abuse and slavery, or to be sold as child soldiers in Sudan.[84] There is evidence the LRA has committed crimes within the ICC jurisdiction. On factual grounds, then, ICC involvement would fall within the court's mandate and mission.[85]

The hidden moral hazard problem in this case arises from the fact that, in all likelihood, the Ugandan government is capable of bringing key members of the LRA to justice through the use of domestic institutions. After all, the Ugandan People's Defense force had a $128 million budget in 2003[86] and up to two million men fit to serve in the military should they be called to do so.[87] In fact, the Ugandan military is sufficiently powerful that, from 1999-2002, it engaged in an ongoing conflict in the neighboring DR

[81] Press Release, International Criminal Court, President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC (9 Jan. 2004), *available at* http://www.icc-cpi.int/press/pressreleases/16.html.
[81] Anthony Deutsch, *Congolese Human Rights Minister: New Criminal Court Deters Tribal Warfare*, ASSOCIATED PRESS, 22 Jan. 2004. Apparently, the Ugandan President began to consider this move in December 2003 and subsequently met with the ICC Prosecutor in London before making the formal referral. Mohamed M. El Zeidy, *The Ugandan Government Triggers the First Test of the Complementarity Principle: An Assessment of the First State's Party Referral to the ICC*, 5 INT'L CRIM. L. REV. 83, 84 (2005).
[82] *See generally* El Zeidy, *supra* note 81**,** 83 (providing a background to the Uganda case before the ICC); Hans Peter Schmitz, *Transnational Activism and Political Change in Kenya and Uganda*, *in* THE POWER OF HUMAN RIGHTS, *supra* note 43, at 39, 39 (discussing the human rights movement in Uganda); J.D. FAGE, A HISTORY OF AFRICA (Routledge 3d ed. 1995) (offering a history); HUMAN RIGHTS WATCH, THE SCARS OF DEATH: CHILDREN ABDUCTED BY THE LORD'S RESISTANCE ARMY IN UGANDA 9 (1997).
[83] *See* El Zeidy, *supra* note 81; Human Rights Watch, *supra* note 82.
[84] The Secretary-General, *Report of the Secretary-General on the Abduction of Children from Northern Uganda*, ¶¶ 6, 11–12, *delivered to the Economic and Social Council*, U.N. Doc. E/CN.4/2000/69 [hereinafter U.N. Doc. E/CN.4/2000/69]; *see also Children and Armed Conflict* ¶ 34; Press Release, Security Council, Despite Progress in Protecting Children in Armed Conflict, General Situation Remains 'Grave and Unacceptable,' Security Council Told, U.N. Doc. SC/7985 (20 Jan. 2004), *available at* http://www.un.org/News/Press/docs/2004/sc7985.doc.htm.
[85] The Preamble to the Rome Statute affirms "that the most serious crimes of concern to the international community as a whole must not go unpunished." Rome Statute, *supra* note 61, pmbl.
[86] CIA, *Uganda*, THE WORLD FACTBOOK (2005), http://www.cia.gov/cia/publications/factbook/geos/ug.html#Military.
[87] *Id.*

Congo.[88] Likewise, the Ugandan police forces are operational and generally able to apprehend suspects.[89] Finally, the Ugandan judiciary is relatively robust[90] and the court system is operational throughout the country.[91] Admittedly, there are serious problems of corruption in the army, police and judiciary,[92] with the court system marred by bribery and lack of independence.[93] Despite these shortcomings, if the Ugandan government chose to, it could probably arrest and prosecute the LRA leadership through military, police, and domestic judicial means. Certainly, with some attention and domestic institutional reform, national prosecutions would be possible.

Domestic prosecutions would, however, be financially and politically costly to the Museveni government. There are domestic incentives for prosecution—"many Ugandans want [rebel leader] Mr. Kony and his cohorts behind bars"[94] The government is, however, currently involved in a delicate peace negotiation with the LRA and evidence suggests key interest groups including many victims prefer an amnesty process to prosecutions.[95] Without the ICC, the Ugandan government would have to balance these costs and benefits and might well end up pursuing some form of domestic justice. The ICC, however, created a moral hazard by giving Museveni's government a second option. Instead of prosecuting at home, Uganda referred the situation to the ICC. Although some small steps, such as an amnesty commission, have been taken domestically, national efforts against the LRA remain minimal.[96] The existence of the ICC may have changed Museveni's calculation of interests. Without the ICC, he could either absorb the costs of acting against the LRA or face international and domestic consequences of allowing impunity. By referring the case to the ICC, he has been able to both garner international commendation and respond to domestic critics, without facing the costs of domestic prosecution.[97] As one Ugandan legal expert observed, the Ugandan government "tries to hide behind organizations and other entities" rather than taking serious action at home.[98] In so doing, there has been a continued failure in Ugandan domestic institutional reform and a diversion of international resources from situations in which the ICC is truly the only available recourse.

In some ways, the drafters of the Rome Statute anticipated the possibility of such "self-referrals," in which states bring their own domestic situations before the Court. Early drafts of the Rome Statute were wary of allowing "self referrals" and a 1995 *ad hoc* committee report noted that the ICC "should in no way undermine the effectiveness of national justice systems and [self-referrals] should only be resorted to in exceptional cases."[99] Yet, the final version of the Statute allowed states to refer their own situations to

[88] *See* John F. Clark, *Museveni's Adventure in the Congo War: Uganda's Vietnam?*, *in* THE AFRICAN STAKES OF THE CONGO WAR, *supra* note 74, at 145, 145–61 (describing Ugandan interventions in Congo).
[89] *See* U.S. Dep't of State, Country Reports on Human Rights Practices: Uganda (2002), http://www.state.gov/g/drl/rls/hrrpt/2002/18232.htm.
[90] Citizens for Global Solutions, Conference Transcript, War Crimes in Uganda: Seeking Peace Through Accountability, 12 May 2004, http://www.globalsolutions.org/events/uganda_event.pdf.
[91] *See* Marian Liebmann, *Restorative Justice in Uganda and Russia*, 28–31March 2001, *available at* http://www.restorativejustice.org/resources/docs/liebmann/download; *see also* Human Rights Committee, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Initial Report—Uganda*, ¶¶ 18–27, U.N. Doc. CCPR/C/UGA/2003/1 (14 Feb. 2003).
[92] Infoplease.com, The 2003 Transparency International Corruption Perception Index, http://www.infoplease.com/ipa/A0781359.html (last visited 6 Jan. 2006) (ranking Uganda the 17th among the most corrupt countries in the world).
[93] CIETinternational, Uganda National Integrity Survey 1998, at ii, x, 12, 15–16 (Aug. 1998), http://www.ciet.org/www/image/download/UGA_NIS.pdf.
[94] Marc Lacey, *Victims of Uganda Atrocities Choose a Path of Forgiveness*, N.Y. TIMES, 18 Apr. 2005, at A1.
[95] *See id.* (observing that "a number of those who have been hacked by the rebels, who have seen their children carried off by them or who have endured years suffering in their midst say traditional justice must be the linchpin in ending the war").
[96] For example, in 2000 the Ugandan government adopted an Amnesty Law that provided for a system of pardons for rebels that surrender voluntarily. Yet, the law has not been particularly successful due to ongoing threats from the LRA against those who defect. *See* Interview by Jordan Tama with Deo R. Nkunzigoma, Ugandan Law Society in Kampala, Uganda (October 2003). According to a Justice of the Ugandan Supreme Court, "[u]nder the Act any Ugandan who engaged in acts against the government since 26 January 1986 is eligible for amnesty, regardless of their role in the rebellion. Once amnesty is granted, the individual cannot be prosecuted for crimes in the rebellion." Interview by Jordan Tama with The Honorable Peter Onega, Supreme Court Justice and Chairman of the Amnesty Commission in Kampala, Uganda, (28 Oct. 2003). Apparently 10,000 people have sought amnesty as of October 2003, with 4,000 of them coming from the LRA. *Id.*
[97] A number of top Ugandan international law experts have noted that Museveni's goal may well be to avoid domestic action by using the ICC as a kind of shield to give him political cover. *See Report of an Experts Meeting on the Role of the ICC in Uganda and Congo*, University of Amsterdam, 14-15 October, 2004**.**
[98] *See* Interview with Deo R. Nkunzigoma, *supra* note 121.
[99] *Id.*

the Court, resulting in the possibility that states will use the ICC rather than reforming, improving, and utilizing their own domestic institutions.

A second version of the moral hazard effect—still based on the ability of a foreign court to shift the incentives facing domestic actors—arises when a national government seeks to block the operation of a foreign or international court by structuring its own laws or judicial institutions to shield its citizens from international prosecution. This danger arises when the foreign tribunal's legal competence is sufficiently clear that a domestic government can help its nationals avoid international accountability through careful legal maneuvering around the court's statute.

Recent legislative activity in Colombia offers an example of this form of the moral hazard effect. Colombia ratified the Rome Statute in 1998, and the ICC has jurisdiction over crimes in Colombia since 1 July 2002. In an effort to bring paramilitary groups out of the jungles, the Colombian government has offered very generous terms for those who join the peace process.[100] The so-called Justice and Peace Law, passed in late June 2005, in part seeks to shield paramilitary leaders involved in crimes within the ICC's jurisdiction by allowing them to confess, but face very limited punishments with double-jeopardy guarantees against further prosecution.[101]

Cases are inadmissible before the ICC when "The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution" or where "The person concerned has already been tried for conduct which is the subject of the complaint."[102] Although there are safeguards built into the Rome Statute for cases in which a domestic trial was "for the purpose of shielding the person concerned from criminal responsibility," Colombia appears to be seeking to manipulate its domestic laws in ways that may allow favored individuals to escape international prosecution.[103]

The confessions, investigations, and sentences are designed to cover any crimes the individual may have committed and certain Colombian officials indicated that there was, therefore, no potential for ICC intervention, pursuant to Articles 17 and 20 of the Rome Statute.[104] In fact, senior officials in the ICC Office of the Prosecutor were sufficiently concerned about potential crimes within the Court's jurisdiction in Colombia that communications were initiated with the Government of Colombia in which the Court's potential jurisdiction was noted.[105] Perhaps in part due to this communication from the Court, the Colombian Supreme Court has recently struck down the most offensive provisions of the legislation.[106]

Twenty years ago, Colombia might have offered paramilitary groups a blanket amnesty. With the existence of the ICC and other foreign tribunals that could prosecute in the future, the Colombian government has instead drafted legislation that provides for minimal punishment so as to block the exercise of jurisdiction by foreign courts. Admittedly, individual perpetrators might still face ICC prosecution if the law is deemed a sham, but the concurrent jurisdiction of an international court may well have resulted in a law that allows individual perpetrators to escape the potential for more serious accountability.

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[100] For a background discussion on the situation of paramilitary groups in Colombia, see Human Rights Watch, Smoke and Mirrors: Colombia's Demobilization of Paramilitary Groups (1 Aug. 2005), http://www.hrw.org/reports/2005/colombia0805/colombia0805.pdf.

[101] Juan Forero, *New Colombia Law Grants Concessions to Paramilitaries*, N.Y. TIMES, 23 June 2005, at A3. Crimes under the law are also deemed political offences, providing a shield to extradition requests from other states.

[102] Rome Statute, *supra* note 61, art. 17.

[103] *Id.* art. 20(3).

[104] The law has been significantly criticized by foreign governments, with pressure from Washington for it to be amended before further foreign aid is provided. *See* Juan Forero, *U.S. Threat Is a Blow to Colombia's Easy Terms for Death Squads*, N.Y. TIMES, 7 July 2005, at A5. For other criticism, see Human Rights Watch, *supra* note 100; Press Release, Amnesty International, Colombia: Justice and Peace Law Will Guarantee Impunity for Human Rights Abusers (26 Apr. 2005), *available at* http://news.amnesty.org/index/ENGAMR230122005.

[105] Interview with anonymous official from the International Criminal Court in the Hague, Netherlands, (30 June 2005).

[106] *See* Human Rights Watch, Court Fixed Flaws in Demobilization Law, 19 May 2006, available at http://hrw.org/english/docs/2006/05/19/colomb13430.htm.

The two political effects that result from shifting incentives of national governmental officials—the catalytic effect and the moral hazard effect—cut in opposite ways. These effects may either catalyze national prosecutions or they may create a moral hazard that limits the use of national and even international judicial institutions. Which effects arise will depend, to a large degree, on the political balance within the target state. Where that state determines that international prosecution would enhance the power of the sitting government or, at least, allow it to avoid potentially costly choices, the result may well be a moral hazard. Where, instead, the national government would prefer domestic adjudication because of potentially greater control over proceedings and the reputation costs of deferring to an international forum, the result may be catalytic. It is often difficult to determine *ex ante*, at least without a great deal of context specific knowledge, which effects will result.

B. Changing Domestic Power Structures

A second pathway of political effects identified in the typology presented above involves foreign and international tribunals shifting domestic power structures within target states. The effect can be either legitimating or de-legitimating. These effects alter the relative power and influence of individuals and institutions within national governments, emboldening particular institutions to act or undermining the power of key actors within a national government. These effects can be particularly influential and lasting because they reach deep within the target state and fundamentally reorganize the power structures of national governments.

i. The Legitimating Effect

Legitimating effects occur when a foreign tribunal enhances the standing or power of another judicial body, allowing it to take action that might otherwise have been impossible. Legitimating effects occur when the foreign tribunal alters domestic political balances, supporting its peer judicial institutions in the target state. Legitimating effects can operate in a number of different ways, but, in each case, the result is to enhance the standing of a domestic judicial institution so that it is better able to serve as an enforcement agent in the multilevel enforcement system.

The two primary means of legitimating domestic institutions are building capacity and increasing institutional power. In cases of capacity building, the foreign tribunal engages in direct contact with the national institution, providing financing, training, or expertise that allows the national court to act in ways that previously would not have been possible. Examples of such direct exchange abound. Networks of judges and judicial officials meet regularly to exchange ideas, experience, and best practices. In the area of international criminal law enforcement, for example, the ICTY has organized a number of training sessions for judges, prosecutors, and judicial officials in Bosnia, Croatia, and Serbia.[107] Even more directly, capacity building is being achieved through the direct exchange of judges, with foreign judges sitting on national war crimes benches in Bosnia, Cambodia, and East Timor.[108] Each of these processes enhances either the capacity of the domestic court to act or the perceived legitimacy of its operation.

A second modality of the legitimating effect involves the foreign or international tribunal increasing the institutional power of the domestic institution. International tribunals can enhance the institutional power of a domestic counterpart by providing well reasoned and respected jurisprudence in similar cases. Cross-citation to the judicial opinions of foreign courts can lend support, credibility, and legitimacy to otherwise controversial decisions by national judiciaries.[109]

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[107] Interview with David Tolbert, Deputy Prosecutor, ICTY, in the Hague, Neth. (1 July 2005).

[108] In the State Court of Bosnia, for example, British and Portuguese judges sit on the bench of the War Crimes Chamber and British, French and German judges sit on the Constitutional Court. *See* Interview with Judge Almiro Rodrigues, State Court of Bosn & Herz., in Sarajevo, Bosn. & Herz. (5 Aug. 2005); *see also* Interview with Judge David Feldman, Constitutional Court of Bosn. & Herz., in Cambridge, U.K. (2 Aug. 2005). For a discussion of the special panels in East Timor and the Extraordinary Chambers in Cambodia, see generally Burke-White, *supra* note 202 (providing a political and historical account of the creation of hybrid tribunals in East Timor and Cambodia).

[109] *See* Interview with Judge Almiro Rodrigues, *supra* note 132. Judge Rodrigues notes that the ability of the State Court in Bosnia to cite to the ICTY increases the legitimacy of its decisions.

Decisions of an international tribunal can also reshape the domestic political alignments in the target state. Where a foreign tribunal adjudicates a case involving events on the territory of the target state or acts by a national of that state, the decision of the foreign court may enhance the standing of the national court, allowing it to adjudicate related cases. The foreign decision could, for example, provide grounds for the invalidation of a domestic blanket amnesty that had previously barred action by the national judiciary.[110] In effect, the exercise of jurisdiction by the foreign tribunal permeates the domestic political scene, making possible heretofore unobtainable outcomes at the national level.

One of the most significant examples of the legitimating effect is the Pinochet case and the impact of the foreign proceedings in Spain and the United Kingdom on the domestic judiciary and society in Chile. By way of background, Augusto Pinochet took power in Chile in a coup against the government of Salvadore Allende on 11 September 1973.[111] He was eventually named President of the Republic and then "engaged in a brutal crackdown of opposition groups" including torture, extrajudicial killing, and forced disappearances.[112] Pinochet's National Intelligence Directorate (DINA) led Operation Condor in a brutal crackdown against dissidents.[113] In 1978, the Pinochet government issued a self-serving amnesty decree, covering all acts committed by the government and military since the overthrow of the Allende government.[114] Pinochet stepped down as President in 1990, but kept his position as Commander-in-Chief of the military until 1998 at which time he was appointed Senator-for-Life.[115]

For the decade and a half following the re-establishment of democratic rule in Chile, Chilean domestic courts were unable to act against Pinochet and the leading members of his regime. The 1978 amnesty legislation provided a legal bar on prosecutions, granting formal amnesty to "all persons who committed, as perpetrators, accomplices or conspirators, criminal offences . . . between 11 September 1973 and 10 March 1978."[116] The Chilean Supreme Court affirmed the validity of the 1978 Amnesty Law in a 1990 challenge.[117] Moreover, during Pinochet's rule, "military tribunals [were used] to prosecute suspected enemies of the state and to later provide a defensive shield for the regime when assailed for human rights abuses."[118]

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[110] For a discussion of blanket amnesties, particularly in Latin America, see William W. Burke-White, *Reframing Impunity: Applying Liberal International Law Theory to an Analysis of Amnesty Legislation*, 42 HARV. J. INT'L L. 467, 482-494 (2001).

[111] See LOIS HECHT OPPENHEIM, POLITICS IN CHILE: DEMOCRACY, AUTHORITARIANISM, AND THE SEARCH FOR DEVELOPMENT (2d ed. 1999) (describing the coup); RONALDO MUNCK, LATIN AMERICA: THE TRANSITION TO DEMOCRACY (1989) (providing a general political history).

[112] 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, 160 (2000). For a discussion of Pinochet's tactics, see AMNESTY INTERNATIONAL, CHILE: EVIDENCE OF TORTURE (1983); COMISIÓN NACIONAL DE VERDAD Y RECONCILIACIÓN, REPORT OF THE CHILEAN NATIONAL COMMISSION ON TRUTH AND RECONCILIATION app. 2 (Phillip E. Berryman trans., 1993). For a discussion of the history of the rule of law in Chile and the crimes under General Pinochet, see Robert J. Quinn, *Will the Rule of Law End? Challenging Grants of Amnesty for the Human Rights Violations of a Prior Regime: Chile's New Model*, 62 FORDHAM L. REV. 905, 910–17 (1994).

[113] *See* Peter Kornbluh, *Prisoner Pinochet: Chilean Dictator Augusto Pinochet on Trial in London*, NATION, 21 Dec. 1998, at 11.

[114] Law of Amnesty, No. 2.191 (18 Apr. 1978) (Chile) [hereinafter Chilean Law], *reprinted in* CYNTHIA G. BROWN, HUMAN RIGHTS AND THE "POLITICS OF AGREEMENTS": CHILE DURING PRESIDENT ALYWIN'S FIRST YEAR 32 (1991). For a detailed discussion of the law, see Burke-White, *supra*, note 109, at 482–87.

[115] *See* Calvin Sims, *As Thousands Protest, Pinochet Assumes Chilean Senate Seat*, N.Y. TIMES, 12 Mar. 1998, at A9 (describing the protests in Chile).

[116] *See* Chilean Law, *supra* note 113, art. 1.

[117] In one noteworthy case, victims' relatives brought suit in August 1978 against General Manuel Sepulveda, Director of the DINA, alleging violations of article 141 of the Penal Code of Chile, relating to illegal arrests and disappearances. The court declined jurisdiction, noting that the accused was subject to military law, a decision affirmed by the Court of Appeals of Santiago. In December 1989, the Second Military Tribunal ordered dismissal of the case, pursuant to the Chilean Law. Hermosilla v. Chile, Case 10.843, Inter-Am. C.H.R., Report No. 36/96, OEA/Ser.L/V/II.95, doc. 7 rev. at 156 (1997). One hundred human rights cases have been permanently closed and eight hundred temporarily closed because of the Chilean Law. U.S. DEP'T OF STATE, CHILE HUMAN RIGHTS PRACTICES, 1994 (Feb. 1994). For a discussion of the Chilean judiciary during the period, see Edward C. Snyder, *The Dirty Legal War: Human Rights and the Rule of Law in Chile 1973–1995*, 2 TULSA J. COMP. & INT'L. L. 253 (1995). Similar amnesty decrees have, however, been declared invalid by the Inter-American Commission for Human Rights. *See Hermosilla*, Case 10.843, Inter-Am. C.H.R. at 156. This case considered the problem of impunity in Chile for those responsible for the arrest and disappearance of seventy individuals. The petitioners had sought domestic recourse in Chile but had their case dismissed pursuant to the Chilean Law.

[118] Snyder, *supra* note 116, at 265.

Even after a series of judicial reforms in 1991, the judiciary remained unable or unwilling to act against Pinochet.[119] After all, in the early 1990s, the majority of the members of the Supreme Court were Pinochet appointees.[120] Only slowly did the Chilean judiciary begin to take a more proactive role in dealing with abuses under Pinochet's rule. In 1993, for example, the Supreme Court found the DINA responsible for the disappearance of a Chilean citizen[121] and, in September 1994, two judges of the Santiago Court of Appeals struck down the 1978 Amnesty law as a violation of the Geneva Conventions.[122] Yet, Pinochet himself remained untouchable, legally immune as Senator-for-Life and still backed by *de facto* political protection.[123] As a result, the domestic layer of the global governance system could not be activated to prosecute international crimes.

Enter two foreign tribunals with concurrent jurisdictional entitlements that not only acted against Pinochet directly, but also enhanced the legitimacy and power of the Chilean domestic judiciary such that it could eventually act at home. Spain was the first foreign judicial system to prosecute Pinochet, spurred by a petition from the Progressive Union of Prosecutors filed with the Audiencia Nacional, under a Spanish universal jurisdiction law.[124] Simultaneously, Judge Baltazar Garzon's investigation of Argentine military leaders uncovered orders from Pinochet for the commission of torture in Operation Condor.[125] At the time, Pinochet was in the United Kingdom undergoing back surgery and, on 13 October 1998, Judge Garzon submitted an arrest warrant to British authorities,[126] alleging torture and conspiracy to commit murder of Spanish citizens in Chile.[127]

Under the European Extradition Convention, the U.K. was obligated to arrest Pinochet and did so in his hospital room on 16 October 2003. After proceedings of judicial review and habeas corpus before the Queen's Bench,[128] the case was appealed to the House of Lords.[129] The Law Lords' final decision found Pinochet did not enjoy immunity and could be extradited to Spain for crimes committed after 29 September 1988, the date of UK ratification of the Torture Convention.[130] Despite this ruling, Home Secretary Jack Straw, who had final authority over the extradition, repatriated Pinochet to Chile on grounds of "rap-

[119] *See* Snyder, *supra* note 116, at 265; *see also* SEBASTIAN BRETT, CHILE, A TIME OF RECKONING: HUMAN RIGHTS AND THE JUDICIARY 199 (1993) (considering judicial treatment of human rights in Chile).
[120] *See id.* at 283; U.S. DEP'T OF STATE, *supra* note 141.
[121] *Supreme Court Rules Secret Police Responsible for Political Disappearance*, NOTISUR, 1 Oct. 1993.
[122] *See also* Snyder, *supra* note 116, at 285 (discussing the Chilean court's decision to invalidate the amnesty law); *Court Punches Hole in 1978 Amnesty*, LATIN AM. WKLY. REP., 13 Oct. 1994, at 465 (providing part of the text of the decision).
[123] One commentator observes: Pinochet "retained a significant amount of political power . . . . The end of the Pinochet dictatorship thus marked more of a transition than an end to his involvement in the Chilean government." Patrick J. Thurston, *The Development of Religious Liberty in Chile, 1973–2000*, 2000 BYU L. REV. 1185, 1205 (2000).
[124] *See* Ley Organica Del Poder Judicial [L.O.P.J.] art. 65 (Spain). For a discussion of the proceedings, see Richard J. Wilson, *Prosecuting Pinochet in Spain*, HUM. RTS. BRIEF, Spring 1999, at 3. For the full text of the criminal action of 1 July 1996, see Juicio a Pinochet en España, http://www.derechos.org/nizkor/chile/juicio/denu.html (last visited 6 Jan. 2006). Spain operates under a partie civile system, whereby citizens or injured foreigners can bring criminal complaints directly. *See* CONSTITUCIÓN [C.E.] art. 125 (Spain); L.E. CRIM. art. 101 (Spain). For a general discussion of the Spanish judiciary, see ELENA MERINO-BLANCO, THE SPANISH LEGAL SYSTEM (1996). Spanish criminal law directly criminalizes and grants domestic courts jurisdiction over crimes against humanity, war crimes and genocide, which provided the legal basis for charges against Pinochet. *See* L.O.P.J. art. 23(4) (Spain) (incorporating international crimes into Spanish law). For a discussion, see Aceves, *supra* note 111, at 163.
[125] *See* Wilson, *supra* note 123, at 3; Aceves, *supra* note 111, at 163–64.
[126] *See* Aceves, *supra* note 111, at 163–64. The Chilean investigations in Spain were consolidated under Judge Garzon in mid-October 1998. *See* Margarita Lacabe, The Criminal Proceedings Against Chilean and Argentinean Repressors in Spain: A Short Summary (11 Nov. 1998), http://www.derechos.net/marga/papers/spain.html.
[127] R v. Evans, No. CO/4083/98 (Q.B.D. 28 Oct. 1998), *reprinted in* 38 I.L.M. 68, 76 (1999).
[128] *Id.* The decision found the arrest warrant invalid, on grounds that a former head of state continues to enjoy sovereign immunity for official acts of state.
[129] *See* R v. Bow Street Metropolitan Stipendiary Magistrate, *ex parte* Pinochet Ugarte [2000] 1 A.C. 61 (H.L.). In a November 1998 decision, the Lords found the warrant valid on grounds that torture and hostage taking are never official acts of state. This decision was appealed based on the relationship between Lord Hoffman and Amnesty International. The Lords set aside their earlier decision and allowed rehearing. R v. Bow Street Metropolitan Stipendiary Magistrate, *ex parte* Pinochet Ugarte (No. 2) [2000] 1 A.C. 119 (H.L.). For discussion, see Aceves, *supra* note 111, at 166–67.
[130] The lords examined both the double criminality rule and issues of sovereign immunity, finding that Pinochet's acts were only criminal in the U.K. after ratification of the Torture Convention. For a discussion, see Marc Weller, *On the Hazards of Foreign Travel for Dictators and Other International Criminals*, INT'L AFF., July 1999, at 599, 599–617.

idly deteriorating health."[131] On 2 March 2000, Pinochet arrived back in Santiago to what has been described as a "muted hero's welcome."[132]

Although Pinochet was not extradited to Spain, the proceedings there and in England marked a significant activation of the domestic level of the multilayer system of international criminal law enforcement. William Aceves has described it as an example of "a network of liberal democracies … applying the principle of universal jurisdiction to enforce common international standards."[133] Similarly, Marc Weller cited it as exemplary of "international constitutionalism," whereby there exists "an interlocking legal order" of institutions from a number of states.[134] Yet, the most significant impacts of the Pinochet decision may not be on the development of international law itself, but rather the case's legitimating political effect in Chile.

Upon Pinochet's return to Chile, the domestic judiciary began to get serious about bringing him to justice.[135] Over the next five years, a series of cases moved slowly through the Chilean courts taking small steps forward toward an eventual trial.[136] In May 2000, a Chilean appeals court stripped Pinochet of his immunity and there appeared to be a new willingness to bring him before national courts.[137] In a series of June 2001 setbacks, the Chilean Supreme Court refused to allow his extradition to Argentina to face charges there,[138] an appeals court ruled he was too ill to stand trial,[139] and many experts suggested the legal battle against him had been "lost."[140] In July 2002 Pinochet quit his lifetime seat in the Senate, yet the Supreme Court reaffirmed his immunity from prosecution.[141] By 2004, however, proceedings against Pinochet began to pick up steam. In May of that year, a lower court stripped Pinochet of his immunity[142] and, on 26 August 2004, the decision was upheld by the Supreme Court in a close 9-8 decision.[143] In January 2005, the Supreme Court found that Pinochet was fit to stand trial and not mentally incompetent.[144] Soon thereafter he was placed under house arrest.[145] It now seems likely he will face trail for his involvement in Operation Condor. The move toward accountability and the Chilean Supreme Court's rejection of Pinochet's immunity "reflects a growing national feeling against him" and a strengthening of the Chilean judiciary.[146]

While a broader transition to democracy is partly responsible for the changing attitude of the Chilean judiciary, the proceedings in England and Spain have also had a profound legitimating effect on the idea of

[131] *See* Kim Sengupta, *The Flight of Pinochet: The History—How a 'Fat Fish' Finally Slipped Through the Net*, INDEPENDENT (London), 3 Mar. 2000, at 4. Sengupta suggests that a secret deal may have been brokered between Chile, Spain and the U.K.. *See also* Kim Sengupta, *The Pinochet Ruling: Lords Vote Puts Straw on the Spot, Decide Dictator Has No Immunity; Home Secretary's Dilemma*, INDEPENDENT (London), 25 Mar. 1999, at 7.
[132] Clifford Krauss, *Pinochet Receives Hero's Welcome on Return to Chile*, N.Y. TIMES, 4 Mar. 2000, at A3.
[133] Aceves, *supra* note 111, at 170.
[134] Weller, *supra* note 129, at 614, 616.
[135] For a general discussion, see Michel Pincon & Monique Pincon-Charlot, *Le Cas Pinochet: Justice et Politique*, LE MONDE DIPLOMATIQUE, June 2003, at 30 (Fr.); ARIEL DORFMAN, EXORCISING TERROR: THE INCREDIBLE UNENDING TRIAL OF AUGUSTO PINOCHET 1 (2002).
[136] Each case tends to be for a different operation by Pinochet and the DINA. Under the Chilean system earlier cases do not provide for issue estoppel such that each case must make its way separately to the Supreme Court and the Court's prior decisions on similar issues are not binding precedent.
[137] Clifford Krauss, *Ruling on Immunity Puts Chile Closer to Trial of Pinochet*, N.Y. TIMES, 25 May 2000, at A4.
[138] Clifford Krauss, *Chile: Argentina Won't Get Pinochet*, N.Y. TIMES, 2 June 2001, at A7.
[139] Clifford Krauss, *Chile Court Bars Trial of Pinochet*, N.Y. TIMES, 10 July 2001, at A1.
[140] Clifford Krauss, *Chile's Effort to Try Pinochet is Running Out of Steam*, N.Y. TIMES, 25 June 2001, at A3.
[141] Larry Rohter, *Chile: Pinochet Quits Senate*, N.Y. TIMES, 5 July 2002, at A10.
[142] Larry Rohter, *Chile: Court Preserves Pinochet Immunity*, N.Y. TIMES, 9 Nov. 2002, at A6.
[143] *Chile Strips Pinochet of Immunity*, BBC NEWS, http://news.bbc.co.uk/2/hi/americas/3602630.stm (last updated 26 Aug. 2004); *see also* Kathleen Day & Pascale Bonnefoy, *Pinochet Loses Immunity in Chile*, WASH. POST, 27 Aug. 2004, at A14 (discussing another Chilean decision to deny Pinochet immunity).
[144] Larry Rohter, *Chile: Court Upholds Pinochet Indictment*, N.Y. TIMES, 5 Jan. 2005, at A6. The decision was in part based on a highly lucid television interview Pinochet gave in December 2003. *See Chile's Top Court Strips Pinochet of Immunity*, REUTERS, 27 Aug. 2004 (citing the decision). In a related case, the Court of Appeals lifted immunity in a case involving the forced disappearance of leftists. *See* Pascale Bonnefoy, *Chile: Pinochet Loses Immunity*, N.Y. TIMES, 7 July 2005, at A11. In another case against Pinochet, his mental health was again confirmed in July 2005. *See* Steve Anderson, *"Pinochet Mentally Fit For Trial," Says Court in Chile*, SANTIAGO TIMES, 11 July 2005.
[145] Larry Rohter, *Chile: Pinochet Under House Arrest*, N.Y. TIMES, 6 Jan. 2005, at A8. Another series of cases against Pinochet also moved forward throughout June and July 2005 based on financial corruption charges. *See* Pascal Bonnefoy, *Chile: Pinochet Loses a Round and Wins One*, N.Y. TIMES, 8 June 2005, at A7.
[146] Phil Davison, *Five Years On, Will Pinochet Finally Be Brought to Justice in His Native Chile?*, INDEPENDENT (London), 6 Jan. 2005, at 34.

accountability for Pinochet in Chilean society and judicial circles.[147] When asked if the "efforts in Spain and England to arrest and extradite Pinochet … facilitate[d] his indictment" at home, Juan Guzman, the judge who issued the initial indictment of Pinochet in 2001, responded: "Yes, … It was like a vaccination: we Chileans got accustomed to him being locked up (so to speak), to seeing his case argued before the courts."[148] In a separate statement Judge Guzman noted that Pinochet's arrest in London

> gave the case international importance. Although political will and to an extent judicial will was lacking, the coverage in communications media worldwide was a powerful stimulus for judicial action in Chile. The judiciary could not remain indifferent in the face of such attention in the media. National justice and international justice forcefully complemented each other. Acting in conjunction, they achieved what was impossible to achieve.[149]

In a 2005 personal interview, Judge Guzman remarked that the English proceedings were an "essential prerequisite" that gave him the "power to act" against "Pinochet in Chile."[150]

The European proceedings gave the Chilean judiciary new power vis-à-vis other elements of the Chilean domestic government. One scholar, who has extensively interviewed key officials in Chile, notes that the proceedings in England "helped to break the spell that he [Pinochet] had cast over Chile" and "emboldened a judiciary previously admonished for deference towards the military dictatorship."[151] Another scholar has referred to the "Pinochet effect" whereby justice for human rights violations becomes a "transnational" process.[152] The European proceedings have also spurred a wider recognition of "the supremacy of international law over domestic law" that has recently manifested itself in a number of cases against Pinochet and others during his rule.[153]

The Pinochet case illustrates the ability of a foreign tribunal to legitimate a domestic court, increase its institutional power, and help activate previously unavailable judicial mechanisms. The proceedings in England and Spain had repercussions in Chile by making judicial officials believe that Pinochet could be brought to justice. They, in turn, strengthened the domestic judiciary in their battle with conservative elements in the government. At the same time, the cases in Spain and U.K. legitimated the Chilean Courts, they de-legitimatized Pinochet himself in the eyes of the Chilean people, who got used to seeing him as a criminal in a cell, thus breaking the spell of his perceived power and requisite immunity.

ii. The De-legitimating Effect

The second type of effect that arises through alterations in domestic power structures is de-legitimating. These effects occur when the existence or actions of a foreign tribunal shift power balances within a national government so as to undermine the position or influence of certain individuals within that government. Whereas legitimating effects are generally aimed at enhancing the influence or independence of institutions—such as the national judiciary—de-legitimating effects usually target individuals—such as sitting heads of government—who may either have perpetrated international crimes or are, for some reason, resisting the exercise of national jurisdiction. Early examples of such de-legitimating effects are the lustration policies adopted after World War II, after the fall of some Communist regimes in Eastern

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[147] For the most thorough treatment of these influences, see DAVID SUGARMAN, PURSUING PINOCHET: A GLOBAL QUEST FOR JUSTICE (forthcoming).
[148] David Sugarman, Resilience of the Judge Who Risked All to Indict Pinochet, TIMES (London), 19 February 2002.
[149] Judge Juan Guzman Tapia, A Free People Will Not Tolerate Incomplete Justice, Keynote Address at the Amnesty International Annual Report at Cardinal Raúl Silva Henríquez University in Santiago (25 May 2005), *available at* http://www.memoriayjusticia.cl/english/en_issues-guzman.html.
[150] Interview with Judge Juan Guzman Tapia, Prosecuting Magistrate for Santiago, Chile, in Princeton, N.J. (21 Oct. 2005).
[151] David Sugarman, Will Pinochet Ever Answer to the People of Chile, Times (London), 14 Sept. 2004, at 10.
[152] *See* NAOMI RIGHT-ARRIAZA, THE PINOCHET EFFECT: TRANSNATIONAL JUSTICE IN THE AGE OF HUMAN RIGHTS (2005).
[153] Memoria y Justicia, *Educating Judges on International Law*, 7 July 2004, *available at* http://www.memoriayjusticia.cl/english/en_memory_garreton.htm.

Europe, and pursued during the US occupation of Iraq.[154] These efforts are intended to undermine the legitimacy of members of former regimes and remove them from positions of power and influence.[155]

Lustration processes, however, have typically been domestic or undertaken by an occupying power, rather than conducted by an international tribunal or foreign court.[156] More recently, international criminal tribunals have had powerful de-legitimating effects, discrediting sitting governmental officials and expediting their exit from the political scene. Either through the indictment of particular individuals[157] or by drawing attention to international crimes in which such officials may be implicated,[158] foreign tribunals shift domestic power balances and may result in the decreased influence of targeted individuals or even broader changes of government.

The most direct way that a foreign criminal tribunal can have a de-legitimating effect is by issuing a criminal indictment. Arguably, the issuance of an indictment would fall within a court's legal, rather than political, effects as it does involve a formal judicial process. Yet, as indictments are not decisions on the merits, but rather preliminary expressions of potential criminal responsibility, they are deemed here to give rise to political effects. While the issuance of an indictment is unlikely to immediately and single-handedly lead to the removal of a sitting official from office, it can reshape domestic political alignments, giving opposition groups a new rallying point and potentially calling into question the status and stature of the indictee.

The operative pathway whereby an international court can have a de-legitimating domestic political effect is activated by altering the way in which representation occurs within the target state. In this model, the state is viewed as a disaggregated entity, made up of individuals and groups with particular interests, all of whom seek to control the government and to have their interest reflected in state policy.[159] Those interests with the greatest influence and power are also most likely to hold positions in the government or, at least, to have their preferences articulated as state policy. The issuance of an indictment or even the initiation of an investigation by a foreign court can then facilitate power shifts among coalitions of domestic interest groups. The indictment or investigation can provide new leverage for interest groups opposed to a current regime, buttressing their claims for control of the government. Similarly such an investigation or indictment can erode the support base of the indicted incumbent. An indictment can also alter the attitudes of third states, giving them stronger grounds for opposing a particular official. In situations in which governance is hotly contested, the political impact may be sufficient to facilitate regime change.

Two recent examples from international criminal tribunals—one from the ICTY and one from the Special Court for Sierra Leone—are illustrative of the de-legitimating political effect. On 22 May 1999, then ICTY Prosecutor Louise Arbour indicted Serbian President Slobodan Milosevic for crimes against hu-

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[154] *See* Council on Foreign Relations, *Iraq: Debaathification*, *available at* http://www.cfr.org/publication.php?id=7853. Recent concern has arisen at the possibility of debaathification undermining the new tribunal established to prosecute crimes in Iraq with the possibility of judges being removed from the bench due to past Baath Party connections. *See* Neil MacDonald, *Baathist Purge May Stall Hussein Trial*, CHRISTIAN SCI. MONITOR, 28 July 2005, at 6. McDonald observes that "nearly half of the judges still under threat of an anti-Baathist purge." *Id.* The possibility then exists that de-legitimating effects may also undermine the ability of national governments to exercise jurisdiction domestically, particularly where such efforts are targeted at a court or judicial institution.

[155] For a discussion, see Roman Boed, *An Evaluation of the Legality and Efficacy of Lustration as a Tool of Transitional Justice*, 37 COLUM. J. TRANSNAT'L L. 357, 357 (1999) (describing lustration as "a measure barring officials and collaborators of a former regime from positions of public influence in a country after a revolutionary change of government").

[156] A more recent example where a form of lustration was conducted by an occupying power is the de-Baathification programs adopted by the Coalition Provisional Authority in Iraq. *See* Order No. 1, 16 May 2003 on "The De-Ba'thificaiton of Iraqi Society" ("Individuals holding positions in the top three layers of management in every national government ministry, affiliated corporations and other government institutions (e.g., universities and hospitals) shall be interviewed for possible affiliation with the Ba`ath Party, and subject to investigation for criminal conduct and risk to security. Any such persons determined to be full members of the Ba`ath Party shall be removed from their employment.").

[157] For a discussion of how international criminal law has effectively rendered governments transparent, turning them "into an aggregation of individual officials performing specific functions, with each personally responsible for his or her actions," see Anne-Marie Slaughter & William Burke-White, *An International Constitutional Moment*, 43 HARV. INT'L L.J. 1, 14 (2002).

[158] For example, the visit of a tribunal's prosecutor to a particular country or region may have such an effect without the issuance of an actual indictment in a particular case. *See, e.g.*, MICHAEL IGNATIEFF, VIRTUAL WAR (2000) (discussing the visit of Louise Arbour, the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia to Kosovo).

[159] *See* Moravcsik, *supra* note 13**,** (discussing the second assumption of liberal international relations theory).

manity and war crimes.[160] The indictment was unsealed on 27 May 1999, during NATO air strikes against Serbia and two weeks prior to the signing of an agreement on the withdrawal of Serb forces from Kosovo. Arbour's decision to indict Milosevic was criticized at the time as potentially damaging to the settlement negotiations.[161] Arbour has suggested that part of her goal was to help end the conflict, noting a desire "to negotiate a deal for his [Milosevic's] departure" and thus bring about a settlement.[162] While it is likely impossible to isolate the impact of the indictment on the eventual settlement, it is noteworthy that, the very day after the indictment was unsealed, Milosevic met with Russian Prime Minister Viktor Chernomyrdin and reached a framework deal that would eventually result in the withdrawal of Serb troops from Kosovo.[163]

The de-legitimating effect of the Milosevic indictment also had a direct impact on Milosevic's eventual fall from power. After Milosevic's decade of rule in the Balkans, in 1999 an opposition group called Optor—the Serbian word for resistance—emerged in Belgrade. Its operative slogan was "He [Milosevic] is finished."[164] In the September 2000 elections, Milosevic lost the popular vote in a relatively free election and was removed from office.[165] Simultaneously, Serbian domestic courts initiated an investigation of Milosevic on corruption charges. Widespread protests in early October resulted in Milosevic's arrest. [166] Following pressure from the ICTY[167] and an ultimatum from the U.S. that foreign aid was conditional on Milosevic's transfer to the ICTY,[168] on 28 June 2001, he was sent to the Hague to face trial.

Clearly, Milosevic's decline was part of a far broader shift in Serbian politics. A number of factors—ranging from the war to economics—may have contributed to eventual regime change. Evidence suggests, however, that the ICTY indictment played at least a part in this process on both the international and domestic fronts.[169] Internationally, the indictment shifted the way Milosevic was viewed in the mainstream media. References changed from "President Milosevic" to "Indicted War-Criminal Milosevic."[170] Likewise, the indictment appears to have galvanized Western governments to provide significant aid for the conduct of a free election that would, they hoped, remove Milosevic from power.[171] In Madeleine Albright's words, the indictment sent the same signal NATO had been sending for two months: "those who perpetrate ethnic cleansing will end up failing to gain what they seek and losing what they have."[172] The indictment may also have tempered Russia's traditional support for its Balkan ally.

Domestically, the Optor resistance group utilized Milosevic's indictment as a political weapon, referencing the indictment in campaigns, literature and even graffiti.[173] By May 2001, tracking polls in Serbia showed that Milosevic's approval ratings had fallen to "66 percent unfavorable" and "only 17 percent

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[160] *See Prosecutor v. Slobodan Milosevic*, Case No. IT-99-37-PT, Kosovo Indictment, 22 May 1999. This indictment was subsequently amended to include charges of genocide in Kosovo and Bosnia. *See Prosecutor v. Milosevic*, Case No. IT-02-54-PT, Second Amended Indictment (Kosovo), 29 Oct. 2001; *Prosecutor v. Milosevic*, Case No. IT-02-54-PT, Amended Indictment (Bosnia), 21 Apr. 2004.

[161] Richard Sisk, *A Rush to Indict Slobo: Prosecutor Feared U.S. Would Let Him off Hook*, DAILY NEWS, 28 May 1998, at 8. It is likewise interesting to note that Arbour decided not to indict Milosevic earlier, during the negotiation of the Dayton Accords, as he was considered instrumental to reaching an agreement with the Serbs. *See* Simon Chesterman, *No Justice Without Peace? International Criminal Law and the Decision to Prosecute, in* CIVILIANS IN WAR 145, 151 (Simon Chesterman ed., 2001) (discussing Milosevic's role in the Dayton process); Danner, *supra* note 50, at 544. *See generally* RICHARD HOLBROOKE, TO END A WAR (1998) (providing a history of the Dayton process from the US viewpoint).

[162] Marlise Simons, *Proud but Concerned: Tribunal Prosecutor Leaves*, N.Y. TIMES, 15 Sept. 1999, at A3 (quoting Arbour: "I thought we might miss out as peace was being discussed. I thought he might be able to negotiate a deal for his departure").

[163] CHRIS STEPHEN, JUDGMENT DAY: THE TRIAL OF SLOBODAN MILOSEVIC 145 (2004).

[164] *See* Stephen, *supra* note 162, at 155–56 (2004).

[165] Stephen, *supra* note 162, at 159. The voting was 52% - 35% in favor of Kostunica.

[166] *Id.* at 162.

[167] In January 2001 ICTY Prosecutor Carla del Ponte traveled to Belgrade to secure the transfer of Milosevic. Her efforts failed. *See id.* at 161.

[168] *Id.* at 163.

[169] *See* Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities*, 95 AM. J. INT'L L. 7, 9 (suggesting that "the ICTY helped to de-legitimize Milosevic's leadership"). For a discussion of his fall from power, see generally LOUIS SELL, SLOBODAN MILOSEVIC AND THE DESTRUCTION OF YUGOSLAVIA (2002) (describing the end of the Milosevic regime).

[170] *See, e.g.*, Stephen Erlanger, *Crisis in the Balkans; Milosevic Gets Draft*, N.Y. TIMES, 3 June 1999, at A14; Blaine Harden, *Surprising Lesson: Bombing Can Work*, N.Y. TIMES,5 June 1999, at A6.

[171] The electoral victory over Milosevic was assisted by $77 million in US aid to the Serbian Center for Free Elections and Democracy. *See* Mary H. Meier, *How Milosevic's 'Unreality' Became Yugoslavia's Tragedy*, BOSTON GLOBE, 29 Mar. 2002, at F22.

[172] MADELEINE ALBRIGHT, MADAM SECRETARY 419 (2003).

[173] *See* SELL, *supra* note 168.

favorable."[174] The net result, as Mary Robinson, then UN High Commissioner for Human Rights, observed was "Milosevic is no longer a respected figure in Serbia."[175] Even if his trial is remembered for his grandstanding and untimely death, "the prosecution has managed to get him out of Balkan politics once and for all."[176] While it may be difficult to conclusively show the indictment's causal role, Harold Koh argued that "Bosnia . . . taught that indictment alone can be a valuable political tool."[177]

A second example of the de-legitimating effects of foreign tribunals is the March 2003 indictment by the Special Court for Sierra Leone of then Liberian President Charles Taylor for crimes against humanity and war crimes.[178] The Special Court—a hybrid with jurisdiction over crimes in the territory of Sierra Leone—reached beyond its own borders, indicting Taylor for crimes he committed as a sitting head of state in Liberia, but with effects in Sierra Leone.[179] An arrest warrant for Taylor was unsealed in June 2003 when he was in Ghana for peace negotiations.[180] Though Taylor was not arrested by Ghanaian authorities, he immediately returned to Liberia.[181] By August 2003, Taylor had left office, fleeing to Nigeria where he had been promised safe-haven.

Evidence again suggests that Talyor's decisive actions immediately following the issuance of the arrest warrant are, at least in part, a result of the de-legitimating influence of the Special Court. Again, it is not possible to show actual causation, but commentators suggest that the indictment helped bring both domestic and international pressure to bear on Taylor, prompting his early departure.[182] Domestically, as soon as Taylor returned from Ghana, Monrovia erupted in chaos, with "people fleeing the city in the thousands and troops taking to the streets"[183] in what may have been a failed coup attempt.[184] The indictment may well have disrupted peace negotiations that would have kept Taylor in power. Once the arrest warrant was issued, the main rebel group, Lurd, suddenly became "uncomfortable with the arrangements" for negotiations and the other rebel group, Model, postponed "an agreement to come" to the talks.[185] The local Monrovian newspaper, *The News* called for Taylor's ouster, demanding a "restor[ation] of credibility" for the country.[186] The indictment likewise seems to have hindered Taylor's negotiating position. As he told journalists, "if this peace process is to succeed, this indictment has to be removed."[187] The eventual peace accord brokered in mid-June explicitly required Taylor to step down within thirty days.[188] In early July, hundreds took to the streets in Monrovia calling for Taylor's resignation and noting the indictment by the Special Court.[189] By 4 July, Taylor committed to leave office as soon as an interim government was in place[190] and, despite delays, went into exile in Nigeria on 11 August 2003.

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[174] Gary Bass, *Milosevic in the Dock*, FOREIGN AFF., May/June 2003, at 82.
[175] Mary Robinson, cited in Bass, *supra* note 173, at 82.
[176] Bass, *supra* note 174. Harold Koh offers another perspective: "Although two of the leading architects of ethnic cleansing in Bosnia, Radovan Karadzic and Ratko Mladic, have not yet been brought to trial, their indictment before the Yugoslav tribunal has effectively removed them from political life, creating space for more moderate political forces to emerge." Harold Hongju Koh, *On America's Double Standard; The Good and Bad Faces of Exceptionalism*, AM. PROSPECT, Oct. 2004, at 115.
[177] Koh, *supra* note 15, at 115.
[178] *See* Prosecutor v. Charles Ghankay Taylor, Indictment, Case No. SCSL-2003-01-I, 3 Mar. 2003 (Sierra Leone), *available at* http://www.sc-sl.org/SCSC-03-01-I-001.pdf.
[179] *See* Prosecutor v. Charles Ghankay Taylor, Indictment, SCSL-2003-01-I, 7 Mar. 2003 (Sierra Leone), *available at* http://www.sc-sl.org/Documents/SCSC-03-01-I-001.pdf.
[180] See Cesare P.R. Romano & André Nollkaemper, *The Arrest Warrant Against the Liberian President, Charles Taylor*, ASIL INSIGHTS, June 2003, http://www.asil.org/insights/insigh110.htm.
[181] Paul Welsh, *Liberian Leader's Strange Day in Ghana*, BBC NEWS, http://news.bbc.co.uk/1/hi/world/africa/2965110.stm (last updated 5 June 2003).
[182] *See* Jamie O'Connell, *Where Interest Meets Humanity: How to End the War and Support Reconstruction in Liberia, and the Case for Modest American Leadership*, 17 HARV. HUM. RTS. J. 207, 218 (2004) (discussing U.S. pressure on Taylor to leave the country).
[183] *Liberia Chaos as Leader Returns*, BBC NEWS, http://news.bbc.co.uk/1/hi/world/africa/2964098.stm (last updated 5 June 2003).
[184] *Liberia Coup Attempt Foiled*, BBC NEWS, http://news.bbc.co.uk/1/hi/world/africa/2966186.stm (last updated 5 June 2003).
[185] *Liberia Chaos Threatens Talks*, BBC NEWS, http://news.bbc.co.uk/1/hi/world/africa/2964970.stm (last updated 5 June 2003).
[186] *Liberia's Taylor in Accra Ambush*, BBC NEWS, http://news.bbc.co.uk/1/hi/world/africa/2969568.stm (last updated 6 June 2003).
[187] *Liberia Leader Wants Charge Lifted*, BBC NEWS, http://news.bbc.co.uk/1/hi/world/africa/2980710.stm (last updated 12 June 2003).
[188] *Liberian Foes Sign Ceasefire*, BBC NEWS, http://news.bbc.co.uk/1/hi/world/africa/2995812.stm (last updated 17 June 2003).
[189] *Liberians March Against Taylor*, BBC NEWS, http://news.bbc.co.uk/1/hi/world/africa/3040268.stm (last updated 3 July 2003).
[190] *Liberia Leader Offers to Go*, BBC NEWS, http://news.bbc.co.uk/1/hi/world/africa/3044220.stm (last updated 4 July 2003)

Equally, the indictment de-legitimated Taylor internationally. A number of West African newspapers used the opportunity of Taylor's arrest warrant to condemn him, with *The Statesman* in Ghana calling Taylor an "African sham" and *Le Temps* in the Ivory Coast noting that the indictment was the "beginning of the end for the master of Monrovia."[191] The Sierra Leone *Standard Times* openly backed the Special Court's indictment and Nigeria's *Guardian* lauded the fact that Taylor's "past is catching up with him."[192] The international press took to referring to Taylor as having been "indicted as a war crimes suspect."[193] The U.N. ratcheted up pressure[194] and US President Bush called on Taylor to leave office, noting "President Taylor needs to step down, so that his country can be spared further bloodshed."[195] Following a request by the Special Court, the Swiss government froze Taylor's numbered accounts in Switzerland, limiting his access to foreign funds.[196]

In the rhetoric of his departure speech Taylor claimed "no-one can take credit for asking me to step down."[197] Yet, in reality, it appears the indictment by the Special Court played an important role. As one commentator observed, "the military situation and Taylor's indictment by the Special Court for Sierra Leone, announced in June, brought enough pressure to force Taylor to flee to exile in Nigeria in August."[198] Michael Reisman has described the indictment as "a clear example of purposive international regime change."[199] Whether or not this de-legitimating effect has broader applicability outside extremely weak states is debatable, but at least in Liberia, the indictment by the Special Court helped de-legitimate Taylor's rule and contributed to his departure from the political scene.

C. Altering the Transnational Power Balance

A third pathway of influence in the typology presented above is activated when an international court changes the transnational power balance. Whereas the first two pathways—changes in the incentives of domestic actors and shifts in domestic power structures—result in structural changes within the government of the target state, this third pathway instead focuses on the way foreign tribunals can influence the pressures being exerted by third states on a target state. Particularly where a powerful third state tries to block action by a target state's domestic judiciary, the foreign tribunal can help alleviate that pressure, allowing the target state to exercise jurisdiction domestically. The major political effect resulting from this pathway is cost-externalization.

i. Cost-Externalization Effects

The prosecution of international crimes often involves significant political costs for the state exercising jurisdiction, particularly where the accused is a citizen of some third state or has close ties to that state. In such cases, the third state will often attempt to use its political power to block action by the national judiciary of the first state. Where the state trying to block prosecution is politically, economically, or militarily strong, it may succeed in preventing action by the judiciary of the first state. The intervention of a foreign or international tribunal facilitates the externalization of the political costs of prosecution and allows a national government to undertake otherwise impossible prosecution. The cost-externalization effect of

[191] *Liberia's Taylor in Accra Ambush*, *supra* note 210.
[192] *Africa Media Watch*, BBC NEWS, http://news.bbc.co.uk/1/hi/world/africa/3006120.stm (last updated 20 June 2003).
[193] Liberian Foes Sign Ceasefire, *supra* note 212.
[194] Though not directly tied to the indictment, on 2 August the UN Security Council authorized the deployment of a multinational force to Liberia, adding pressure on Taylor to leave. *UN Approves Force for Liberia*, BBC NEWS, http://news.bbc.co.uk/1/hi/world/africa/3118363.stm (last updated 2 Aug. 2003).
[195] *Bush Tells Liberian Leader to Go*, BBC NEWS, http://news.bbc.co.uk/1/hi/world/africa/3024594.stm (last updated 26 June 2003). The U.S. State Department lashed out at Taylor calling him a "destructive force" and in the words of Richard Boucher, a "catalyst for much of the violence in Liberia." *Taylor Defies Calls to Quit Liberia*, BBC NEWS, http://news.bbc.co.uk/1/hi/world/africa/2970970.stm (last updated 7 June 2003).
[196] *Swiss Freeze Taylor Accounts*, BBC NEWS, http://news.bbc.co.uk/1/hi/world/africa/3012978.stm (last updated 23 June 2003).
[197] *Taylor's New Nigerian Home*, BBC NEWS, http://news.bbc.co.uk/1/hi/world/africa/3142101.stm (last updated 11 Aug. 2003).
[198] *Nigeria Defends Taylor Exile*, BBC NEWS, http://news.bbc.co.uk/1/hi/world/africa/3142659.stm (last updated 12 Aug. 2003). After a considerable period of exile in Nigeria, Taylor was repatriated to Liberia and then transferred to The Hague in June 2006 to face trial before a special bench of the Special Court for Sierra Leone to sit at the premises of the International Criminal Court.
[199] W. Michael Reisman, *Why Regime Change is (Almost Always) a Bad Idea*, 98 AM. J. INT'L L. 516, 517 (2004).

foreign courts can thus promote the exercise of jurisdiction at the national level by shifting the political costs of national action onto a foreign court or the international community.

The cost-externalization effect is of particular significance for weak states that may be more susceptible to pressures from their powerful neighbors. States with limited capacity, fragile institutions, and weak governments may be more vulnerable to external threats and have greater need for the political cover that foreign courts may offer.[200] This is often the case when states are recovering from governmental collapse, civil war, ethnic strife or other conflict. In these circumstances, the foreign court may buttress the national government and allow it to act, even in the face of contrary pressure from a powerful neighbor.

Cost-externalization effects often arise in the context of a hybrid tribunal with a mix of national and international judges. A hybrid tribunal may offer the national government political cover vis-à-vis the resistant third state. By virtue of the hybrid having foreign judges and international involvement, the national government can distance itself—at least slightly—from the tribunal and can pass on some of the political costs of prosecution to the international community. This, in turn, expands the win-sets available to national governments facing foreign pressure not to prosecute, allowing accountability through the hybrid entity.

The cost-externalization effect operates with respect to two different audiences—one domestic and one foreign. Where key domestic interest groups within the state are opposed to prosecution, the national government may be able to convince that audience that the actions were undertaken by the international or hybrid court, as distinct from the government itself. This may result in changes to the way interest groups within the state perceive of the particular action, with any negative political repercussions directed at the international community, rather than the national government.[201]

The cost-externalization effect can also have a purely international dimension when a domestic government seeks to prosecute but is blocked by pressure from a powerful neighboring state. In this situation, the domestic government may use a hybrid tribunal to again distance itself from the prosecution and use the international element of the tribunal as a buffer between it and the pressure from the powerful neighbor. The result is to alter the "policy interdependence" or "the set of costs and benefits created for foreign societies when dominant social groups in a society seek to realize their preferences."[202] The international or hybrid court can increase the costs on the neighboring state for resisting domestic action by the first state or shift the neighboring state's response from the domestic government of the first state to the international community at large.

An example of the cost-externalization political effect is evident in the operation of the Special Panels established by the United Nations Transitional Administration in East Timor (UNTAET) to prosecute international crimes during the 1999 conflict following a referendum on independence from Indonesia.[203] UNTAET was empowered by the UN Security Council to exercise all political authority in East Timor. [204] 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.[205] At the end of the period of UN Administration of East Timor, the Constituent Assembly of East Timor decided to continue the operation of the Special Panels for a limited

[200] For a discussion of weak states, see WEINSTEIN, PORTER & EIZENSTAT, *supra* note 58.
[201] In the context of an ad hoc tribunal, for instance, the significant dissatisfaction in Rwanda with the ICTR was directed at the international community, not the Rwandan government. For a discussion, see José E. Alvarez, *Crimes of State/Crimes of Hate: Lessons From Rwanda*, 24 YALE J. INT'L L. 365, 365-380 (1999). Admittedly, the ICTR is a purely international court, but in the context of a hybrid tribunal, lines may become sufficiently blurred that that political costs are born by the international community, not the national government.
[202] Moravcsik, *supra* note 13, at 520.
[203] For a more detailed discussion, see William W. Burke-White, *A Community of Courts: Toward a System of International Criminal Law Enforcement*, 24 MICH. J. INT'L L. 1, 38–45 (2002).
[204] United Nations Transitional Administration in East Timor, Regulation No. 1999/3, On the Establishment of a Transitional Judicial Service Commission, § 1, U.N. Doc. UNTAET/REG/1999/3 (3 Dec. 1999).
[205] *See* United Nations Transitional Administration in East Timor, Regulation No. 2000/11, On the Organization of Courts in East Timor, §§ 10.1, 10.3, U.N. Doc. UNTAET/REG/2000/11 (6 Mar. 2000).

period under the new constitution. Even though, under the power of the East Timorese Ministry of Justice, the Special Panels continued to operate as a hybrid court through mid May 2005.[206] By applying international, as well as domestic, law and relying on both national and international judges, the Special Panels retained their quasi-international character, with their decisions reflecting the views of both East Timorese and international judges.

The Special Panels have had a pronounced cost-externalization effect in East Timor by shifting much of the political cost of prosecution away from the national government. Indonesia is a powerful neighboring state and the former occupying power in East Timor.[207] Many of those involved in crimes against humanity in East Timor were Indonesian citizens or members of pro-Indonesian forces with strong ties to Jakarta. The Indonesian government has expressed a clear policy preference against the prosecution of crimes committed during the conflict, has failed to undertake serious investigations of its own, and has been reluctant to cooperate with the Special Panels in Dili.[208] The Indonesian government has been intent on protecting its own and has put serious pressure on East Timor to end investigations. By virtue of the hybrid nature of the Special Panels, in its relations with Indonesia, the East Timorese government has been able to cite the international presence as the driving force behind prosecution. Moreover, by having two international judges on each panel and applying international law, East Timor has been able to "blame" the internationals and distance itself from decisions affecting Indonesian suspects. As one human rights officer in East Timor observed in 2002, "[it is] politically much easier to have the UN 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."[209] The result has been the conviction of eighty-nine individual defendants during the five year operation of the Special Panels, even in the face of pressure from Indonesia.[210]

D. Pressuring Criminal Perpetrators

The fourth pathway of influence whereby a foreign tribunal can have a political effect on a target state is by directly pressuring criminal perpetrators within the target state. The focus of the pressures that arise through this pathway is not on governmental or judicial officials, but instead on the actual perpetrators of international crimes within the jurisdiction of the foreign court. The existence of a foreign tribunal with concurrent jurisdictional claims may alter the cost-benefit calculations for international criminals as the potential of prosecution goes from being a distant possibility to a meaningful likelihood. Though such

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[206] *See* Press Release, Judicial System Monitoring Program, The Special Panels for Serious Crimes Hear Their Final Case (20 May 2005), http://www.jsmp.minihub.org/Court%20Monitoring/SPSC/Documents/2004/01-2004%20Sisto%20Barros%20et%20al/2005-12%20JU%20Eng.pdf.

[207] For a discussion, see Case Concerning East Timor (Austl. v. Port.), 1995 I.C.J. 90 (13 June), *available at* http://www.icj-cij.org/icjwww/icases/ipa/ipa_isummaries/ipa_isummary_19950630.htm.

[208] Though a limited human rights tribunal is finally sitting in Jakarta, the government of Indonesia has taken every possible opportunity to delay proceedings. 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, 14 Mar. 2002 (discussing Indonesian cooperation with the Special Panels in East Timor); *Trial Begins in Indonesia This Week for East Timor Crimes*, ASSOCIATED PRESS, 10 Mar. 2002, http://iiasnt.leidenuniv.nl (noting the "long delayed trials"). Indonesia's preference for impunity has been further evidenced by its systematic failure to cooperate with the UNTAET judiciary. Suzannah Linton, *Cambodia, East Timor and Sierra Leone: Experiments in International Justice*, 12 CRIM. L.F. 185, 223 (2001) (describing an "atmosphere of hostility and unwillingness to cooperate"). 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, Indonesia has repeatedly refused to hand over suspects for prosecution. For a more detailed discussion, *See* Burke-White, *supra* note 202, at 50.

[209] Interview with Jim Coy, Human Rights Officer, UNTAET, in Dili, E. Timor (15 Jan. 2002).

[210] *See* Press Release, *supra* note 230. Note, however, that the quality of justice was often questionable, with serious inadequacies particularly in the area of defense rights. For a discussion, see Judicial System Monitoring Program, Background Paper on the Justice Sector (4 June 2003), http://www.jsmp.minihub.org/Reports/jsmpreports/JSMP%27s%20Bacground%20paper.htm. The cost externalization afforded by the hybrid nature of the Special Panels was, in large part, facilitated by the international presence in East Timor. With independence in 2002 and the withdrawal of the international mission in May 2005, that international presence declined sharply, with reductions in staff and funding. The termination of international involvement in 2005 has led to the closure of the Special Panels and the International Serious Crimes Unit in Dili. East Timore's decision not to continue these prosecutions on a purely national basis after May 2005 may be due, in part, to continued pressure from Indonesia and East Timor's reduced ability to externalize political costs after the end of the UN mission. For a discussion of East Timor's ongoing differences with Indonesia on justice issues, see *id.* For a discussion of the end of the Special Panels, see International Center for Transitional Justice, The Serious Crimes Process in Timor-Leste: In Retrospect (April 2006), http://www.ictj.org/en/news/pubs/index.html; International Center for Transitional Justice, Justice Abandoned? An Assessment of the Serious Crimes Process in East Timor (June 2005), http://www.ictj.org/en/news/pubs/index.html.

individuals may still believe apprehension to be highly unlikely,[211] the mere possibility of a prosecution by a foreign tribunal, when national courts have long been unable or unwilling to act, may alter their incentives and even change their behavior. Two distinct sub-effects are possible when international criminals suddenly find themselves under new legal pressure: stabilizing effects and destabilizing effects.

i. Stabilizing Effects

A stabilizing effect occurs when the existence of a foreign tribunal promotes the stability of a fragile domestic situation by deterring international criminals from committing further crimes. Stabilizing effects can be the result of pure deterrence, political incapacitation, or a socialization of human rights norms. A foreign tribunal with concurrent jurisdictional claims can directly influence the actions of international criminals by deterring them from the commission of future crimes. The deterrent effect of the criminal law has long been a subject of legal study and need not be reexamined here.[212] What is new in these cases is that a criminal perpetrator suddenly goes from facing a minimal chance of prosecution, given that national courts have not been willing to act, to facing a meaningful threat of prosecution by a foreign tribunal.[213]

The potential for such criminal sanction may push individuals toward compliance with underlying substantive legal regulations. A simple carrot-and-stick analysis of deterrence suggests that a perpetrator will determine whether to engage in a crime by calculating whether the benefits of that activity outweigh the likelihood of punishment multiplied by the costs of punishment.[214] The existence of the foreign tribunal should increase the likelihood of punishment and thereby change the cost-benefit calculation in favor of restraint from criminal conduct.[215] International crimes often occur in the context of weak states that may already be at risk of governmental collapse or domestic turmoil. In these cases, continued criminal conduct could well lead to state collapse. The deterrent effect of foreign courts can thereby afford a means of reducing the occurrence of international crimes and promoting political stability.

The stabilizing influence may also arise when a foreign tribunal removes certain powerful individuals from the political scene in a target state. Individuals may be indicted or even arrested and hence barred from political activity. Even if not formally indicted, the potential for such an indictment by a foreign tribunal may push individuals out of the public space and into hiding. Payam Akhavan's study of the ICTY's effects in Bosnia & Herzegovina, for example, indicate that the tribunal "helped to marginalize nationalist political leaders and other forces allied to ethnic war and genocide, to discourage vengeance by victim groups, and to transform criminal justice into an important element of the contemporary international agenda."[216] The result has been a reshaping of "the civic landscape and … the ascendancy of more moderate political forces."[217] For example, even though Ratko Mladic and Radavan Karadic remain at large, they have been effectively neutralized as political forces. Similarly, the arrest on 3 April 2000, of Momcilo Krajisnik, a leader of the Serb campaign of ethnic cleansing, removed an "ultranationalist still

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[211] The examples of Rodavan Karadzic and Ratko Mladic who remain at large years after indictments by the ICTY add credence to this belief structure. *See Profile: Radovan Karadzic*, BBC NEWS, http://news.bbc.co.uk/1/hi/world/europe/876084.stm (last updated 6 June 2005); *Profile: Ratko Mladic*, BBC NEWS, http://news.bbc.co.uk/1/hi/world/europe/1423551.stm (last updated 6 June 2005).

[212] *See, e.g.*, JOHANNES ANDENÆS, PUNISHMENT AND DETERRENCE (1974) (providing a traditional account of the logic of criminal deterrence); DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES (Alfred Blumstein, Jacqueline Cohen & Daniel Nagin eds., 1978) (examining how punishments impact criminal behavior).

[213] For a consideration of the potential deterrent effect of a foreign tribunal such as the ICC, see Michael L. Smidt, *The International Criminal Court: An Effective Means of Deterrence?*, 167 MIL. L. REV. 156, 156-158 (2001) (suggesting the ICC may not have a deterrent effect on international war crimes).

[214] For an example of this approach in interstate compliance, see George W. Downs et. al.., *Is the Good News About Compliance Good News About Cooperation?*, 50 INT'L ORG. 379, 383 (1996).

[215] *See* Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Deter Future Atrocities*, 95 AM. J. INT'L L. 7, 12 (2001) (observing that "the threat of punishment may persuade potential perpetrators to adjust their behavior").

[216] *Id.* at 10.

[217] *Id.*

active on the Bosnian political stage."[218] The ICTY's indictments have at least contributed to "the moderation of Bosnian Serb politics" and the stabilization of the country.[219]

In its most attenuated form, the existence of a foreign tribunal may reshape the culture of the target state or even the identities of criminal perpetrators, dissuading them from future crimes. Through constructive processes of socialization and norm internalization,[220] the foreign tribunal's values (often the liberal concepts of legality and accountability)[221] may alter identities of actors, including criminal perpetrators, in target states.[222] Thomas Risse and Kathryn Sikkink have observed, "international norms are internalized and implemented domestically . . . [through a] process of socialization."[223] This appears to have happened in the Balkans, where the ICTY has helped promote "a new reality of habitual lawfulness."[224] Overtime, for example, Serb leadership in the former Yugoslavia has moved from open hostility toward the ICTY to grudging acceptance. In fact, in October 2000, Vojaslav Kostunica remarked that the prosecution of Milosevic was necessary and would contribute to "national reconciliation between those in power and those not in power."[225] Though it remains difficult to show a causal link between a foreign court and domestic value shifts, Akhavan and others suggest the ICTY played an important role in recreating national identities and even those of criminal perpetrators themselves, thereby contributing to the stabilization of the country.[226]

ii. Destabilizing Effects

The second political effect that can result when an international or foreign court pressures criminal perpetrators is the destabilizing effect—the inverse of the stabilizing effect. Whereas the stabilizing effect assumed the threat of prosecution would deter criminal conduct, the destabilizing effect recognizes the possibility that such a threat may lead criminals to defect from a peace agreement so as to avoid apprehension or increase the stakes of judicial activity against them. In such cases, the result of the foreign tribunal's actions may be defections from a peace agreement, destabilization, and possibly even state failure.

Depending on its future direction, the ICC investigation in the DR Congo may have a potentially destabilizing effect on the present peace process. Some governmental officials, particularly those who perceive a meaningful threat of prosecution from the ICC, have threatened to defect from the peace agreement and return to the rebel stronghold in the eastern part of the country if they are indicted. For example, Vice Presidents Jean Pierre Bemba of the MLC rebel group and Azarias Ruberwa of the RCD group are among the possible first indictees of the ICC in Congo as various reports to the Prosecutor have implicated them personally in war crimes and crimes against humanity.[227] Reports suggest that Bemba and Ruberwa are both concerned by the possibility of prosecution and have spoken openly of restarting the war should such

[218] *Id.* at 8.
[219] *Id.* at 16.
[220] For a discussion of identity construction in international politics, see ALEXANDER WENDT, SOCIAL THEORY OF INTERNATIONAL POLITICS (1999).
[221] Garry Bass argues that most foreign courts are the product of the ideas of legality of liberal states. *See* GARY JONATHAN BASS, STAY THE HAND OF VENGEANCE (2000).
[222] Harold Koh has offered one possible pathway of such change through his idea of the transnational legal process. *See* Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623, 678 (1998) (suggesting a "constructive role" for "international law"). For an application to the criminal law, see Johannes Andenæs, *The General Preventive Effects of Punishment*, 114 U. PA. L. REV. 949, 949 (1966).
[223] Thomas Risse & Kathryn Sikkink, *The Socialization of International Human Rights Norms into Domestic Practices: Introduction*, *in* THE POWER OF HUMAN RIGHTS, *supra* note 44, at 1, 5.
[224] Akhavan, *supra* note 214, at 13.
[225] *Kostunica Views Opposition, Elections, Milosevic*, FBIS Doc. EUP20000417000289 (17 Apr. 2000) (trans. of NIN (Belgrade), 13 Apr. 2000), *cited in* Akhavan, *supra* note 214, at 18.
[226] *See generally* Akhavan, *supra* note 214.
[227] *See* James Astill, *Congo Cannibalism Claim Provides First Challenge*, GUARDIAN (London), 11 Mar. 2003, at 14. The possible connections between Ruberwa, Bemba, and crimes within ICC jurisdiction is not surprising, considering that both men were in direct control of rebel forces alleged to have committed war crimes and crimes against humanity in eastern Congo up till the mid-2003 peace settlement. With respect to Ruberwa, see James Astill, *Fighters Now Hold Their Punches in Muhammad Ali's Congo Hotel*, GUARDIAN (London), 25 Sept. 2003, at 21 (noting that Ruberwa is "the former leader of a brutal Rwandan-backed rebel group" and "perhaps the most loathed man in Congo").

action become imminent.[228] Such a defection would cause the imminent collapse of the peace process and the destabilization of the state.

The ICC's investigation in Uganda has also had a potentially destabilizing effect on a peace process. Although negotiations between the Government of President Museveni and the Lord's Resistance Army began in early 2005, they stalled in late spring over the issue of an amnesty grant, after the ICC launched an investigation of Joseph Kony and other LRA commanders.[229] Many Ugandans have advocated "giving forgiveness more of a chance" and are opposed to an ICC investigation because it may disrupt the peace process.[230] One observer noted, "the local people will suffer if the rebel command feels cornered."[231] To the degree that the ICC makes prosecution of the LRA leadership unavoidable, its actions may cause Korny and others to defect from the peace process.

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The proceeding section has sought to demonstrate that a range of political effects operating through four distinct pathways of influence have emerged within the system of multilevel global governance. Foreign and international tribunals can and do wield political influence over individuals, institutions, and governments in the states over which they exercise criminal jurisdiction. When such effects operate, international and domestic courts prosecuting international crimes can no longer be seen as autonomous and unrelated entities, but rather are part of a complex and interconnected system of international criminal law enforcement. What remains to be seen, however, is how these effects actually operate in the richer context beyond the mini-case studies presented here and, whether, from a normative perspective, these effects are a positive or negative development.

III. POLITICAL EFFECTS AND THE EFFECTIVENESS OF FOREIGN TRIBUNALS

The preceding part has shown that foreign and international courts have powerful political reverberations in target states. Some of these political effects may promote the operation of domestic judicial institutions, deter international crimes, or de-legitimate international criminals. Other political effects, however, may have a darker side. They may inhibit domestic accountability or jeopardize weak states. The mere existence of political effects does not alone imply that the existence of or exercise of jurisdiction by a foreign tribunal will promote criminal accountability or enhance the operation of the system.

If political effects are to be understood and utilized as part of the multilevel system of international criminal law enforcement, normative questions about their relationship to the effective operation of that system must be posed. In many cases it may not be possible to predict with any certainty the direction a foreign tribunal's political effects and the impact of any particular political influence on the effectiveness of the system. Yet, an analysis of these effects can offer some generalizations about whether, and how, they can be strategically employed to promote the more effective enforcement of international criminal law.

A. Defining Effectiveness in a Political Context

Whether or not foreign and international tribunals are deemed effective depends, in large measure, on normative choices about the purpose of international criminal law. A range of different values has been

[228] One observer notes that Bemba and Ruberwa are now asking "maybe me too" when they think about the ICC. Interview with Raphael Wakenge, Initiative Congolaise du Justice et Paix, in Bukavu, Dem. Rep. Congo (30 Oct. 2003).
[229] *See* Melanie Thernstorm, *Charlotte, Grace, Janet, and Caroline Come Home*, N.Y. TIMES, 8 May 2005, § 6, at 34.
[230] Lacey, *supra* note 119.
[231] *Id.*

suggested as the ultimate goal of international criminal law enforcement,[232] from deterrence[233] to incapacitation,[234] from reconciliation[235] to community restoration.[236] The political effects of foreign tribunals may, at times, promote any or all of these values. Hence, to judge political effects with respect to any particular one of these values does not provide an adequate ground for differentiating the potential impact of such effects. A broader measure of the purpose of international law enforcement and, particularly, the role of foreign tribunals in that process, is therefore needed.

A number of definitions of the effectiveness of international courts and tribunals have emerged in recent scholarship at the intersection of international law and politics. Slaughter and Helfer, for example, define effectiveness as the ability of a supranational tribunal "to compel compliance with its judgments by convincing domestic government institutions, directly and through pressure from private litigants, to use their power on its behalf."[237] The merit of this definition is that it recognizes that supranational tribunals exist in relationships with "citizens and subjects of domestic governments."[238] A weakness in Slaughter and Helfer's definition is that it limits the measured effectiveness of supranational tribunals to the ripple effect their legal decisions have on domestic governments. This definition fails to capture a tribunal's political effects.

Posner and Yoo have recently suggested an alternate definition of effectiveness based on state compliance with judgments, usage, and overall success of a treaty regime.[239] They assert a tribunal should be deemed more effective if "the number of complied with judgments divided by the total number of judgments" is high, if it is frequently used by states, and if the treaty regime in which it is embedded is largely successful.[240] This definition is likewise unhelpful in examining political effects because it links effectiveness to state compliance with a tribunal's legal judgments.

To assess political effects, an alternate measure of effectiveness is needed. The definition developed here avoids having to make a choice among alternate purposes of international criminal justice and, instead, accepts the preexisting normative choices of states as articulated in their international legal commitments. Specifically, effectiveness is measured as a function of the degree to which political effects promote compliance with underlying substantive legal obligations of both states and individuals. In the international criminal context, state obligations include (1) the prohibition of the commission of international crimes, (2) duties (where they exist) for states to exercise jurisdiction over supposed international criminals, and (3) any other duties states or individuals may have pursuant to treaty or customary obligations such as a peace agreement. Individuals, in turn, have direct international legal duties not to commit international crimes.

In light of these obligations, a wider definition of effectiveness is used here so as to capture the political effects of an international or foreign tribunal. In this broader context, effectiveness is defined as the ability of a tribunal to influence or alter the behavior of a target state or individuals within that target state toward compliance with substantive legal obligations. The political influences of foreign tribunals will be considered effective when they alter state behavior in favor of compliance. The benefit of this definition is that it offers an external standard—namely the relative legal obligations of the target state—and cap-

[232] For a discussion of the range of purposes of transitional justice, see RUTI G. TEITEL, TRANSITIONAL JUSTICE (2000); Eric A. Posner & Adrian Vermeule, *Transitional Justice as Ordinary Justice*, 117 HARV. L. REV. 761 (2004).
[233] *See* Mirjan Damaska, *The Shadow Side of Command Responsibility*, 49 AM. J. COMP. L. 455, 471 (2001) (noting "the special deterrence needs of international criminal justice"); *see also* Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 87 (noting the collective goal of deterrence).
[234] For the leading discussion of incapacitation, see JAMES Q. WILSON, THINKING ABOUT CRIME (1975).
[235] *See generally* MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS 1 (1998) (offering reconciliation based approach to transitional justice).
[236] *See generally* TRUTH V. JUSTICE (Robert I. Rotberg & Dennis Thompson eds., 2000).
[237] Helfer & Slaughter, *supra* note 9, at 290.
[238] *Id.* at 289–90.
[239] *See* Poser & Yoo, *supra* note 10, at 40–41. Though they admit their criteria for effectiveness are "highly imperfect," a significant problem with Poser and Yoo's approach is that there is slippage between the different dimensions of their definition in their empirical work.
[240] *Id.* at 40–41.

tures even the more attenuated political effects of foreign and international tribunals. Obviously, this definition will strike some as inappropriate and reaching beyond the traditional mandate of a court. Yet, the definition is appropriate for the limited purposes here of judging the significance of political effects for the broader system of international criminal law enforcement.

B. Enhancing the Effectiveness of International Criminal Law Enforcement

From a systemic perspective, the question becomes whether political effects help international and foreign courts exercising criminal jurisdiction achieve this goal of promoting state and individual compliance with substantive legal obligations. Where such effects promote compliance with legal obligations, they ought to be considered effective. Where, in contrast, political effects inhibit compliance, they should be viewed as normatively unwelcome.

While this definition of effectiveness provides an objective measure against which the political effects of a foreign tribunal can be judged, it does not provide clear guidance as to when and if a court's political effects will promote compliance with substantive legal obligations. In fact, each of the political influences discussed above could be either effective or ineffective, depending upon the particular institutional structure and political context in which they operate. Yet, some general conclusions can be drawn about the impact of political effects of foreign tribunals.

Generally speaking, catalytic, cost-externalizing, stabilizing, legitimating and de-legitimating effects will promote compliance with underlying legal obligations. Where these effects result in the activation of national judicial systems or enhance the status of domestic courts, they promote compliance with state obligations to prosecute international crimes. Where they result in the removal from power of international criminals, they further legal obligations for accountability and potentially even a right of democratic governance. Where they deter international crimes, they promote individual compliance with substantive norms of the criminal law. These political influences, then, generally have a positive impact on the effectiveness of the system.

In contrast, the moral hazard effect and the destabilizing effect tend to prevent compliance with legal obligations and have a negative impact on systemic effectiveness. Where such political effects inhibit the operation of national judiciaries, they may interfere with a state's compliance with obligations to prosecute international crimes. Where they result in defections from peace processes or the destabilization of states, they may encourage violations of peace treaties or the rights of states enshrined in the UN Charter.

From a normative perspective, then, and speaking in the most general of terms, the effective operation of a system of multilevel global governance would seek to maximize catalytic, cost-externalizing, stabilizing and legitimating influences, while attempting to avoid, as far as possible, moral hazards and destabilizing effects. Such a strategy would, then, harness those political effects with positive characteristics and minimize those with negative implications. The result should be a more effective overall enforcement system.

Given the context-specific nature of political effects, however, it is often difficult to know with certainty *ex ante* which political effects a tribunal will have in a particular case. Specific factors outside the tribunal's immediate control—the permeability of target state institutions, for example—will have considerable influence on how political effects operate in practice. Moreover, underlying substantive legal obligations may, at times, be in tension such that, where political effects promote the activation of national judicial systems, they may also result in defections from peace agreements. Hence, any strategic use of political effects in the global governance enforcement system will often require detailed, case-specific analysis.

Unfortunately, courts are often poorly positioned and poorly equipped to engage in such political analysis. To the degree courts are capable of differentiating positive and negative political effects, however, these influences have a significant potential to enhance the overall operation of the enforcement of international criminal law by adding a new and powerful set of tools to promote both state and individual compliance

with substantive international legal obligations. To do so, courts may need to approach these issues from a very different perspective that includes politics as well as law. They may need to develop new skill sets and knowledge bases that include political analysis. Institutional designers may need to pay far greater attention to the nature of incentives for domestic actors embedded in the statutes of international courts and tribunals.

If political effects can be targeted and used strategically in ways that maximize positive influences, including catalytic, legitimating, stabilizing, and cost-externalization effects, the system may be made more efficient and effective. States and individuals will be pressured toward compliance with substantive international legal obligations. In the process, additional capacity may be added to the system as domestic institutions are catalyzed into action. Whether or not courts can, in practice, use such political effects strategically is not yet clear. A more detailed analysis of the operation of political effects in context—beyond the mini-case studies of this chapter—may offer greater insight into the potential of courts and tribunals to target and leverage such influences in order to enhance the overall effectiveness of the international criminal law enforcement system.

IV. CONCLUSION

This chapter has examined political effects in some detail. As such effects have rarely been noted and never subjected to systematic analysis, the chapter presents novel insight into the operation of the international criminal law enforcement system and the roles and powers of foreign courts and tribunals exercising international criminal jurisdiction. The chapter has argued that such political effects are a potent and here-to-fore under recognized source of power and influence for international tribunals.

Drawing on international relations and political science methodologies, the chapter develops a theoretical account of political effects within the multilevel enforcement system and derives a set of pathways of influence whereby international and foreign courts exert political effects. Through a series of mini-case studies the chapter tests the pathways of influence in this typology to determine if political effects do, in fact, operate within the system.

The analysis presented here confirms the basic hypothesis that international and foreign courts exert political effects through distinct pathways of influence. It also suggests that political effects could well be an important tool for international courts and tribunals in their efforts to generate state and individual compliance with underlying substantive norms of international law.

The recognition that foreign tribunals have political effects on target states has significant—though not uncontroversial—implications for the nature of international judicial institutions. Whether they like it or not, courts, their designers, and their staffs, are political as well as legal actors. At times the political impact of an international court may be unavoidable; at other times, it may reflect a conscious choice. To the degree that courts wield political effects, they are transformed from purely legal actors into both legal and political institutions. This in turn leads to questions about the ability of international courts to utilize these effects, about the independence and legitimacy of judicial institutions, and about their accountability as autonomous political agents.

This analysis also suggests that the operation of political effects in the system of multilevel global governance has implications for the effectiveness of international criminal law enforcement more generally. Political effects of numerous courts operating together as a system can cajole, pressure, prod, and even compel states and their institutions to comply with substantive international legal obligations. In so doing, these effects may collectively offer new insight and potential solutions to the broader challenges of enforcement of international law.

Two fundamental questions remain about the operation of the multilevel global governance system in international criminal law enforcement generally, and the strategic use of political effects more specifically. First, in the richer context of the actual enforcement of international criminal law, do soft legal, hard legal, and political effects actually operate in an interconnected and interdependent system of judicial institutions? Second, if so, can these soft legal, hard legal, and political influences enhance the overall effectiveness of the international criminal law enforcement system? Chapters V and VI seek to answer these two questions through in-depth case analyses of two sets of institutional relationships within the system: the relationship between the ICTY and Bosnia & Herzegovina and the relationship between the ICC and the DR Congo.

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