

## ARTICLES

# THE PERSUASIVE AUTHORITY OF INTERNATIONALIZED CRIMINAL TRIBUNALS

ELENA BAYLIS<sup>\*</sup>

I. INTRODUCTION .....	612
II. RELATIONSHIPS BETWEEN INTERNATIONALIZED AND NATIONAL COURTS .....	615
III. WHAT MAKES COURTS INFLUENTIAL? .....	621
A. INTERNATIONAL COURT INFLUENCE.....	622
1. Structural/Institutional Characteristics .....	625
2. Political Dynamics.....	626
3. National Courts' Interests .....	627
4. Transnational Networks.....	629
5. Utility and Availability of Opinions.....	631
B. U.S. BELLWETHER TRIALS IN MASS TORT CASES .....	634
1. Case Selection.....	638
2. Investigation and Legal Analysis .....	639
IV. IMPLICATIONS .....	641

---

\* Elena Baylis, Associate Professor, University of Pittsburgh School of Law. Thanks to Susana SáCouto and the War Crimes Research Office for inviting me to speak at WCRO's 20th anniversary conference. Thanks also to Harlan Cohen, Cara Drinan, Heather Elliott, Amanda Frost, Amanda Leiter, Jaya Ramji-Nogales, Elizabeth Porter, Justin Smith, Peter Spiro, David Zaring, and the participants in the Georgia International Law Colloquium and the Temple International Law Colloquium for their comments on an earlier version of this article.

## I. INTRODUCTION

International and internationalized<sup>1</sup> criminal tribunals have multiple aims. These include not only their core function of trying cases, but also other, broader objectives, such as developing the legal standards of the field of international criminal law, incentivizing states to pursue transitional justice mechanisms, and achieving socio-political impact in the concerned post-conflict states. While international criminal tribunals initially behaved as though achieving these other aims might flow naturally from their work on their cases, it has since become evident that these objectives require attention in and of themselves. In this article, I argue that future internationalized criminal tribunals should refocus more of their efforts to pursue these goals on a natural conduit with underutilized potential: influencing national courts in post-conflict states. Internationalized tribunals could exponentially expand the effect of their judgments in post-conflict societies if national judges in the concerned post-conflict states were to regularly consider those judgments and treat them as persuasive authority when deciding their own cases. This is the most ordinary, well-accepted way that courts influence each other and, eventually, society at large: by issuing rulings that are then adopted or adapted by other courts. It is thus a core part of internationalized tribunals' role as courts. In so doing, internationalized criminal tribunals could become what we might call bellwether<sup>2</sup> courts: courts

---

<sup>1</sup> Throughout this article, I will use the terms "internationalized" and "hybrid" to encompass tribunals, courts, and chambers that are established to hear cases of genocide, war crimes, and crimes against humanity and that incorporate both international and national components. These include both independent courts and chambers within national judicial systems. The internationalized/hybrid criminal tribunals established thus far include the Special Panels for Serious Crimes in East Timor, the Special Court for Sierra Leone, the War Crimes Chamber of the Court of Bosnia and Herzegovina, the Regulation 64 panels in Kosovo, the Extraordinary Chambers in the Courts of Cambodia, the Special Tribunal for Lebanon, and the Extraordinary African Chambers in Senegal. There are also several purely international criminal tribunals: the ad hoc International Criminal Tribunal for the former Yugoslavia, the ad hoc International Criminal Tribunal for Rwanda, and the International Criminal Court. See Beth Van Schaack, *The Building Blocks of Hybrid Justice*, 44 DENV. J. INT'L L. & POLICY 101 (2015).

<sup>2</sup> See *Bellwether*, AM. HERITAGE DICTIONARY (4th ed. 2004) (defining "bellwether" as used today as "a person or thing that assumes the leadership or forefront, as of a profession or industry." The word "bellwether" derives from the word bell and the Middle English word "wether," which meant a castrated ram. It originates in a medieval shepherding practice: flocks of sheep typically had a

who are norm leaders in a particular field, whose reasoning and decisions are influential on other tribunals not because they must be followed, but because other courts choose to follow them.

Effectively operationalizing this function is, however, a complex task, both conceptually and practically. Internationalized tribunals and domestic post-conflict courts have only a very limited formal relationship with each other, so that any such mechanism of rapprochement would be entirely voluntary. Internationalized criminal tribunals' cases and the processes by which they are heard are highly complex, so that influence on national courts cannot be the sole or even the primary consideration in most internal decisions concerning case management and judgment. International criminal trials and post-conflict legal systems are inevitably attended by messy socio-political circumstances that further complicate the functioning of the concerned legal institutions and any attempt at developing transnational relationships between courts. In addition, internationalized criminal tribunals often suffer from a legitimacy gap vis-a-vis constituencies in the concerned post-conflict states. Finally, internationalized criminal tribunals, like other courts, are primarily designed to try cases.<sup>3</sup>

Accordingly, I propose that internationalized tribunals could expand their engagement with post-conflict national courts in two ways. First, internationalized criminal tribunals should do more. Future internationalized courts could make relatively minor, discrete internal design choices that would make their judgments more accessible and useful to national actors trying atrocity cases. This would enable a form of transjudicial dialogue<sup>4</sup> between national and internationalized criminal tribunals that is based in the core function of courts as decision-makers and capitalizes on internationalized tribunals' particular expertise and resources. In addition, they should target their direct engagement with national courts where it will have

---

single wether as their leader, and the shepherd placed a bell around the leading wether's neck to signal the flock's movement and direction).

3. See discussion *infra* Part II.

4. See Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99, 112-13 (1994-95) (discussing how both types of jurisdictions voluntarily communicate and forge a dialogue even though a formal procedure regulating the relationship between international and national courts is absent).

the most impact, in peer-to-peer contacts with judges, prosecutors, and other national court actors.

Internationalized criminal tribunals should also do less. They should outsource other aspects of the process of influencing national courts through persuasive authority to the extensive rule of law networks that operate in post-conflict countries. Such networks can offer the benefit of direct contacts with national actors and institutions as well as expertise in working with those institutions; these networks also have an interest in promoting successful national atrocity trials as part of their rule of law agenda. They could also make use of their interns and alumni to expand their transnational networks in concert with rule of law actors without unduly taxing court resources. In this way, internationalized courts could remain focused on their area of expertise, trying international criminal law cases, while enabling transnational rule of law networks to amplify the effects of that work.

This is an appropriate time to consider these questions, because after a period in which it seemed as though *ad hoc* internationalized criminal tribunals were waning, proposals for such tribunals are proliferating again.<sup>5</sup> The recent success of the Extraordinary African Chambers in Senegal in trying Hissène Habré highlights the resurgent trend toward *ad hoc* hybrid institutions.<sup>6</sup> The international community could make strategic choices in designing this new generation of tribunals to maximize their potential influence on national courts.

In this article, I focus solely on internationalized tribunals' relationships with national courts in the concerned post-conflict countries. Of course, other national courts may also hear atrocity cases by exercising universal jurisdiction or other bases of jurisdiction. However, it is through the national courts of the relevant post-conflict states that internationalized criminal tribunals can hope to produce their desired impact in those states; in addition, internationalized tribunals have a different and more complex

---

5. Van Schaack, *supra* note 1, at 102 (listing ten pending proposals for new tribunals).

6. Dionne Searcey, *Hissène Habré, Ex-President of Chad, Is Convicted of War Crimes*, N.Y. TIMES, May 30, 2016, [www.nytimes.com/2016/05/31/world/africa/hissene-habre-leader-chad-war-crime](http://www.nytimes.com/2016/05/31/world/africa/hissene-habre-leader-chad-war-crime).

relationship with those national courts by virtue of their direct connection to the venue of the atrocities and the attendant socio-political context. As such, it is appropriate to treat them as a discrete case.

Also, although I use the International Criminal Court (ICC) as an example from time to time, and although a proposal for a new regional African Criminal Court is pending,<sup>7</sup> the suggestions made in this article will likely be more effectively implemented by future *ad hoc* tribunals that are focused on the situation in a single country. Such tribunals will have greater opportunities for intensive engagement with national counterparts, can more readily tailor their judgments to national circumstances, and will be able to build persuasive components into their structural design choices.

Part II discusses the nature of the relationships between internationalized criminal tribunals and post-conflict national courts and the benefits that a more robust engagement centered on persuasive authority might provide. Part III explores the characteristics that have enabled some courts to extend their persuasive authority to other courts not bound to follow their legal reasoning. Part IIIA focuses on studies of international court influence, while Part IIIB considers how U.S trial courts have used specialized bellwether trials to influence other courts on the national level. Part IV concludes with discussion of the implications of this model.

## II. RELATIONSHIPS BETWEEN INTERNATIONALIZED AND NATIONAL COURTS

International and internationalized criminal courts share jurisdiction with national courts over the international crimes of genocide, war crimes, and crimes against humanity, which I will refer to collectively as “atrocities.”<sup>8</sup> The legal bases for allocation of

---

7. Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, art. 16, A.U. Doc. No. STC/Legal/Min. 7(1) Rev. 1 (May 14, 2014).

8. See Xavier Phillipe, *The Principles of Complementarity and Universal Jurisdiction: How Do the Two Principles Intermesh?* 88 INT’L R. RED CROSS 375, 377, 379 (2006) (stating that crimes which are grave in nature may be prosecuted nationally by states or internationally by international organizations and that such universal jurisdiction allows for the trial of international crimes committed by

jurisdiction between internationalized and national courts are often set forth in the founding statutes of internationalized tribunals.<sup>9</sup> In practice, irrespective of the formal structure of the shared jurisdiction, internationalized tribunals have the resources to hear only a few, typically high profile, cases.<sup>10</sup> In this regard, these courts exist in a potentially synergistic relationship. Internationalized tribunals can take on a select set of cases that national courts are unable or unwilling to pursue, and national courts provide a response to international courts' limited capacity to hear the many cases that arise from conflicts.

However, although national courts in post-conflict states typically have jurisdiction to hear atrocity cases either under national law or by applying international law, they do not always do so.<sup>11</sup> There are a variety of reasons for this, including lack of resources, unfamiliarity with international law, and political and social pressure.<sup>12</sup> When cases are heard, there are sometimes problems in how post-conflict national courts handle them, such as neglect or misuse of international law, due process lapses, evidentiary gaps, or external influence to convict or acquit.<sup>13</sup> These impediments are, in fact, one

---

anyone anywhere in the world).

9. See generally Statute of the Special Court for Sierra Leone, art. 8, Jan. 16, 2002, 2178 U.N.T.S. 145. (providing for concurrent jurisdiction and assigning primacy to the Special Court); Rome Statute of the International Criminal Court, art. 17, July 17, 1998, 2187 U.N.T.S. 90 (explaining the legal bases for the allocation of jurisdiction) [hereinafter Rome Statute].

10. See *Judgment List*, U.N. INT'L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA (Sept. 2016), <http://www.icty.org/sid/10095> (demonstrating that a small number of cases were heard by the International Criminal Tribunal for the former Yugoslavia); see also *The Cases*, U.N. MECHANISM FOR INT'L CRIM. TRIB. (Sept. 2016), <http://unictr.unmict.org/en/cases> (showing that the International Criminal Tribunals generally hear a few high profile cases); *Archive*, Residual Special Court for Sierra Leone (Sept. 2016), <http://www.scsldocs.org/documents> (demonstrating that the Residual Special Court for Sierra Leone heard the case of Charles Taylor, the former President of Liberia).

11. See Elizabeth B. Ludwin King, *Big Fish, Small Pond: International Crimes in National Courts*, 90 IND. L.J. 829, 830 (2015) (stating that trials may not be possible due to issues such as the lack of available judicial resources).

12. See Keren Michaeli, *The Impact of the International Criminal Tribunal for Yugoslavia on War Crime Investigations and Prosecutions in Croatia*, DOMAC 78-79 (Dec. 2011), <http://www.domac.is/media/domac-skjol/Domac-10-KM-Croatia.pdf> (listing the many challenges in hearing atrocity cases at the national court level).

13. See Jane E. Stromseth, *Justice on the Ground: Can International Criminal*

of the primary rationales for creating internationalized criminal tribunals. We should not, however, establish simple dichotomies contrasting national and internationalized tribunals' capabilities. Internationalized tribunals have experienced their own due process problems, evidentiary gaps, and accusations of bias.<sup>14</sup>

Also, internationalized criminal tribunals are intended not only to issue fair judgments in individual criminal prosecutions, but also to promote socio-political change in post-conflict societies. This includes such ambitious goals as fostering social reconciliation, providing a sense of justice for victims, rebuilding trust in rule of law, creating a historical record for future generations, and deterring further atrocities.<sup>15</sup> In practice, internationalized criminal tribunals have found progress toward these goals to be distressingly elusive, at least in the short-term. Indeed, tribunals (especially international tribunals, but also hybrid courts) have found that domestic audiences often regard them as distant, irrelevant, or even unjust.<sup>16</sup>

---

*Courts Strengthen Domestic Rule of Law in Post-Conflict Societies?* 1 HAGUE J. RULE L. 87, 91 (2009) [hereinafter Stromseth, *Justice on the Ground*] (recognizing that national courts often handle cases in a problematic manner, particularly when it comes to accountability and the state of the domestic justice system).

14. See John D. Ciorciari & Anne Heinde, *Experiments in International Criminal Justice: Lessons from the Khmer Rouge Tribunal*, 35 MICH. J. INT'L L. 369, 387-88 (2013-2014) (outlining several problems that internationalized tribunals have encountered such as methodological failures, biases, a lack of transparency, and procedural irregularities); Alex Whiting, *Lead Evidence and Discovery Before the International Criminal Court: The Lubanga Case*, 14 UCLA J. INT'L FOREIGN AFF. 207, 208-09 (2009) (stating that the inability of the Prosecutor to disclose exculpatory materials and information material to the defense did not allow for a fair trial); *contra* William Schabas, *Prosecutorial Discretion v. Judicial Activism at the International Criminal Court*, 6 J. INT'L CRIM. JUST. 731, 734-35 (2008) (explaining that the Prosecutor uses three factors based on an ICC statute to decide whether to exercise his proprio motu powers) [hereinafter Schabas, *Prosecutorial Discretion*].

15. See James F. Alexander, *The International Criminal Court and the Prevention of Atrocities: Predicting the Court's Impact*, 54 VILL. L. REV. 1, 4 (2009) (stating that one goal of the ICC is to prevent grave crimes).

16. See *Public Perception in Serbia of the ICTY and the National Courts Dealing with War Crimes*, OSCE (2009), [http://wcjp.unicri.it/proceedings/docs/OSCESrb\\_ICTY\\_Perception\\_in\\_Serbia.pdf](http://wcjp.unicri.it/proceedings/docs/OSCESrb_ICTY_Perception_in_Serbia.pdf) [hereinafter *Public Perception*] (showing that public perception of the ICTY in Serbia is generally negative); see also Pham et. al., *So We Will Never Forget: A Population-Based Survey on Attitudes About Social Reconstruction and the Extraordinary Chambers of Cambodia*, HUM. RTS. CTR. U.C. BERKELEY, 3-4 (Jan. 2009), <http://hhi.harvard.edu/sites/default/files/publications/so-we-will-never-forget.pdf> [hereinafter

Internationalized criminal tribunals have increasingly taken proactive steps to heighten their positive impact in the affected societies, rather than expecting such influence to follow naturally from their trial activities. Many of the recent *ad hoc* tribunals have been organized as hybrid courts located within the affected state and staffed with a number of domestic judges and lawyers, rather than as international tribunals sited elsewhere and staffed almost exclusively with international personnel.<sup>17</sup> Internationalized tribunals have developed outreach programs to publicize and legitimize their work with the concerned domestic populations and to assist in the capacity building work of NGOs and other rule of law actors.<sup>18</sup>

The variety of courts hearing atrocity cases also implicates another aim of internationalized criminal tribunals: to develop the field of international criminal law, by establishing legal standards, procedural rules, methods of investigation and evidence development, and so on. Over the last twenty years, the courts hearing atrocity cases have proliferated, and so have the standards they apply.<sup>19</sup> Accordingly, there is also an ongoing debate about the degree of legal integration or pluralism that is desirable in international criminal law, and about the role of the ICC and other

---

Pham et. al., *So We Will Never Forget*] (demonstrating mixed sentiments regarding the role and effects of the ECCC on delivering justice and the overall objectivity and integrity of the court); see also Pham et. al., *Trauma and PTSD Symptoms in Rwanda: Implications for Attitudes Toward Justice and Reconciliation*, 292 JAMA 602, 608, 610 (2004) [hereinafter Pham et. al., *Trauma and PTSD Symptoms in Rwanda*] (showing that those who were educated more possessed negative attitudes toward judicial processes, rather than negative ones); see also Peter Uvin & Charles Mironko, *Western and Local Approaches to Justice in Rwanda*, 9 GLOBAL GOVERNANCE 219, 220-21 (2003) (stating that Rwandans and the Rwandan government maintains a negative attitude towards the ICTR).

17. See Stromseth, *Justice on the Ground*, *supra* note 13, at 89 (stating that direct participation of national judges, prosecutors, defense counsel, and other personnel are an advantage of hybrid tribunals).

18. See e.g. JANE STROMSETH, ET AL., CAN MIGHT MAKE RIGHTS? BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS 263-95 (2006); *Outreach Programme*, U.N. INT'L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA (Sept. 2016), <http://www.icty.org/sid/242>; William A. Schabas, *International Criminal Tribunals: A Review of 2007*, 6 NW. U. J. INT'L HUM. RTS. 382, 414 (2008).

19. See Nancy Combs, *Seeking Inconsistency: Advancing Pluralism in International Criminal Sentencing*, 41 YALE J. INT'L L. 1, 13 (2016) (elaborating on the unfettered sentencing discretion wielded by judges as this proliferation has occurred, leading to wide variation in sentences).



internationalized tribunals in setting legal standards for the field.<sup>20</sup> This paper does not seek to identify the optimal degree of legal integration. Rather, it assumes that some degree of pluralism is inevitable, in light of the inability of any one court to impose its legal standards on another and the pluralism that has already developed among national and international jurisdictions.<sup>21</sup> It recognizes the value both of legal integration as a means to developing a coherent field of law, and of legal pluralism as a mode of tailoring that field to particular states' situations and domestic legal cultures. But in order to gain these benefits of integration and pluralism, courts' decisions on whether to adopt shared norms or go their own way should be informed and purposeful.

With these characteristics in mind, this paper begins from a pair of interrelated premises concerning the relationships between internationalized criminal courts and post-conflict national courts: (1) that internationalized tribunals have an interest in playing a bellwether role as norm leaders, influencing other courts to adopt their standards and setting practices for the field as a whole; and (2) that there are benefits in internationalized tribunals playing such a role, particularly vis-à-vis national courts in the concerned post-conflict states. Such national courts are best positioned by virtue of location and personal jurisdiction to hear atrocity cases arising from their own state's conflict; however, they are also likely to have limited resources and capabilities in the aftermath of the conflict, especially in the immediate post-conflict years. Internationalized tribunals' decisions may enable national courts to pursue more prosecutions by reducing the obstacles to trying these complex cases. Treating internationalized tribunals' judgments as persuasive authority should increase national courts' facility with international law, whether national courts ultimately adopt, adapt, or reject internationalized tribunals' parsing of the relevant law. In addition, a national court might be able to adopt the practice of some international and hybrid tribunals and take judicial notice of an internationalized tribunal's findings on the core facts of the

---

20. *See id.* at 1-2 (stating that debates about pluralism are popular in international criminal scholarship, particularly when it comes to international criminal sentencing).

21. *See id.* (noting widespread pluralism in international criminal law).

conflict;<sup>22</sup> this would enable the national court to avoid expending the considerable resources necessary to undertake repeated, large-scale investigations into those facts. Internationalized court judgments may provide guidance on application of due process principles, and it could also deflect some socio-political pressure for national courts to be able to defer to internationalized tribunals as a source of authority for their legal, factual, and evidentiary determinations.

If this inter-court communication becomes a dialogue, the benefits could flow both ways. Discussion with national court judges and familiarity with national court judgments might help internationalized tribunals gain traction on national laws, norms, the history of the conflict, and differences in legal culture and social expectations about justice processes.<sup>23</sup> This is particularly important in light of the difficulty internationalized tribunals have often had in gaining credibility with national audiences, as noted above. National court interpretations of international law may also influence internationalized tribunals; this exchange would make the discussion of international criminal standards more diverse and robust and could ultimately promote a greater degree of uniformity in interpretation of international criminal law standards.

There are, however, three major obstacles to realizing the advantages of such an interchange. The first stems from the formal relationship between the courts – or, more accurately, the lack thereof. National courts do not have to follow internationalized tribunals' findings, nor do international courts have to take account of national courts' judgments. For example, the ICC's

---

22. See generally Decision on the Prosecution Motion for Judicial Notice and Admission of Evidence, *Prosecutor v. Bimba, Kamara & Kanu*, Case No. SCSL-04-16-PT, Trial Chamber II, Oct. 25, 2005 (taking judicial notice of certain facts); Decision on Accused's Motion for Judicial Notice of Adjudicated Facts Related to Count One, *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Trial Chamber, Jan. 21, 2014 (taking judicial notice of certain facts); see also Ralph Mamiya, *Taking Judicial Notice of Genocide: The Problematic Law and Policy of the Karemera Decision*, 25 WISC. INT'L L. J. 1 (2006) (describing the ICTR's use of judicial notice and arguing for international criminal tribunals to take judicial notice only of previously adjudicated facts).

23. See Baylis, *What Internationals Know: Improving the Effectiveness of Post-Conflict Justice Initiatives*, 14 WASH. U. GLOBAL STUD. L. REV. 243, 275-79 (2015) (describing the utility of national knowledge for international personnel in hybrid tribunals).

complementarity provisions require it to defer to national courts' prosecutions, but not to consider their legal analysis or fact-finding.<sup>24</sup> Second, this is a non-trivial task, as the relationship between the courts is not likely to be uncomplicated or uniformly positive. Indeed, the existing relationship between the ICC and some African states is affirmatively hostile, as indicated by the recent withdrawals of South Africa, Burundi and Gambia from the ICC.<sup>25</sup> The final obstacle stems from the realities of the conditions of justice systems and modes of communication in post-conflict states: many national courts simply do not have access to the judgments of internationalized criminal tribunals, especially those national tribunals that operate in rural areas or in situations of ongoing conflict.<sup>26</sup> National courts may not issue written judgments, and if they do, they may not be widely circulated or may be produced in a local language.<sup>27</sup> So how can internationalized tribunals persuade national courts to follow, or at least consider, their legal and factual findings? And in turn, how can national courts participate in the transnational development of international criminal law?

### III. WHAT MAKES COURTS INFLUENTIAL?

In Part A, I will examine the factors identified by studies that have examined international court influence, focusing on examples of particularly persuasive international courts identified by these studies. In Part B, I will explore how national trial courts have influenced other domestic courts through bellwether trials in mass tort cases in the United States. Each of these examples relates to a different aspect of internationalized criminal tribunals' capacity to

---

24. See generally Rome Statute of the International Criminal Court, art. 17, July 17, 1998, 2187 U.N.T.S. 90 (explaining the legal bases for the allocation of jurisdiction).

25. See *Under Fire, ICC Prosecutor Says to Uphold Fight Against Atrocities*, N.Y. TIMES, Nov. 23, 2016, [www.nytimes.com/Reuters/2016/11/23/world/Africa/23 Reuters-war crimes-prosecutor.html](http://www.nytimes.com/Reuters/2016/11/23/world/Africa/23 Reuters-war crimes-prosecutor.html) (discussing withdrawals).

26. See generally Elena Baylis, *Reassessing the Role of International Criminal Law: Rebuilding National Courts Through Transnational Networks*, 50 B.C.L. REV. 1, 57-58 (2009) (noting national courts' lack of access to internationalized tribunals' judgments) [hereinafter Baylis, *Reassessing the Role of International Criminal Law*].

27. See *id.* at 30, n.95 (describing the difficulty of obtaining unpublished military court judgments in the DRC).

influence post-conflict national courts. The identified international courts provide an example of how to develop a functional structural framework and communicative strategy, while mass tort bellwether trials demonstrate how to select cases and direct legal analysis.

#### A. INTERNATIONAL COURT INFLUENCE

Like internationalized criminal tribunals, some other international and regional courts have authority only over the cases before them, and national courts are not obligated to follow their reasoning in future cases. The European Court of Human Rights (ECHR) and European Court of Justice (ECJ) can demand compliance with their judgments from the parties in their cases, but while they claim some *erga omnes* effect for their judgments, they have no means of enforcing that effect and that claim of authority is not universally accepted; the Andean Tribunal of Justice (ATJ) and Inter-American Court of Human Rights (IACHR) are similarly situated.<sup>28</sup>

However, there are considerable differences in how successful these courts are in influencing national courts to treat their decisions as persuasive. National courts in Europe frequently follow the ECHR's interpretations of the European Convention for the Protection of Human Rights and Fundamental Freedoms when considering human rights issues in the cases before them, even though they are not legally obligated to do so by the convention unless they are party to a case decided by the ECHR on the relevant issue.<sup>29</sup> The ECHR itself claims status as the authoritative interpreter of the convention, and many European states treat it as such, although many "do not consider the *erga omnes* effect of ECHR rulings to be a legal requirement."<sup>30</sup> The ECHR is also regularly

---

28. See Alexandra Huneus, *Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights*, 44 CORNELL INT'L L. J. 493, 524 (2011); see also Laurence R. Helfer and Karen J. Alter, *The Andean Tribunal of Justice and its Interlocutors: Understanding Preliminary Reference Patterns in the Andean Community*, 41 N.Y.U. J. INT'L L. & POL. 871, 876 (2008).

29. See TIM KOOPMANS, *COURTS AND POLITICAL INSTITUTIONS* 86 (2003) (stating that under the European Convention for the Protection of Human Rights and Fundamental Freedoms, member states are obligated to comply with the ECHR's judgments in the cases it decides, but the Convention does not create an obligation for national courts to adopt the ECHR's interpretation of the Convention in their own cases).

30. Laurence R. Helfer, *The Effectiveness of International Adjudicators*, in

cited by courts outside Europe addressing human rights issues, and it is generally regarded as the most successful regional human rights court.<sup>31</sup> Likewise, the ECJ has succeeded in gradually gaining credibility with the national courts in its jurisdiction. In contrast, other regional courts have struggled to gain acceptance by the national courts in their jurisdiction or have found the extent of their influence to be more limited. The IACHR rarely achieves even direct compliance with its rulings from national judicial actors.<sup>32</sup> Similarly, the ATJ has a stronger relationship with certain administrative agencies than with national courts.<sup>33</sup> As discussed below, this seems to be in part due to differences in structure or strategy by the international courts, and partly due to differences in national politics and other external circumstances. All told, the characteristics of the ECHR and its counterparts suggest a path for internationalized criminal courts seeking to extend their influence with the relevant domestic courts.

There is a growing body of scholarship addressing international courts' persuasive influence on national courts. Anne-Marie Slaughter and Melissa Waters have described modes of transnational judicial dialogue that enable national and international courts to extend their influence with each other, such as cross-citation.<sup>34</sup> Many scholars have focused on the narrower issue of national compliance with international court judgments in individual cases, which encompasses but is not limited to the role of national courts; for example, Alexandra Huneus has studied national courts' compliance with IACHR judgments,<sup>35</sup> and Anne-Marie Slaughter

---

THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 464, 472 (Cesare P. R. Romano, Karen J. Alter & Yuval Shany eds., 2014).

31. See Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103, 1109-11 (1999-2000) (using examples from South Africa, Zimbabwe, and Jamaica).

32. See Huneus, *supra* note 28, at 494 (finding that Latin American prosecutors and judges rarely comply with Inter-American Court rulings requiring their action).

33. See Helfer & Alter, *supra* note 28, at 876 (finding that administrative agencies act as stronger compliance constituencies for the ATJ than national courts).

34. See Slaughter, *supra* note 4, at 101-102; Melissa Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 Geo. L. J. 487, 492-531 (2005).

35. See Huneus, *supra* note 37, at 494 (concluding that national courts often

and Laurence Helfer have examined national institutions' compliance with ECHR and ECJ rulings.<sup>36</sup> More expansively, Karen Alter writes about the role of international courts' national "compliance constituencies" in promoting their influence; she defines compliance broadly to include not only literal compliance with judgments but also adoption and implementation of an international court's legal standards by its national counterparts across all cases and situations.<sup>37</sup> Laurence Helfer has broken down international courts' influence into several categories, including not only compliance-oriented forms of effectiveness but also, "embeddedness effectiveness," i.e., "whether ICs [international courts] are effective in embedding international law and international judicial rulings in national legal orders,"<sup>38</sup> and "effectiveness in developing international law" which comprises all manner of norm-generating functions including transnational judicial dialogue.<sup>39</sup> Similarly Helfer, Alter, and Madsen have produced a framework for analyzing international courts' authority that includes their "intermediate legal authority" to persuade compliance partners "to comply with international law as interpreted by the IC" generally, and their "extensive authority" to "consistently shape law and politics" in their field, in addition to their "narrow authority" to ensure compliance in a particular case.<sup>40</sup>

These studies have identified factors that shape the relationships between international and national courts. They focus primarily on international courts' influence on national courts and other national institutions; to a lesser extent, they identify modes of influence by national judges and other national actors on international courts.

---

fail to comply with Inter-American Court rulings and suggesting several courses of actions to remedy the issue).

36. Laurence Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L. J. 273, 276 (1997) (finding that the ECJ and ECHR have managed to create an effective strategy that makes their decisions as effective as national court rulings).

37. See generally KAREN J. ALTER, *THE NEW TERRAIN OF INTERNATIONAL LAW: COURTS, POLITICS, RIGHTS*, 5, 21-22 (2014).

38. Helfer, *supra* note 30, at 474.

39. *Id.*

40. See Karen J. Alter, Laurence R. Helfer & Mikael Rask Madsen, *How Context Shapes the Authority of International Courts*, 79 LAW & CONTEMP. PROBS. 1, 10-11 (2016) (examining how these metrics of compliance help determine the actual power that an international court wields).

Each study focuses on a different aspect of international-national engagement, identifies a somewhat different set of factors and categorizes those factors in different ways. I focus here on components that seem particularly salient in the context of *ad hoc* internationalized tribunals and their relationships to their national counterparts in post-conflict states. These factors fall into five interrelated categories: structural/institutional characteristics of the international courts; political dynamics; convergence with national courts' interests; development of transnational networks; and the utility and availability of the international courts' opinions.<sup>41</sup>

### 1. *Structural/Institutional Characteristics*

In their theory of supranational adjudication, Helfer and Slaughter identify several structural elements that contribute to the effectiveness of an international tribunal on the national level by enhancing the perceived legitimacy and capability of the international tribunal.<sup>42</sup> Of particular relevance for internationalized criminal tribunals, these include judges who are recognized as skilled experts and the capacity to effectively manage a high caseload of significant cases; the ECHR, for example, has benefitted from the recognized skill and expertise of its judges and its capacity to efficiently manage a steady stream of high profile cases, although it has in recent years developed a problematic backlog.<sup>43</sup> For the internationalized criminal tribunals, these are two persistent structural problem areas. Internationalized tribunals have proceeded slowly with their cases, and this has affected their credibility in the concerned post-conflict states.<sup>44</sup> As for hiring expert judges, while

---

41. See Alter, Helfer, & Madsen, *supra* note 40, at 10; Huneus, *supra* note 28, at 524; Helfer & Slaughter, *supra* note 36, at 285 (exploring individually separate factors that impact the influence and clout international courts have on national courts); see generally Helfer & Alter, *supra* note 28, at 911-12 (explaining, as an example, the relationship between national courts and the Andean Tribunal of Justice in the context of IP litigation).

42. See generally Helfer & Slaughter, *supra* note 36, at 300-36 (expounding on these elements that include, but are not limited to, the composition of the court, caseload, quality of reasoning, the subject-matter, and the formal authority the tribunal operates under, among other things).

43. See *id.*; Helfer, *supra* note 30, at 472 (documenting a backlog of pending applications at the ECHR).

44. See Jean Galbraith, *The Pace of International Justice*, 31 MICH. J. INT'L L. 79, 81 (2009) (describing the slow pace of ICTR and ICTY proceedings and the

the ICC has access to many highly qualified candidates for judicial positions, hybrid courts have historically struggled to hire judges who are experts in international criminal law to work in the post-conflict settings where hybrid courts are based.<sup>45</sup>

In their framework for analyzing the effectiveness of international tribunals, Alter, Helfer, and Madsen identify additional structural components that incentivize national actors to engage with an international court, such as its accessibility to non-state actor litigants to bring claims and the extent to which the subject matter is technical rather than political; neither of these factors favor successful engagement by internationalized criminal tribunals, due to the inherently prosecutorial and political nature of the courts' work.<sup>46</sup> However, structure alone is not determinative. The ATJ is closely modeled on the ECJ structurally but has a more limited degree of influence on the national courts within its purview due to the impact of other factors, discussed below.<sup>47</sup>

## 2. Political Dynamics

Political pressures can play several different roles. First, there is the role of politics in the relationship between the international court and the political branches of the national government. The ICC has been perceived as targeting African states as the subject of its investigations and as basing its selection of defendants at least in part on political considerations, and this has led to an increasingly tense relationship between the court and the concerned national governments in that region.<sup>48</sup> The examples of the IACHR and the ATJ also affirm the role of political dynamics; the ATJ's sphere of

---

negative reaction from victims and others, but ultimately concluding that the speed is not dissimilar to that of other complex cases).

45. Elena Baylis, *What Internationals Know: Improving the Effectiveness of Post-Conflict Justice Initiatives*, 14 WASH. U. GLOBAL STUD. L. REV. 243, 281-282 (2015).

46. See Alter, Helfer, & Madsen, *supra* note 40, at 17-22 (classifying these context factors into three distinct analytical categories: institution specific context; constituencies context; and global, regional, and local political context).

47. See Helfer & Alter, *supra* note 28, at 875-76.

48. See Leslie Vinjamuri, *The International Criminal Court and the Paradox of Authority*, 79 L. & CONTEMP. PROBS. 275, 282-86 (2016) (elaborating on the difficulties that individual domestic politics can create as international criminal courts attempt to work collectively towards a single common goal).



influence has been considerably narrower than its jurisdiction due in part to lack of sufficient national political support, while the IACHR has faced resistance from some national constituents.<sup>49</sup>

Second, there are the political dynamics surrounding the subject matter of the legal issue. For example, some South American administrative agencies have found that referring cases to the Andean Tribunal insulates them from internal political pressure on the intellectual property matters within their jurisdiction.<sup>50</sup> Most atrocity trials concern actors who are deeply entangled in the politics of their states and in the quest for peace and reconciliation in the wake of devastating conflicts, so political pressures surrounding these trials tend to be extremely high. Depending on the circumstances, this can produce varying relationships with internationalized criminal tribunals. The government of the Democratic Republic of the Congo (“DRC”), for example, was perceived as using its ICC referral to target its political enemies; in contrast, Uhuru Kenyatta used his ICC indictment as a campaigning point in his favor in winning election as President of Kenya.<sup>51</sup>

Finally, there may be civil society advocacy networks promoting engagement or disengagement with the international court and/or particular results on the merits. This played an important role in the ECJ context; similarly, the ECHR has benefitted from a movement towards integration in Europe and from the development of regional institutions and the dynamics that foster participation in its regime.<sup>52</sup> Of course, the significance of political pressure will also vary according to the degree of independence of the national courts.

### 3. *National Courts’ Interests*

When national courts are not required to engage with international courts or apply international legal standards, they will tend to do so when it serves their own interests. One such interest is in expanding their own power. The ECJ referral system enables national courts to exercise power by giving them control over which cases to refer,

---

49. See Huneeus, *supra* note 34; Helfer & Alter, *supra* note 28, at 875-76.

50. See Helfer, *supra* note 30, at 475.

51. See generally James Verini, *The Prosecutor and The President*, N.Y. TIMES, June 22, 2016, at MM44 (detailing the rise of Kenyatta and postelection violence in Kenya).

52. See Helfer & Alter, *supra* note 28, at 927.

allowing them to gain judicial review over the executive and legislative branches, and permitting lower level national courts to indirectly challenge higher national court rules.<sup>53</sup> If an internationalized criminal tribunal's work enables national courts to expand their authority over atrocity cases and thereby gain power vis-à-vis national institutions, this may encourage national courts to adopt international rulings as persuasive authority. However, in some particularly fraught post-conflict contexts, such expansion of authority may be too risky to appeal to national judges and prosecutors.

National courts also gain some reputational benefit when international courts cite their decisions with approval, another practice of the ECHR and the ECJ.<sup>54</sup> Within its decisions, the ECHR has affirmed and legitimized national courts' domestic authority by deferring to national courts through the margin of appreciation doctrine and by citing conforming national court opinions. Similarly, the ECJ deliberately developed its collaboration with national courts by deferring to their authority within their jurisdiction, while simultaneously appealing to them to proactively fulfill their obligations to enforce European Community law – and to do so based on the ECJ's interpretations of that law.<sup>55</sup> In so doing, the European courts enlisted national courts as partners with a common goal of enforcing international law.

Of course, internationalized criminal tribunals are not responding to national court decisions and questions as the ECHR and the ECJ are; however, they can nonetheless cite applicable national court decisions where appropriate, as the ECHR and ECJ have done. Making an effort to positively cite national court opinions would require internationalized criminal court actors to seek greater familiarity with national jurisprudence, which would in turn serve the ultimate goal of fostering a transnational dialogue about the developing standards of international criminal law. In addition,

---

53. See *id.*, at 892-93, 924-25; see also Huneus, *supra* note 28, at 515-16 (noting that while direct review of national courts is possible, the ECJ mostly refrains from utilizing it).

54. See Huneus, *supra* note 28, at 525 (suggesting that doing so in certain spheres helps compensate for the greater accountability that the Inter-American Court demands from national courts in others).

55. See Helfer & Slaughter, *supra* note 36, at 309-10.

internationalized criminal tribunals would benefit from learning from their national counterparts about the factual situation, national legal standards, and national legal culture. Internationalized criminal tribunals are often criticized for their lack of a deep understanding of the situations they are investigating, and greater exchange with national counterparts could facilitate greater conversance with the circumstances.<sup>56</sup> Particularly in countries where judgments are not regularly published, this would also require partnering with rule of law actors in the relevant country to gain access to the national judgments and/or engaging directly with national judges, as discussed in the following section.

Another national interest is in attaining guidance and clarification on particular substantive issues, thereby making it easier to adjudicate related cases. As such, the content and the technicality of opinions both matter, as discussed further below.<sup>57</sup> Finally, depending on the circumstances, relying on the standards propagated by an international court may insulate a national court from political pressures, as noted above; however, identifying with international institutions can also bring political risks.

#### 4. *Transnational Networks*

While citations and analysis in judgments are a key way that courts communicate, internationalized tribunals wishing to initiate a sustained, influential relationship with national courts will need to put considerable resources into other connections with those courts. This may come in the form of individual meetings, social gatherings, organized bar associations, or other modes of interaction. Especially in its early days, the ECJ put a great deal of effort into proactively courting national court judges, plying them with visits, seminars and dinners that informed national court judges about the ECJ in pleasant

---

56. See Baylis, *supra* note 45, at 245-248 (asserting that international attorneys working in hybrid tribunals with national counterparts self-reported a more sophisticated understanding of the national circumstances than those working in purely international tribunals).

57. See Helfer & Slaughter, *supra* note 36, at 309-11 (explaining that both the ECJ and the ECHR have fashioned their opinions to reach beyond the parties in the case and provide guidance for national courts and relevant state actors); see also Helfer & Alter, *supra* note 28, at 924-25 (arguing that the real power of the ECJ lies in the cooperation of the national judiciaries, meaning that opinions often reach beyond the parties in the ECJ).

environments.<sup>58</sup>

It is particularly important for internationalized criminal tribunals to form transnational networks with their national counterparts due to their attenuated and at times contentious relationships with the concerned states. Certainly, internationalized criminal tribunals have been increasingly committed to outreach to their national constituencies and capacity building aimed at local courts.<sup>59</sup> However, much of this work has remained focused on the general public and contact with national judges appear to have been centered primarily on capacity building rather than dialogue over legal standards and norms.<sup>60</sup> Optimally, peer-to-peer connections with national counterparts should be one of the first tasks of any internationalized criminal court. These early contacts provide the basis for a relationship of trust that can enable eventual dialogue and debate over the substance of internationalized court decisions and their applicability in national court settings.<sup>61</sup>

Apart from these direct peer-to-peer contacts, internationalized tribunals will want to rely on rule of law networks for other connections. International rule of law actors maintain relationships with national institutions as a core part of their work and maintain extensive, active networks in post-conflict countries. Such networks are important for building trust, sharing information, and facilitating cross citation and cross fertilization of legal norms. Such networks are also a primary mode of sharing judicial opinions across national boundaries, even if such opinions are already publicly available.<sup>62</sup>

---

58. See Helfer & Slaughter, *supra* note 36, at 301-02.

59. See *Outreach: Capacity Building*, U.N. INT'L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA, <http://www.icty.org/en/outreach/capacity-building> (citing the example of the ITCY in launching its outreach section in 1999 and partnering with the OSCE/ODIHR to transfer expertise to courts in the former Yugoslavia through its war crimes justice project).

60. See Baylis, *supra* note 26, at 1 (noting that the ICC's early approach to outreach in the DRC, for example, was focused on generally publicizing the court's work through the news media and through informational sessions provided by ICC outreach staff for national court judges and attorneys).

61. See Baylis, *supra* note 62, at 625.

62. See Elena Baylis, *Function and Dysfunction in Post-Conflict Justice Networks and Communities*, 47 VAND. J. TRANSNAT'L L. 625, 661 (2014) (focusing on how the communication of international staff from these courts helps establish prevailing norms and practices in the international tribunal community); see also Alter, Helfer, & Madsen, *supra* note 40, at 29-30; Huneeus, *supra* note 28,

In addition to using transnational rule of law networks, internationalized criminal tribunals could conserve their personnel resources by deploying interns and alumni to work with national courts on their behalf. With several of the *ad hoc* tribunals shutting down, there is a surfeit of experienced attorneys and other court personnel who would serve as experts for post-conflict national courts.<sup>63</sup> In addition, there is already a transnational network of interns among the existing international and internationalized criminal tribunals.<sup>64</sup> These interns often have detailed knowledge of the intricacies of particular cases for which they have conducted research and frequently have experience at several tribunals through successive internships. Both national and internationalized courts could benefit by establishing an intern circuit between an internationalized court and its counterpart domestic courts that could transfer information about cases and judgments between the two.<sup>65</sup>

#### 5. *Utility and Availability of Opinions*

The utility and availability of international courts' opinions is not a given. To be useful to a national court, an opinion must be on a topic of relevance, addressing the national court's fact situation in a manner that the national court can readily implement, and must be sufficiently technical and apolitical for a national court to refer to it without fear of political retribution. Finally, the content of judgments is critical. Slaughter and Helfer emphasize the importance of "[a]n opinion that systematically canvasses the arguments for and against a particular position, approving some and answering or rejecting others," thereby achieving "the recognition, albeit not the reconciliation, of competing social, political, and economic values."<sup>66</sup> This approach is particularly critical for internationalized

---

at 529-30; Helfer & Slaughter, *supra* note 36, at 309-12, 323-26 (affirming the importance of "awareness of audience" and "cross fertilization and dialogue").

63. Judge Vagn Joensen, Address to the United Nations Security Council: Final Report on the Completion Strategy of the Criminal Tribunal for Rwanda (Sep. 9, 2015) (transcript available in United Nations Mechanism for International Criminal Tribunal).

64. See Baylis, *supra* note 62, at 661; Baylis, *supra* note 45, at 281-282.

65. See Baylis, *supra* note 62, at 661; Baylis, *supra* note 45, at 281-282.

66. See Helfer & Slaughter, *supra* note 36, at 321-22 (suggesting that this method is particularly vital for atrocity cases in which horrific violence between social and political groups is at the heart of the legal confrontation because the

courts trying to serve as norm leaders for national courts, for it provides the information necessary for national courts to assess and either apply, reject, or adapt the international courts' reasoning. Fortunately, international courts typically offer a thorough review of the arguments and evidence produced by each side as part of their ordinary practice.

Other theories of international court influence emphasize the importance of another aspect of the content of the decision. The opinion must serve national courts' interests by addressing a legal topic of importance to them in a way that enables them to more easily address such cases in their own docket. For example, the ATJ has found that its primary area of influence is IP law, because the relevant administrative agencies have gained value from seeking clarification on vague provisions within their own international law.<sup>67</sup> As discussed in the next section on national bellwether trials, internationalized tribunals could select their cases and organize their arguments to be of particular use to national courts hearing cases concerning the same issues or fact settings.

These opinions must also be accessible. Depending on the national context, this may mean more than simply publicly issuing the opinion. Rather, it must be available in an appropriate language, and the national court must be aware of the opinion and its relevance. In direct compliance situations, these issues are less salient, because the parties will be notified of the judgement. But they are quite important where an international court is looking to extend its influence so that its opinions are important not merely to the case at hand but also to the national system generally.<sup>68</sup> It is this level of availability that is best promoted through transnational networks of one kind or another.<sup>69</sup>

---

method recognizes the losing arguments as legitimate and "signal[s] the proponents of these arguments that they have been heard and recognized as important participants in a debate, participants whose arguments must be answered").

67. Laurence R Helfer and Karen J Alter, *The Andean Tribunal of Justice and its Interlocutors: Understanding Preliminary Reference Patterns in the Andean Community*, 41 J. INT'L L. & POL. 871,875-76 (2009).

68. See Alter, Helfer, & Madsen, *supra* note 40, at 29-30 (noting that international judges often write their opinions for a greater audience with an eye to impacting the context in which they operate).

69. See Baylis, *supra* note 26, at 7 (suggesting that transnational networks

In post-conflict settings where information can be extraordinarily hard to come by and where the internationalized court is frequently working in a different language than the national courts, these issues of access are paramount. The European courts make their judgments quickly available in a variety of languages,<sup>70</sup> and the internationalized tribunals need to do the same. The ICC has developed an online case matrix database and a set of legal tools with the aim of making available court documents and judgments from the ICC, other internationalized tribunals, and national jurisdictions.<sup>71</sup> The NGO Case Matrix Network (CMN) has extended this project to tailor the software and other tools for selected national jurisdictions, including the DRC and Colombia among others.<sup>72</sup> This is a valuable step towards increasing accessibility for domestic courts, particularly because availability at the court, or even on the Internet, does not in itself ensure ready access in post-conflict settings, where legal actors may have no means of obtaining foreign and international judgments, or even of knowing they have been issued. What is called for is not merely making judgments passively available, but acting to place them in the hands of national court attorneys and judges. For this purpose, these sorts of partnerships between courts and NGOs enable courts to extend accessibility without diverting substantial internal resources from their primary purpose of trying cases. In addition to partnering with individual NGOs, as the ICC has done with the CMN, internationalized criminal tribunals can also make use of existing rule of law networks which have expertise in such projects.<sup>73</sup>

All in all, studies of international court effectiveness identify a number of characteristics that are fundamental for internationalized criminal tribunals with aspirations to influence post-conflict national

---

promote the goals of post-conflict justice and rebuilding national justice system by facilitating and encouraging communication between international and domestic courts); *see also* Huneeus, *supra* note 28, at 529-30 (advising international courts to use their connections within the international legal community to communicate and establish bonds and relationships to foment change); Helfer & Slaughter, *supra* note 36, at 309-12, 323-26.

70. Helfer & Slaughter, *supra* note 36, at 301-02.

71. *The ICC Case Matrix*, CASE MATRIX NETWORK, <http://www.casematrixnetwork.org/icc-case-matrix/>.

72. *Id.*

73. Baylis, *supra* note 26, at 60 (elaborating on the theories regarding the advantages of transnational networks, specifically highlighting how effective these networks can be as law-conveying tools).

courts. First, internationalized tribunals must put in place the basic structural elements necessary to establish the reputation and credibility of the court. In addition, the requisite political conditions must exist; though often this is not within the control of the international tribunal, the international community could take account of this factor in determining whether to establish an *ad hoc* tribunal for a particular situation. Courts must also undertake a wide range of communicative strategies at every stage of the court's work to develop relationships with national courts, rather than simply producing judgments and letting national courts make of them what they may. In this regard, three mechanisms appear to be particularly critical: cultivating national courts' interests in engaging with international legal standards; fostering connections with counterparts in national courts and making use of transnational networks; and assuring that international decisions are both useful and accessible to national courts.

#### B. U.S. BELLWETHER TRIALS IN MASS TORT CASES

While studies of international courts identify the potential structural, political, and communicative components of a persuasive internationalized criminal tribunal, a U.S. national court practice suggests considerations for selecting cases and for organizing analysis in judgments. Bellwether trials are an innovation of U.S. courts to deal with mass tort cases: a court selects a leading case from a set of related mass tort claims and hears that case before it or any other court proceeds with any of the other correlated cases.<sup>74</sup> The purpose of the bellwether trial is to establish the legal and factual findings that set the trend for all the associated cases, as well as providing a sense of the case's monetary value, if any. These rulings bind only the parties to the bellwether case and are merely advisory for the parties to the remaining cases, unless those parties have agreed in advance to binding bellwether trials.<sup>75</sup> By providing

---

74. See *Manual for Complex Litigation*, FED. JUD. CTR., § 22.315 (4th ed. 2004) ("to obtain the most representative cases from the available pool, a judge should direct the parties to select test cases randomly or limit the selection to cases that the parties agree are typical of the mix of cases").

75. See *Cimino v. Raymark Indus.*, 151 F.3d 297, 300 (5th Cir. 1998) (where the court tried 160 random cases and applied those results to over 2800 related cases in the same class-action for exposure to asbestos).



persuasive authority on the shared legal and factual issues and a data point on the amount of damages, bellwether trials reduce the burden on the courts hearing the remaining cases and facilitate settlement or mini-trials on individual issues to resolve the remaining claims.<sup>76</sup> Bellwether trials have been held, with varying success, in mass tort cases concerning harms allegedly caused by prescription drugs, asbestos, and other products.<sup>77</sup> Of course, so long as the bellwether trial is advisory, other plaintiffs can relitigate the decided issues, and other trial courts will not be obligated to follow its rulings, so the aspiring bellwether court must design its case selection, trial process, and judgment to persuade plaintiffs and other courts to follow its lead.

Mass tort bellwether cases offer a different line of sight on the persuasive authority of internationalized tribunals. Unlike the ECHR and other international courts, U.S. trial courts do not share many structural or institutional similarities with internationalized tribunals. However, there are three critical similarities between mass torts and the international crimes of genocide, crimes against humanity, and war crimes. The sheer numbers involved frequently make it impossible to try all the cases. Further, these numbers and the nature of the acts and injuries also create enormous evidentiary and legal complexity for courts hearing the cases. Finally, both mass torts and atrocities as legal constructs are made up of common and individual elements, that is, some of the matters that must be proved are shared amongst a number of related cases, and others are individual to each litigant. It is these similarities – and the maneuverings of trial courts aiming to persuade other trial courts hearing similar cases – that make mass tort bellwether trials an interesting point of comparison.

Thus, in both mass tort and atrocity situations, a large number of people have typically been injured, often in a bewildering variety of times, places, and manners, making investigation and proof of facts resource-intensive and difficult.<sup>78</sup> Both settings also frequently

---

76. See *Manual for Complex Litigation*, *supra* note 74, §§ 22.312-14.

77. See *In re Fibreboard Corp.*, 893 F.2d. 706, 712 (5th Cir. 1990) (featuring a consolidation of over 3,000 asbestos claims into a single products liability action); see also *In re Vioxx Litig.*, No. 619 (N.J. Sup. Ct. Law Div. May 12, 2004) (concerning a class-action suit against a pharmaceutical company for the manufacture and distribution of a drug linked with adverse side-effects).

78. See *In re Fibreboard Corp.*, at 706-07, 712 (acknowledging the extreme

present difficult and previously undecided legal issues that require considerable court time and attention. In the atrocity context, it is prosecutors who choose which cases they will pursue with the limited resources of their offices, and so it is they who must deal with these problems of numbers and complexity. For post-conflict national courts, even individual atrocity cases may represent an enormous burden. In the mass tort context, where plaintiffs are in control of the numbers and types of cases that are brought and there are innumerable plaintiffs' attorneys ready to take their cases, it is the courts that must take on the role of selection. Bellwether trials operate in part as a streamlining mechanism: by adopting legal analysis and findings of facts from the bellwether case, courts can dramatically reduce the difficulty and resource-intensive nature of hearing a mass tort or an atrocity case.

The other fundamental similarity between mass torts and atrocities is that in both settings, there are some common legal and factual issues that are susceptible of general determination. For example, one relatively small set of twenty-two tort cases concerned the spread of Legionnaire's disease on a cruise ship by malfunctioning spa filters.<sup>79</sup> A bellwether trial determined the common legal and factual questions, including the defective condition of the filters, the defendant's responsibility for those defects, and the appropriate amount of punitive damages.<sup>80</sup> The issues of proximate cause and compensatory damages were individual questions that had to be decided on a case by case basis. Following the bellwether trial, some plaintiffs went forward with mini-trials on the individual issues while adopting the bellwether decision as to the common issues; others settled their claims.<sup>81</sup>

Similarly, in international criminal cases, there are legal questions that are relevant to many cases, such as the standard for joint

---

difficulty and inherent imperfection in the court trying to handle mass torts).

79. *Silivanch v. Celebrity Cruises, Inc.*, 333 F.3d 355, 359-60 (3d Cir. 2001) (resulting in a claim for products liability, negligence, and breach of warranty that garnered millions of dollars in damages).

80. *Id.* (affirming that a punitive damages judgment of over 4 million dollars was reasonable).

81. *See id.* (Noting that while typically bellwether findings are advisory, in this case the plaintiffs had agreed in advance that the bellwether court's determinations on common issues would be binding).

criminal enterprise liability, as well as factual questions that are common to a related set of cases, such as whether a particular series of attacks on civilians occurred and if so, how large and organized they were. By addressing these shared legal and factual questions for an interrelated set of cases, internationalized tribunals could create persuasive authority on which national courts could choose to rely, reducing their own investigative and analytic burdens. Of course, courts hearing atrocity cases can already cite each other's legal analysis if they wish, and some *ad hoc* tribunals take judicial notice of previously adjudicated facts in other cases before the same court, a practice that could potentially be extended to an *ad hoc* international tribunal and national courts hearing cases concerning the same conflict.<sup>82</sup> What the U.S. bellwether trials demonstrate is how to optimize the relevance and utility of the internationalized tribunal's case selection and judgments, so that national courts will be more inclined to apply its determinations.

Three overarching issues have proven particularly salient in mass tort trials: whether the bellwether cases are sufficiently representative of the cases national courts will hear; whether the legal and factual issues decided in the bellwether trials are common to the other cases; and whether it is fair to the litigants for another court to adopt the bellwether court's legal and factual findings.<sup>83</sup> The bellwether trial model suggests that to maximize internationalized tribunals' utility for national courts, such tribunals should (1) select cases that offer significant factual and legal commonalities with a number of related

---

82. See generally Decision on the Prosecution Motion for Judicial Notice and Admission of Evidence, *Prosecutor v. Bimba, Kamara & Kanu*, Case No. SCSL-04-16-PT, Trial Chamber II, Oct. 25, 2005 (taking judicial notice of certain facts); Decision on Accused's Motion for Judicial Notice of Adjudicated Facts Related to Count One, *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Trial Chamber, Jan. 21, 2014 (taking judicial notice of certain facts); Ralph Mamiya, *Taking Judicial Notice of Genocide: The Problematic Law and Policy of the Karemera Decision*, 25 WISC. INT'L L. J. 1 (2006) (describing the ICTR's use of judicial notice and arguing for international criminal tribunals to take judicial notice only of previously adjudicated facts).

83. See *Dodge v. Cotter Group*, 203 F.3d 1190, 1200 (10th Cir. 2000) (grappling with each of these issues in turn during complex litigation involving claims against a uranium mill and the subsequent contamination and pollution it caused in Colorado); see also *Cimino v. Raymark Indus.*, at 300-01 (highlighting the court's struggle to balance the ease of mass litigation with 7th amendment concerns regarding the rights of individual litigants).

cases; and (2) issue judgments that seek to elucidate those commonalities, bearing in mind the three overarching issues mentioned above. In particular, concerns with fairness require that an internationalized court's persuasive determinations remain truly advisory for future cases and that national courts affirmatively evaluate the question of fairness in determining whether to adopt the internationalized court's legal reasoning or take judicial notice of its factual findings.

### *1. Case Selection*

To optimize the bellwether trial model, defendants should be selected for the representativeness of their factual and legal claims, so that the internationalized court can take a leading role in deciding the common factual issues and legal questions that are likely to arise in cases that the national courts may hear. Thus, the prosecutor might select a defendant who orchestrated a particular massacre in part because the immediate perpetrators are already in domestic custody or at least are of known identity and whereabouts. Such a trial would give the court an opportunity to investigate and determine the common facts on which the national court might then choose to rely. Alternatively, the prosecutor might select a defendant and charges whose factual connection to other cases was more attenuated, but whose case offered the opportunity to address critical common legal issues, such as whether a conflict should be treated as international or non-international, or whether certain types of militia activity against civilians could be considered widespread or systematic enough to qualify as a crime against humanity. Optimally, the prosecutor would select defendants and charges that would allow for the determination of multiple common factual and legal issues that would be of use to the national courts. In so doing, the internationalized tribunal would promote the purpose of encouraging and enabling national courts to take on atrocity prosecutions. Most importantly, this approach has the potential to have an impact beyond the immediate impression it leaves on the public, through its influence on national trials.

To date, internationalized tribunals have focused on other criteria for case selection, such as prosecuting defendants in prominent leadership positions, and having representation of all the groups

involved in the conflict amongst the selected defendants.<sup>84</sup> The proposed focus on representativeness would not supplant other prerequisites for prosecution, but rather, could be used in addition to those standards. These other characteristics that might be totally commensurate with seeking out representative cases in certain situations and not at all in others, depending on the socio-political setting of the concerned post-conflict state. Where these interests are in conflict, prosecutors would have to balance them in determining which cases to pursue.

In this regard, adding a representativeness criterion would also have the advantage of providing an additional, principled mechanism for choosing cases to prosecute. While the factors that have been deployed to date are useful for creating a pool of cases that meet minimum admissibility criteria, they are ultimately indeterminate and thus permit unexplained, and perhaps inexplicable, exercise of discretion in case selection.<sup>85</sup> A bellwether trial approach might produce a more determinative pattern of prosecutions if it enables prosecutors to purposefully narrow the set of potential cases that is created by applying the current case selection criteria.

## 2. *Investigation and Legal Analysis*

As noted above, one of the similarities between mass torts and mass atrocities is the existence of certain shared legal elements amongst related claims, which in turn require certain common facts to be established. Specifically, there are two conjunctive aspects to proving mass atrocity crimes: proving the broader context and proving the individual's action and association with that context.<sup>86</sup> For example, to prove that a defendant committed a crime against humanity, it is necessary to prove both that the defendant committed one of a list of forbidden acts (murder, rape, etc.) and that his act had a nexus to a widespread or organized attack on civilians. While the

---

<sup>84</sup> S.C. Res. 1534, U.N. Doc. S/RES/1534 (Mar. 26, 2004); S.C. Res. 1503, S/RES/1503, (28 Aug 2003); Schabas, *International Criminal Tribunals: A Review of 2007*, *supra* note 18, at 387.

<sup>85</sup> See Schabas, *Prosecutorial Discretion*, *supra* note 14, at 736 (claiming that prosecutorial discretion is often "ill-defined and complex," using the problems present in the Lubanga case as an example).

<sup>86</sup> Cherif Bassiouni, *Genocide: The Convention, Domestic Laws, and State Responsibility: Remark*, 83 AM. SOC'Y INT'L L. PROC. 314, 322 (1989).

question of the defendant's act and its nexus to the attack will be individual to each case or perhaps to a few cases stemming from the same act, the existence of the attack and its widespread or organized character are questions common to all the cases relating to that attack. Similarly, in war crimes cases the defendant's act must be related to either an international or non-international armed conflict, and to prove genocide the prosecutor must demonstrate that the defendant's act was done with the intent of destroying a listed group in whole or in part, a question that typically involves reference to a group or government's plan of destruction.<sup>87</sup>

Accordingly, as in mass torts, well-chosen bellwether trials present an opportunity to resolve – or at least, to suggest a resolution for – these common facts and legal determinations rather than retrying them in case after case. As for the individual elements, as in the mass torts context, bellwether trials can serve a useful benchmark function. This is particularly important in the atrocities context, because national post-conflict justice systems frequently lack the human, technical, and monetary resources to resolve these large-scale, complex legal and factual issues.<sup>88</sup> However, they may well possess the capacity to investigate and decide individual cases once the broader factual and legal context has been established. Thus, in addition to providing criteria for case selection, an atrocity bellwether trial would provide an opportunity to allocate the obligation to deploy the funds and other means necessary to deal with factual and legal complexity to a single court, allowing other courts to draft in its wake.<sup>89</sup> It would build from the internationalized court's comparative strengths in legal and investigatory skills and

---

<sup>87</sup> Rome Statute, *supra* note 9, at arts. 6-8.

<sup>88</sup> Hill Moodrick-Even Khen, *Revisiting Universal Jurisdiction: The Application of the Complementary Principle by National Courts and Implications for Ex-Post Justice in the Syrian Civil War*, 30 EMORY INT'L L. REV. 261, 306 (2015) (Using Syria as an example of this phenomenon, explaining how the post-conflict judicial system in Syria will not be able or willing to pursue criminal investigations and prosecutions).

<sup>89</sup> See *How to Draft a Bike*, WIKIHOW (Sept. 18, 2016, 12:44 PM), <http://www.wikihow.com/Draft-on-a-Bike> (explaining the concept of drafting as “. . . a trick where cyclists will go in single file to block the wind for the other people behind them . . . The second rider in a drafting line uses about 23% less energy than the lead rider, the third and subsequent riders use about 33% less energy than the lead rider. . . . A rider in the middle of a pack can use up to 60% less energy than the lead rider.”).

resources, and it would channel the internationalized court's efforts at domestic impact through its core functions: preparing for and holding trials.

Certainly, internationalized criminal tribunals already produce lengthy opinions with thorough analysis of the relevant factual and legal context, so in this sense, the bellwether model would not call for a transformative change in practice. Instead, the court might undertake some small changes in practice designed to make its analysis more readily transferable to national courts, such as specifically designating in its judgments the legal and factual aspects that are relevant beyond the particular case before them and setting out the extent of that relevance. The court might also make some minor alterations to the structure of its judgment to place the common factual and legal findings in separate sections from the individual ones. This aspect of mass tort bellwether trials demonstrates the incredible utility of what international courts are already doing, if they select their cases with an eye to what would be useful to national courts, and then engage in the outreach suggested above in the discussion of the ECHR, so as to place that information in the hands of national courts.

#### IV. IMPLICATIONS

For internationalized courts to succeed in developing persuasive authority for national tribunals hearing related cases, three prerequisite conditions must exist. First, there must be some possibility of national trials; *ad hoc* internationalized tribunals should focus on situations where, although national courts are not currently prosecuting, they might be willing and able to do so if provided with incentives and assistance. National courts might, for example, be willing to prosecute low level perpetrators that did not pose such political risks for the court as high level ones. Or a national justice system might not have the resources to investigate large scale atrocities but might be able to hold trials if it could make use of the results of an internationalized court's investigation. Likewise, a national court might not have the resources to research and analyze novel or complex legal issues, but might be willing to adapt the internationalized court's analysis to the facts before it. In such situations, an internationalized court might exponentially increase its domestic impact by influencing trials in the national court system.

In addition, as suggested by some studies of international court influence, the political conditions must be favorable enough that national courts will be amenable to considering internationalized tribunals' decisions. Atrocity trials often concern highly political issues, and so there is little hope that a tribunal's judgments will be treated as apolitical. But some degree of rapprochement between the internationalized institution and its national counterparts will be necessary for an internationalized criminal court's judgments to have the desired persuasive effect.

Strict adherence to these conditions would also, however, mean avoiding situations in which national courts are totally unprepared or unwilling to prosecute, a choice which would be in tension with another one of international criminal law's purposes: standing as a backstop against total impunity. In such instances, the international community and involved national actors may conclude that preventing absolute impunity is more important; the potential for facilitating national prosecutions is only one factor to be weighed against the other relevant concerns. But while this trade-off between maximizing effectiveness and preventing impunity is regrettable, I would argue that it is, in many instances, a worthwhile one to make in light of several additional considerations. First, internationalized tribunals will not investigate all the meritorious situations that arise due to their limited resources and capacity. The persuasive authority model does not create this problem; it is merely a proposal for choosing amongst the numerous situations that deserve judicial attention on the basis of the other relevant criteria, by focusing on those in which an internationalized tribunal is likely to have greater domestic impact. Furthermore, in situations where the national court system is utterly unwilling and unable to carry out any prosecutions, even with external support, it is unlikely that the national government will facilitate an international investigation and prosecution. Accordingly, in many cases, the complete unwillingness and/or inability of national courts to prosecute is likely to coincide with other factors indicating that international attempts at investigation and prosecution are likely to be stymied. Thus, internationalized tribunals may achieve the best domestic impact in states that are on the cusp of being able to address their own atrocities.



The final prerequisite is that internationalized tribunals must be prepared to produce their judgments in a timely fashion, before national courts have begun hearing their own cases. To date, internationalized tribunals have been acting far too slowly to plausibly offer persuasive authority for national courts. In order to serve as effective influences, future hybrid tribunals will need to act more efficiently. This is a difficult prerequisite to meet, because by their nature international criminal trials are complex, and because a court wishing to play a bellwether role must address the common factual and legal issues that are particularly resource-intensive to investigate and analyze.

Once these preconditions are met, the studies of international court effectiveness and the U.S. bellwether trial strategy suggest several important design elements for future internationalized criminal tribunals. Certain structural elements, such as hiring expert judges, and communicative strategies, such as cultivating national court interests and ensuring the ready availability of international judgments, will tend to promote internationalized courts' work as persuasive authority for national courts. Similarly, internationalized tribunals' judgments will be more useful to their national counterparts if they resolve common factual and legal issues that the national court would otherwise have to devote great resources to deciding. To do so, it will be important for the internationalized tribunal to select representative cases and to design its judgments to make those findings useful to later courts.

The lessons from these national and international models derive from our most basic understandings of how courts spread their influence. They do so not merely by compelling the parties to the case before them to comply, but also by persuading other courts to adopt their rulings and analysis, and thereby extending their influence throughout entire justice systems. As courts with expertise in investigation and legal analysis in the field of mass atrocities, internationalized criminal tribunals can most effectively expend their energies on developing the relevant facts and law. To maximize their persuasive authority, they should direct their activities purposefully at the constituency they can most readily influence through their core functions: post-conflict national courts.