University of Pennsylvania Carey Law School

Penn Law: Legal Scholarship Repository

Faculty Scholarship at Penn Law

2008

The Domestic Influence of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia and the Creation of the State Court of Bosnia & Herzegovina

William W. Burke-White

University of Pennsylvania Carey Law School

Follow this and additional works at: https://scholarship.law.upenn.edu/faculty_scholarship

Part of the [Criminal Law Commons](#), [Eastern European Studies Commons](#), [International Law Commons](#), [Law and Society Commons](#), [Other Political Science Commons](#), and the [Public Law and Legal Theory Commons](#)

Repository Citation

Burke-White, William W., "The Domestic Influence of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia and the Creation of the State Court of Bosnia & Herzegovina" (2008). *Faculty Scholarship at Penn Law*. 178.

https://scholarship.law.upenn.edu/faculty_scholarship/178

This Article is brought to you for free and open access by Penn Law: Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship at Penn Law by an authorized administrator of Penn Law: Legal Scholarship Repository. For more information, please contact PennlawIR@law.upenn.edu.

The Domestic Influence of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia and the Creation of the State Court of Bosnia & Herzegovina

WILLIAM W. BURKE-WHITE*

International criminal tribunals are often criticized for having minimal influence on the states over which they exercise jurisdiction. This article argues that the International Criminal Tribunal for the Former Yugoslavia has had a far more positive impact on domestic governance in Bosnia & Herzegovina than previously assumed by both the academic and policy communities. The article develops a theoretical model to explain the impact of international criminal tribunals on domestic governance and tests that model against the ICTY's influence in Bosnia. More specifically, the article advances the claim that the nature of the tribunal's jurisdictional relationship with domestic judicial institutions and the incentives for national and international officials created by that jurisdiction interacted with changing preferences of domestic actors, thereby catalyzing judicial reform and institutional development in Bosnia. Based on an in-depth study of the ICTY's interactions with Bosnia from 1994 to 2006, the article presents new empirical evidence of the Tribunal's early effect of freezing out the activa-

---

* Assistant Professor of Law, University of Pennsylvania School of Law. JD, Harvard Law School; PhD, Cambridge University. The author wishes to thank Marc Weller, Philippe Sands, Philip Allot, Mark Drumbl, Colleen Burke, Jenia Turner, the participants in the University of Connecticut International Law Roundtable (Winter 2006), and the participants in the International Criminal Court Seminar Series (July 2006) who read or commented on earlier drafts. In addition, the author is grateful to all those in Bosnia & Herzegovina who assisted with the research, particularly Michael Johnson, and to the Penn Law Faculty Research Fund for financial support.

tion of the domestic judiciary in Bosnia and its later role in the establishment of the new State Court of Bosnia & Herzegovina with war crimes jurisdiction. The article attributes the variance in the Tribunal's influence over time in large part to changes in its jurisdictional relationship with national courts brought about by the ICTY's Completion Strategy. The article further suggests the significance of a tribunal's institutional design, and particularly its jurisdictional relationship, for the direction and intensity of its influence on domestic institutional development.

I.	INTRODUCTION	281
II	FRAMING THE CASE: THE CONTEXT OF THE ICTY'S RELATIONSHIP WITH BOSNIA & HERZEGOVINA	285
III.	EXPLAINING THE DOMESTIC INFLUENCE OF INTERNATIONAL CRIMINAL TRIBUNALS	289
	A. The Domestic Influence of International Tribunals.....	290
	B. A Multilevel Global Governance-based Theory of the Domestic Influence of International Criminal Tribunals	293
	1. Jurisdiction and the Structure of Multilevel Global Governance.....	296
	2. The Pursuit of Individual Self-Interest.....	303
	3. Norm Leadership	306
	4. Summary.....	308
IV.	TESTING THE MODEL: THE ICTY AND BOSNIA & HERZEGOVINA	309
	A. Phase I: The ICTY's Chilling Effect from 1993– 2002	310
	1. Jurisdictional Relationships: International Primacy and Absolute International Primacy.....	310
	2. The Pursuit of Self-Interest by Domestic and International Actors	315
	3. The Lack of Norm Leadership	317
	B. Phase II: The ICTY's Catalytic Effect from 2002 On..	319
	1. Toward a Jurisdictional Relationship Akin to Complementarity	319
	2. The Congruence of Domestic and International Self-Interest	328
	3. Norm Leadership and the Establishment of the State Court of BiH	335

V. CONCLUSION: INSTITUTIONAL DESIGN AND THE DOMESTIC
IMPACT OF INTERNATIONAL TRIBUNALS.....345

I. INTRODUCTION

A variety of justifications for the establishment of international criminal tribunals have been advanced, ranging from retribution against criminal perpetrators to the restorative impact criminal trials can have on affected communities.¹ Despite these assumed benefits, international criminal tribunals, particularly *ad hoc* tribunals such as the International Criminal Tribunal for the Former Yugoslavia (ICTY), have been thought to have relatively little impact on domestic reconstruction efforts or the reform of national judiciaries. To the limited extent that such tribunals have been perceived as influencing domestic governance, they have often been criticized for either diverting aid away from judicial reform² or eliminating the need for national judicial development by providing an alternative forum for prosecution.³ Even the UN Expert Group, which reviewed the ICTY's operation in 1999, expressed concern at the Tribunal's lack of engagement with the states under its jurisdiction and failure to improve judicial capacity in the Balkans.⁴

1. For a discussion of the justifications of using international criminal tribunals to punish international crimes, see MARK DRUMBL, *ATROCITY, PUNISHMENT AND INTERNATIONAL LAW* 59–70, 149–180 (2007).

2. See, e.g., Jose E. Alvarez, *Crimes of States/Crimes of Hate: Lessons From Rwanda*, 24 *YALE J. INT'L L.* 365, 414 (1999) (noting that “[e]ven if one concedes that present Rwandan procedures for trying perpetrators are fundamentally flawed, it is appropriate to ask whether enough attention and resources have been devoted, internationally, to assisting local Rwandan processes as have been to the creation and ongoing efforts of the ICTR. What would have been the state of Rwandan justice today if, instead of spending between forty and fifty million dollars a year on the ICTR, comparable sums of money and effort had been put into assisting the Rwandan government in overcoming the enormous obstacles it faced in the pursuit of criminal accountability?”).

3. Julian Ku & Jide Nzelibe, *Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?* 44 (Hofstra U. Sch. L. Legal Stud. Res. Series, Res. Paper No. 06-22, 2007) (noting that international tribunals “will often enable politicians in weak states to escape accountability and avoid making hard policy decisions in the context of a crisis”).

4. For a report examining some of the ICTY's early failures, see Expert Group, *Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda*, U.N. DOC. A/54/634 (Nov. 22, 1999). For a critique of the inability of the International Criminal Tribunal for Rwanda to enhance capacity there, see generally Alvarez, *supra* note 2.

These critiques of the ICTY are, in part, correct. For much of its first decade of operation, the ICTY did little to promote domestic development or to enhance the capacity of national judicial institutions in the region. In fact, the ICTY may well have frozen out judicial reform in Bosnia & Herzegovina (BiH) in the years immediately following the war in the Balkans. Since approximately 2002, however, the ICTY's impact on domestic institutions has been much more positive. During this later period, the ICTY has encouraged the development of domestic courts in BiH and catalyzed the activation of domestic judicial institutions. Specifically, the ICTY has helped spur the establishment of the new State Court of Bosnia & Herzegovina (CBiH) with war crimes jurisdiction. This more nuanced reading of the ICTY's role in Bosnia suggests that the Tribunal's domestic impact has changed considerably over time and that its overall contribution to domestic development has been far more positive than has been assumed to date.

A key change in the functioning of the ICTY and its domestic impact between the first period of its operation (1993–2002, when it froze out domestic judicial development) and the second period (2002–present, when it catalyzed the activation of national institutions in BiH), was the advent of the Tribunal's Completion Strategy in 2002. The Completion Strategy, developed in response to pressure from donor states to wrap up the work of the Tribunal, shifted the ICTY's jurisdictional relationship with domestic institutions in BiH and, in turn, altered the incentives facing key officials within the Tribunal and in the Bosnian government. These new incentive structures allowed the Tribunal to move from inhibiting domestic judicial development to facilitating nascent domestic demands for a stronger national judiciary.

This article advances both a narrow claim that challenges conventional understandings of the ICTY's impact in BiH and a broader claim that the jurisdictional relationships between domestic and international tribunals are a critical factor in the ability of an international tribunal to influence domestic governance. With respect to the narrower claim, the article asserts that the ICTY has had a far more positive impact on domestic governance and judicial development, particularly with respect to war crimes prosecutions, in BiH after 2002 than previously assumed by the academic and policy communities. More specifically, the article contends that the jurisdictional relationship between the ICTY and domestic courts created incentives that structured the changing interests of domestic actors to alter their policy choices in favor of judicial reform and institutional development in BiH. Based on an in-depth study of the ICTY's interactions with Bosnia from 1994 to 2006, the article pre-

sents new empirical evidence of the Tribunal's early effect of freezing out the activation of the domestic judiciary in Bosnia and its later role in encouraging the establishment of the State Court of Bosnia & Herzegovina.⁵

The article's broader claim—generalized from the case study of the ICTY in BiH—is that the institutional design of an international criminal tribunal, and particularly its jurisdictional relationship with national courts, plays a key role in determining the direction and intensity of its influence on domestic institutional development. The article explains the variance in the ICTY's domestic impact over time based on two key variables: changes in domestic interests in Bosnia & Herzegovina over time and alterations in the ICTY's jurisdictional relationship with national courts brought about by its Completion Strategy. While the first of these variables—changes in domestic interests over time—is hardly surprising, the second variable—the role of a tribunal's jurisdictional relationship with national courts in structuring its domestic impact—is heretofore unexplored. This article, therefore, develops and applies a theoretical model to explain how changes in the jurisdictional relationship of an international criminal tribunal can directly influence core policy choices of a national government.

Although some of the impacts of international criminal tribunals, such as their deterrent effect, have been subject to considerable theoretical analysis, largely through analogies with their domestic counterparts,⁶ the impact of international criminal tribunals on domestic judicial development has not been the subject of significant

---

5. The argument presented here is based on an in-depth evaluation of the interactions between the ICTY and Bosnia & Herzegovina. The primary data analyzed herein derive from documentary analysis and more than fifty interviews conducted in 2005 and 2006 in Sarajevo and Mostar, Bosnia & Herzegovina, The Hague, Netherlands, and New York, N.Y. with government officials, national judicial personnel, international legal officials, and both local and international NGOs. The interview findings were supplemented and corroborated with key documents made available by Bosnian governmental institutions, the ICTY, the United Nations, and various NGOs. For a discussion of the basic techniques used in qualitative interview analysis, see Jody Miller and Brian Glassner, *The "Inside" and the "Outside": Finding realities in interviews*, in *QUALITATIVE RESEARCH, THEORY, METHOD AND PRACTICE* 99–111 (David Silverman ed., 1997); Janice M. Morse, "Emerging from the Data": *The Cognitive Processes of Analysis in Qualitative Inquiry*, in *CRITICAL ISSUES IN QUALITATIVE RESEARCH METHODS* 23, 35 (Janice M. Morse ed., 1994).

6. For domestic legal analogies, see 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). For an application to the work of the ICTY, 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"); Jan Klabbbers, *Just Revenge? The Deterrence Argument in International Criminal Law*, XII FIN. Y.B. INT'L L. 249, 251 (2001).

theoretical enquiry and largely lacks domestic analogies on which such enquiry could draw. This article fills that theoretical gap by offering a micro-foundational account of how an international criminal tribunal can influence significant domestic governance choices, such as the decision to undertake national judicial reform. The model developed here is rooted in institutionalist theories of international relations and comparative politics. It recognizes that international tribunals, even those only empowered to enforce international criminal law against individuals, can monitor, sanction and provide benefits directly to national governments through the jurisdictional design and policy choices of the tribunal. This account is largely functionalist in nature and emphasizes the ways in which the jurisdictional relationship between the international tribunal and national courts can alter the incentives facing domestic actors and, thereby, influence domestic policy outcomes.

The theoretical model and empirical evidence for the ICTY's influence on governance in Bosnia advanced here not only challenge conventional wisdom about the ICTY's record, but also suggest new possibilities for international criminal tribunals to influence states. Beyond simply monitoring state behavior,⁷ international institutions can play a direct role in "shaping or influencing political outcomes within sovereign states in accordance with international legal rules" by strengthening domestic government, backstopping national institutions, and compelling domestic action.⁸ While these functions have long been evident in the operation of international institutions of a more general nature, such as the European Union, this study suggests that even international criminal tribunals that have jurisdiction only over individuals—not states—can strengthen, backstop, and compel domestic governance. This potential, highlighted by the interactions between the ICTY and BiH, provides an opening for international lawyers and diplomats to enhance post-conflict reconstruction or improve domestic governance through strategic choices in the design and operation of international institutions, especially the jurisdictional mandate of international criminal tribunals.⁹

---

7. For discussions of the role of international institutions in monitoring state behavior, see ROBERT KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* (1984); Barbara Koremenos, Charles Lipson & Duncan Snidal, *The Rational Design of International Institutions*, 54 INT'L ORG. 761 (2001); Andrew Kydd & Duncan Snidal, *Progress in Game-Theoretical Analysis of International Regimes*, in REGIME THEORY AND INTERNATIONAL RELATIONS 112 (Volker Rittberger & Peter Mayer eds., 1993).

8. Anne-Marie Slaughter & William Burke-White, *The Future of International Law is Domestic (or the European Way of Law)*, 47 HARV. INT'L L.J. 327–29 (2006).

9. For a discussion of the design of international institutions, see the range of articles contained in *THE RATIONAL DESIGN OF INTERNATIONAL INSTITUTIONS* (Barbara Koremenos, Charles Lipson & Duncan Snidal eds., 2003).

The article begins with a brief introduction to the historical, political and institutional context of the ICTY's interactions with BiH that considers changes in the structure and use of the Bosnian judiciary to prosecute war crimes cases. As this paper attributes those changes in large part to alterations in the jurisdictional mandate and policies of the ICTY and changing domestic interests over time, Part II develops a theoretical model for how an international criminal tribunal, such as the ICTY, can impact the behavior of national governments beyond deterring international crimes. That theoretical account is essentially a rational choice model based on the nature of the jurisdictional relationship between the international tribunal and national institutions and the preferences of domestic actors. Part III applies that model, examining in detail the impact of the ICTY on Bosnia & Herzegovina during two key phases of the Tribunal's operation. During the first phase, from 1993 to 2002, the ICTY generated a strong chilling effect on domestic prosecutions and largely prevented domestic juridical reform. In contrast, during the second phase, from the advent of the ICTY's Completion Strategy in 2002 until present, the Tribunal has catalyzed the activity of the domestic judiciary in Bosnia, including the establishment the State Court of Bosnia & Herzegovina with war crimes jurisdiction. Finally, the Conclusion examines the implications of jurisdictional design choices on the domestic impact of international criminal tribunals and suggests that the experiences of the ICTY may offer valuable guidance for design and policy choices of newer tribunals such as the International Criminal Court (ICC).

II. FRAMING THE CASE: THE CONTEXT OF THE ICTY'S RELATIONSHIP WITH BOSNIA & HERZEGOVINA

Throughout the 1990s, a brutal and violent ethnic and political conflict raged in the Balkans.¹⁰ From 1992 to 1995, Bosnia found itself at the center of a war among the emergent states of the former Yugoslavia marked by significant international crimes by all sides, including war crimes, crimes against humanity, and genocide. Hostilities largely came to an end in 1995 with the Dayton Peace Conference, after which a general peace agreement was signed in

---

10. For a discussion of the history of Bosnia & Herzegovina, see MISHA GLENNY, *THE BALKANS: NATIONALISM, WAR AND THE GREAT POWERS 1804-1999* (2000); NOEL MALCOLM, *BOSNIA: A SHORT HISTORY* (1994); MARK MAZOWER, *THE BALKANS* (2000); LAURA SILBER & ALLAN LITTLE, *YUGOSLAVIA: DEATH OF A NATION* (1997). For a discussion of the plan and the process leading up to it, see DAVID OWEN, *BALKAN ODYSSEY* (1995).

Paris on 14 December 1995.¹¹ The agreement provided for a territorial settlement between the Muslim-Croat Federation and the Serb Republic as well as a new constitution for Bosnia & Herzegovina with an international governmental mandate.¹²

Under the auspices of Dayton, an unusual constitutional structure was established,¹³ providing for a federation of two entities, the Federation of Bosnia & Herzegovina (FBiH) and the Republika Srpska (RS),¹⁴ with most governmental authority at the level of the two constituent entities and some powers reserved for the federal level.¹⁵ A three-person joint presidency includes one member from each of the major ethnic groups.¹⁶ A bicameral parliamentary assembly with ethnic representation has power over fiscal and other matters.¹⁷ Beyond these permanent domestic institutions, the Dayton Accords also provided for the creation of the Office of the High Representative (OHR), an international organization in BiH with the "final authority" to interpret the Dayton Agreement and the power to impose legislation for the country.¹⁸

In the years following Dayton, a Bosnian judiciary emerged with a complex structure. Under Dayton, judicial authority was largely the responsibility of the FBiH and the RS. The FBiH consists of ten semi-independent cantons and the RS is comprised of five separate administrative units. While there is a state level Ministry of Justice, each of the RS entities and each of the FBiH cantons have their own independent justice ministry and court systems.¹⁹ At the

---

11. For a discussion of Holbrooke's efforts, see RICHARD HOLBROOKE, *TO END A WAR* (1998).

12. For a discussion of the agreement, see *id.* For the agreement itself, see Office of the High Representative, Dayton Peace Agreement, The General Framework Agreement for Peace in Bosnia & Herzegovina, Bosn. & Herz.-Croat.-Yugo., Dec. 14, 1995, available at http://www.ohr.int/dpa/default.asp?content_id=380. For all relevant documents to the Yugoslav crisis, see *THE YUGOSLAV CRISIS IN INTERNATIONAL LAW* (Daniel L. Bethlehem & Marc Weller eds., 1997).

13. Annex 4 of the Dayton Peace Accords includes the Constitution of Bosnia & Herzegovina. The Constitution has never been passed through domestic parliamentary channels but is the result of the international peace settlement.

14. See CONST. BOSN. & HERZ., annexed to the Dayton Peace Agreement, *supra* note 12, annex 4, art. I(3).

15. See *id.* art. III(1). Although the Dayton Agreements initially created a relatively weak federal structure, retaining strong powers for the constituent entities, the Constitutional Court of Bosnia & Herzegovina significantly expanded the powers of state level institutions during its first term. Interview with David Feldman, Judge, Constitutional Court of Bosnia & Herzegovina, in Cambridge, U.K. (Aug. 2, 2005).

16. See CONST. BOSN. & HERZ. art. V.

17. See *id.* art. IV.

18. See Dayton Peace Agreement, *supra* note 12, annex X, art. V. The first holder of the position was Carl Bildt of Sweden and the High Representative as of 2005 is Paddy Ashdown.

19. See *War Crimes Trials Before the Domestic Courts of Bosnia & Herzegovina*,

federal level, the Dayton Accords provided for a partially internationalized Constitutional Court with the power of judicial review. Although express power was given to the federal government for "international and inter-Entity criminal law enforcement,"²⁰ no federal judicial institutions other than the Constitutional Court were established. As a result, most law enforcement, including the domestic prosecution of international crimes, was left to the constituent entities.²¹

On 25 May 1993, the UN Security Council established the International Criminal Tribunal for the Former Yugoslavia, with primary jurisdiction over international crimes committed on the territory of the Former Yugoslavia.²² The ICTY's primary jurisdiction gave the new Tribunal the authority to prosecute any cases it wanted to and even to assume jurisdiction away from domestic courts. Endowed with significant international funding and a strong mandate for accountability, the ICTY began the investigation and prosecution of international crimes from the region, with much of its early efforts focused on crimes in BiH.²³

In the first decade after Dayton, the Bosnian judiciary remained weak and judicial reform efforts were limited. Most significant prosecutions of international crimes from the war in Yugoslavia were undertaken by the ICTY. Very few domestic prosecutions for war crimes cases were initiated and, when they were, they were often politically driven acts of reprisal rather than genuine attempts at accountability. While the decentralized structure of the Bosnian judiciary makes record keeping difficult, only fifty-four domestic war crimes prosecutions were documented to have reached trial stage before January 2005.²⁴

Progress and Obstacles, Organization of Security and Cooperation in Europe Report 3 (2005). In the FBiH and the RS, there is a multi-tiered court system. Municipal courts in the FBiH and Basic Courts in the RS are the courts of first instance. Cantonal courts in the FBiH and District Courts in the RS are at the middle tier and Entity Constitutional Courts provide final appellate review. *Id.* at 85. Basic Courts in the RS have jurisdiction in criminal cases up to a maximum 20 year sentence and Cantonal courts in the FBiH have criminal jurisdiction up to a 10 year sentence. In addition, both entities have a series of minor offence courts outside the normal judiciary. *Id.*

20. Dayton Peace Agreement, *supra* note 12, arts. III(2)(c), III(1)(g).

21. See *id.* art. VI; Interview with David Feldman, *supra* note 15. See also, *Final Report of the Independent Judicial Commission* 84 (March 2004) (on file with author) (observing that "[m]ost matters, including the establishment and organization of the judicial system, were made the responsibility of the two Entities").

22. See S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993).

23. For an extensive treatment of the ICTY and its early work, see RACHEL KERR, *THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: AN EXERCISE IN LAW, POLITICS, AND DIPLOMACY* (2004).

24. *War Crimes Trials Before the Domestic Courts of Bosnia & Herzegovina*, *Progress and Obstacles*, *supra* note 19, at 5–6.

Beginning in late 2002, however, judicial reform efforts in Bosnia became far more prominent. In 2002, the Office of the High Representative (OHR) engaged in a process of judicial streamlining within the constituent entities, focusing on the number of courts, their location, jurisdiction and ethnic balance.²⁵ A Judicial and Prosecutorial Service Commission evaluated judges, replaced many of them in an effort to avoid bias and corruption, and significantly increased judicial salaries.²⁶ Efforts were also undertaken to improve court administration and management.²⁷ For example, the OHR led a set of procedural reforms that basically moved BiH from the continental civil law tradition toward an Anglo-American adversarial system.²⁸

The most notable reform effort has been the creation of a new federal level criminal and administrative court, the State Court of Bosnia & Herzegovina (CBIH). Between 2002 and 2004 the Bosnian federal government established this new court of first instance at the state level with jurisdiction over organized crimes, war crimes, and crimes in the federal—as opposed to entity level—penal code.²⁹ This new court is now engaged in the active prosecution of war crimes cases. In addition, the ICTY has now begun to refer cases it had intended to prosecute back to national institutions, particularly to the

---

25. See *Final Report of the Independent Judicial Commission*, *supra* note 21, at 97. See also Interview with John Peyton, Head of Legal Section, Office of the High Representative, in Sarajevo, Bosn. & Herz. (Aug. 5, 2005). The number of municipal courts in FBiH was reduced from 53 to 28 and the number of Basic Courts in the RS was reduced from 25 to 19. See *Final Report of the Independent Judicial Commission*, *supra* note 21, at 99. In the process, a number of courts were merged, some eliminated and others expanded. See *id.* at 104. In addition, commercial divisions of the courts were established. As a result, the number of courts and judges was reduced by 41%, bringing the previously inflated Bosnian judicial system closer in relative size to that of more developed European neighbors. See *Final Report of the Independent Judicial Commission*, *supra* note 21, at 95.

26. See *Final Report of the Independent Judicial Commission*, *supra* note 21, at 95. In effect, all judges were fired and a select group rehired. Judicial salaries are now on the order of €3,000 per month, among the highest paid professionals in the country. See Interview with John Peyton, *supra* note 26. New legislation governing judicial budgets was also passed. See *Final Report of the Independent Judicial Commission*, *supra* note 21, at 111.

27. See *Final Report of the Independent Judicial Commission*, *supra* note 21, at 117–119. These efforts included the introduction of case management systems, increasing the power of court presidents to organize caseload, and changing the opening hours of courts.

28. See *Final Report of the Independent Judicial Commission*, *supra* note 21, at 161–62. In short, “Some elements of the inquisitorial process were abandoned in favour of a more adversarial process, with parties having the right to determine how their case will be presented.” *Id.* The French and German governments were strongly opposed to the change. See Interview with John Peyton, *supra* note 26. Michael Bohlander, a German Judge and former ICTY Senior Legal Advisor has referred to the change as “yet another example of legal colonialism.” Michael Bohlander, *The Transfer of Cases from International Criminal Tribunals to National Courts* 11 (working paper on file with author). It has not proved easy for the local judiciary to adapt. See Interview with Rupert Skilbeck, Head of OKO (Criminal Defense Service), in Sarajevo, Bosn. & Herz. (Aug., 10 2005).

29. See War Crimes Chamber Project, Court of Bosnia & Herzegovina, *Project Implementation Plan Progress Report* (Oct. 20, 2004) (on file with author).

new State Court of Bosnia & Herzegovina.

The overall record of the Bosnian judiciary since 1994 is contradictory. From 1993 to 2002, the domestic judiciary in Bosnia was largely inactive, undertaking relatively few prosecutions of its own and leaving most cases to the ICTY. Similarly, the Bosnian government invested relatively few resources in judicial reform efforts. Toward the end of 2002, however, the Bosnian judiciary became far more active, the CBiH was established, and numerous cases were returned from the ICTY to domestic courts. This variation in the effectiveness of Bosnian courts at prosecuting war crimes raises significant questions. First, what accounts for the changes in the Bosnian judiciary beginning in late 2002? Based on considerable empirical evidence presented below, this article suggests that the changing effectiveness of the Bosnian judiciary can be attributed both to pressure from above, brought about by alterations in the ICTY's jurisdictional mandate and policies under its Completion Strategy, and to pressure from below, brought about by the shifting preferences of key domestic actors over time. To the extent that changes in the ICTY's jurisdiction and policies were a factor in the variance in the development and use of the Bosnian judiciary, a second question arises: how can an international criminal tribunal with jurisdiction only over individuals influence the operation of a domestic judiciary and the policy choices of a national government? The following section develops a functionalist model of how an international criminal tribunal can have such deep influence on the domestic governance choices of states. In so doing, it provides the theoretical foundation for explaining how the ICTY could influence the structure and operation of the domestic judiciary in BiH.

III. EXPLAINING THE DOMESTIC INFLUENCE OF INTERNATIONAL CRIMINAL TRIBUNALS

Despite the now voluminous literature on international criminal tribunals, their influence on domestic governance—as opposed to on the individuals over whom they exercise jurisdiction—remains largely under-theorized. As international criminal tribunals are a functional subset of international institutions more generally, a theoretical account of their influence on domestic governance can be derived from the impact of international institutions on state behavior more generally. In the political science and international relations literature, international institutions have been shown to perform a number of functions with respect to the behavior of their member

states, including reducing transaction costs of cooperation,³⁰ monitoring state behavior,³¹ sanctioning violations,³² generating lags³³ and issue linkages,³⁴ and even changing state preferences through longer-term processes of socialization.³⁵ Each of these functions has the potential to impact state behavior in relation to the institution's particular legal rules and norms. The influence of international criminal tribunals on domestic governance choices ought to be linked to one or more of these general institutional functions.

This Part of the article is organized into two sections: first, section A explains the nature and scope of the influence wielded by international criminal tribunals on state behavior; then section B presents a theory of how this influence arises by drawing on a functionalist analysis of the role played by international criminal tribunals in multilevel systems of global governance. Ultimately, this Part argues that the domestic influence of international criminal tribunals can best be understood by viewing such tribunals as part of a deeply interconnected system of multilevel global governance.

A. *The Domestic Influence of International Tribunals*

Over the past two decades, perhaps the most important development in the role of international institutions has been the legalization of dispute resolution³⁶ through a proliferation of international courts and tribunals.³⁷ Due to the function and structure of interna-

---

30. See ROBERT KEOHANE & JOSEPH NYE, *POWER AND INTERDEPENDENCE: WORLD POLITICS IN TRANSITION* (1977) (developing an institutionalist theory of international relations). KEOHANE, *supra* note 7, at 89–109.

31. See ABRAM CHAYES & ANTONIA H. CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 22–24, 135–73 (1995).

32. See Downs George, David Rocke & Peter Barsoom, *Is the Good News about Compliance Good News about Cooperation?*, 50 INT'L ORG. 379–406 (1996).

33. INTERNATIONAL REGIMES 359–61 (Stephen Krasner ed., 1983); see also ANDREAS HASENCLEVER, PETER MAYER & VOLKER RITTBERGER, *THEORIES OF INTERNATIONAL REGIMES* (1997).

34. HOWARD RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* 13, 285–87 (1982) (discussing the positive impact of linkages in the negotiation process); Keohane, *supra* note 7, at 91–93.

35. See generally ALEXANDER WENDT, *SOCIAL THEORY OF INTERNATIONAL POLITICS* (1999). See also Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621 (2004); Alastair Ian Johnson, *The Social Effects of International Institutions on Domestic (Foreign Policy) Actors*, in *LOCATING THE PROPER AUTHORITIES: THE INTERACTION OF DOMESTIC AND INTERNATIONAL INSTITUTIONS* 145 (Daniel W. Drezner ed., 2002); Harold Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996).

36. See generally LEGALIZATION AND WORLD POLITICS 1–104 (Judith L. Goldstein, Miles Kahler, Robert O. Keohane & Anne-Marie Slaughter eds., 2001).

37. See Project on International Courts and Tribunals, <http://www.pict-pecti.org/>.

tional tribunals generally, and international criminal tribunals more specifically, their ability to impact state behavior draws on a subset of the more general mechanisms noted above through which international institutions influence state conduct. Some of the standard mechanisms through which international institutions impact states are inapplicable to international tribunals of any sort, due to their particular operation. For example, international courts are not designed to help states identify and act upon common interests. Nor do international courts, in and of themselves, generate lags or issue linkages that might alter state interests and behavior.³⁸

In contrast, international tribunals are well positioned to impact state behavior through other functions of institutional influence, such as monitoring, imposing sanctions, and promoting norm socialization. International tribunals deepen the delegation of international commitments.³⁹ They thereby increase the costs of defection from underlying legal norms by monitoring state behavior and, where that behavior breaches underlying legal rules, sanctioning it.⁴⁰ Likewise international tribunals can socialize states through iterative interactions with the court.⁴¹

These mechanisms of influence available to international tribunals suggest that the main impact of such tribunals will be to increase compliance rates with the legal norms the tribunal enforces. Monitoring, sanctioning, and socializing essentially push and pull states toward greater compliance with the legal regime the tribunal enforces by making the costs of noncompliance greater than they would have been absent the tribunal or by acculturating states into the acceptance of new sets of norms and values. The overall result of the establishment of an international tribunal to enforce a particular set of substantive legal norms should, therefore, be to more effectively pressure states to comply with the underlying legal rules enforced by the tribunal.⁴²

---

38. International courts might, however, be in a position to adjudicate violations of underlying substantive legal rules that could well generate lags or issue linkages. The WTO is perhaps the best example thereof. See, e.g., Jose E. Alvarez, *International Organizations: Then and Now*, 100 AM. J. INT'L L. 324 (2006); Jose E. Alvarez, *The Boundaries of the WTO: The WTO as Linkage Machine*, 96 AM. J. INT'L L. 146 (2002).

39. Goldstein, Kahler, Keohane & Slaughter, *supra* note 36, at 1–104.

40. See generally Downs, Rocke & Barsoom, *supra* note 32.

41. See generally Goodman & Jinks, *supra* note 35.

42. Even here, however, the record of international courts is somewhat mixed. See CONSTANZE SCHULTE, COMPLIANCE WITH DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE (2004) (tracing the record of state compliance with ICJ decisions). Except to the degree that the underlying legal rules subject to the court's jurisdiction require some degree of domestic political change or transformation, the standard explanations for the domestic impact of international institutions on state behavior neither anticipate nor explain the influence of international tribunals on domestic policy choices beyond enhancing compliance

Drawing on this analysis, institutionalist theory would predict that the primary impact of international criminal tribunals would be to increase compliance rates with substantive norms of international criminal law. International criminal tribunals are distinct from tribunals of more general jurisdiction in two ways, both of which reinforce this expected impact of such courts in increasing compliance with international criminal law. First, international criminal tribunals have jurisdiction over a very narrow set of substantive legal obligations, namely the prohibition of genocide, crimes against humanity, and war crimes.⁴³ As a result, their monitoring and sanctioning should increase compliance rates largely with respect to these particular rules. Second, these tribunals have criminal jurisdiction over individuals, not states.⁴⁴ Hence, their most immediate impact should be to alter the incentives of particular individuals and, hopefully, deter individual commission of international crimes.

Given that international criminal tribunals have jurisdiction over individuals and not states, the influence of such criminal tribunals on state behavior should be of a secondary nature. When international criminal tribunals deter particular individuals who happen to be in control of state policy from engaging in some prohibited conduct, those officials may, in turn, alter state behavior to better conform to the substantive rules of international criminal law subject to the tribunal's jurisdiction. International criminal tribunals would therefore be expected to have a particularly strong primary impact of individual deterrence and a secondary influence of altering state behavior toward compliance with the substantive rules of international criminal law. The standard theories of institutional impact do not, however, explain how international criminal tribunals can have a broader impact on domestic governance with respect to norms not directly within the international tribunal's jurisdiction, such as reforming or activating domestic judiciaries.

---

with underlying legal rules. For a more general discussion of international relations theories and compliance with international law, see Anne-Marie Slaughter & Kal Raustiala, *International Law, International Relations, and Compliance*, in *HANDBOOK OF INTERNATIONAL RELATIONS* 538 (Walter Carlsnaes, Thomas Risse & Beth A. Simmons eds., 2002).

43. See, e.g., Statute of the International Criminal Tribunal for the Former Yugoslavia, May 25, 1993, 32 I.L.M. 1203; Statute of the International Criminal Tribunal for Rwanda, Nov. 8, 1994, 33 I.L.M. 1598.

44. See, e.g., Statute of the International Criminal Tribunal for the Former Yugoslavia, *supra* note 43; Statute of the International Criminal Tribunal for Rwanda, *supra* note 43.

B. *A Multilevel Global Governance-based Theory of the Domestic Influence of International Criminal Tribunals*

Although extant theories of the function and influence of international tribunals do not suggest that such tribunals would have significant influence on domestic governance, beyond enhancing compliance with the substantive norms they adjudicate, at least some international tribunals have had deeper impacts on the domestic policy choices of states within their jurisdiction. Anne-Marie Slaughter and Walter Mattli, for example, have offered an institutionalist theory of the influence of the European Court of Justice (ECJ) on the behavior of member states. They argue that the judges of the European Court of Justice “managed to turn the Treaty of Rome . . . into a constitution,” and thereby promote “the gradual penetration of EC law into the law of its member states.”⁴⁵ Slaughter and Mattli offer a neo-functionalist account⁴⁶ of how the ECJ came to directly influence the states over which it exercises jurisdiction and, essentially, shift the political center of gravity from the nation state to the regional level.⁴⁷

Part of the ECJ’s deeper political influence can be attributed to the fact that the substantive norms it adjudicates involve key issues of domestic policy and even the structure of domestic institutions. Hence, the monitoring and sanctioning of that behavior by the ECJ could account for deeper influences on domestic governance consistent with the standard function of international tribunals. Slaughter and Mattli’s analysis, however, suggests that the judges of the ECJ were able to push beyond the legal norms articulated in the Treaty of Rome and more fundamentally reshape the relationships between domestic and regional governance. They assert that the ECJ’s far-reaching influence stems from the Court’s place in the broader process of European integration, in which actors above and below the state looked to the Court in their own pursuit of instrumental self-interest toward incremental expansion of integration.⁴⁸ In essence, the ECJ was situated within a system of multilevel global governance, through which actors and institutions at the regional and na-

---

45. Anne-Marie Burley (now Slaughter) & Walter Mattli, *Europe Before the Court: A Political Theory of Legal Integration*, 47 INT’L ORG. 41–43 (1993).

46. According to Ernst Haas, neofunctionalism addresses the way in which “political actors in several distinct national settings are persuaded to shift their loyalties, expectations, and political activities toward a new and larger center, whose institutions possess or demand jurisdiction over the pre-existing national states.” ERNST HAAS, *THE STUDY OF REGIONAL INTEGRATION* 610 (1970).

47. Burley & Mattli, *supra* note 45, at 53. For a discussion of neo-functionalism in the context of European integration, see generally ERNST HAAS, *THE UNITING OF EUROPE* (1958).

48. Burley & Mattli, *supra* note 45, at 53–56.

tional levels could influence one another's policy choices in ways that benefited the Court's own power and the Court could likewise use the interests of those national and supranational actors to its benefit. In Slaughter and Mattli's words, the ECJ's development depended on the Court's interaction with a "specialized national and supranational community."⁴⁹

While the context of the ECJ is unique, Slaughter and Mattli's neo-functionalist analysis of the Court's broader impact provides a starting point for a theoretical account of the political influences of international criminal tribunals beyond deterring the crimes subject to their jurisdiction. Just as the ECJ is situated within a multilevel governance structure—in that case comprised of domestic and European institutions—so, too, are international criminal tribunals, such as the ICTY, embedded in a broader, multilevel governance structure. Such a structure of multilevel global governance consists of a number of functionally distinct institutions at a range of levels of authority in international affairs operating in a deeply interconnected and mutually reinforcing set of relationships with one another and with national governments.⁵⁰

As in the context of European integration, the structure of multilevel global governance in which the ICTY is embedded involves sharing authority within particular functional domains between national and international institutions and shifting the loci of power and authority over those functional domains. As James Rosenau explains, in a global governance structure, order is achieved not only through the coercive power of the state, but also through the dispersion of authority in the international system and "the collective capacity to identify and solve problems on a global scale."⁵¹ Within such a system, a range of different parties—including states, international organizations, and non-state actors—have control over particular functions of governance.⁵² Central to the operation of such multi-

---

49. *Id.* at 58.

50. For a discussion of global governance, see James N. Rosenau, *Governance, Order, and Change in World Politics*, in *GOVERNANCE WITHOUT GOVERNMENT: ORDER AND CHANGE IN WORLD POLITICS* 1, 4 (James N. Rosenau & Ernst-Otto Czempiel eds., 1992). Elements of global governance thinking, can be found in the earlier writings of the English School in political science. See HEDLEY BULL, *THE ANARCHICAL SOCIETY: A STUDY OF WORLD POLITICS* (1977). The growing scholarship in the field of global governance led to the foundation of a new journal in the 1990s entitled *GLOBAL GOVERNANCE*, which has been the focal point of writings on the topic.

51. Anne-Marie Slaughter, *Everyday Global Governance*, *DÆDALUS*, Winter 2003, at 83.

52. See generally DAVID HELD, *DEMOCRACY AND THE GLOBAL ORDER: FROM THE MODERN STATE TO COSMOPOLITAN GOVERNANCE* (1995) (considering the implications of global governance on cosmopolitanism); ORAN YOUNG, *GLOBAL GOVERNANCE: DRAWING INSIGHTS FROM THE ENVIRONMENTAL EXPERIENCE* (1997) (examining the operation of global

level governance, Rosenau asserts there are "major shifts in the location of authority and the site of control mechanisms. . . ." ⁵³

International criminal tribunals such as the ICTY operate within such a context of contestation over the levels of authority at which certain governance functions should occur. In the case of international criminal tribunals, that contestation largely relates to the appropriate level of governance at which criminal prosecutions should be undertaken. When the UN Security Council established the ICTY, it endowed it with primary criminal jurisdiction over the states of the former Yugoslavia. In so doing, the Security Council shifted the locus of authority over the exercise of criminal jurisdiction, traditionally a closely guarded element of domestic governance, ⁵⁴ up from the nation state to an international institution. Both the ICTY and national courts came to share jurisdiction over international crimes, such that the choices made at one level of governance would have direct impact on the outcomes at the other level of governance. Actors at both the domestic and international levels could use this contestation of jurisdictional authority to secure, enhance, or expand their own powers and, in turn, influence policy choices at the other level of governance.

This jurisdictional relationship created by the Security Council provided a powerful framework within which an international criminal tribunal could impact the incentives of domestic actors, not just with respect to the commission of international crimes, but also with respect to the very structure and organization of national government. Essentially, the contestation over the appropriate locus of jurisdictional competence provided an international criminal tribunal, which would normally only be able to influence individual behavior, with direct leverage over state conduct and the operation of national institutions. This jurisdictional relationship gives an international criminal tribunal the power to monitor and sanction state behavior through choices with respect to the exercise of jurisdiction in addition to its ordinary influence on individual behavior through the application of criminal sanctions. As a result, the tribunal could influence domestic policy outcomes far beyond merely enhancing individual compliance with substantive rules of international criminal law.

---

governance in international environmental affairs).

53. Rosenau, *supra* note 50, at 153.

54. Historically, the exercise of criminal jurisdiction was largely left to the domestic courts of the territorial state. As Vattel observed ". . . the justice of each nation ought in general to be confined to the punishment of crimes committed in its own territories . . ." E. DE VATTEL, *THE LAW OF NATIONS* bk. 1, ch. 19, § 233 (Charles G. Fenwick trans., 1916) (1758). For a general discussion of the exercise of jurisdiction with respect to crime, see *Draft Convention on Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. SUP. 435 (1935).

The multilevel global governance model, which is based on the jurisdictional relationship between domestic and international courts, provides the foundation for explaining the influences of international criminal tribunals. It offers a theoretical account of how international criminal tribunals can monitor, sanction, and grant benefits to actors and institutions at the domestic level of governance beyond the simple adjudication of substantive international criminal law. This account is rooted in three key elements: first, the jurisdictional relationships between international and domestic institutions; second, the pursuit of rational self-interest by actors at both the domestic and international levels of governance; and, third, norm leadership by international institutions. This model can explain both the influence of the ICTY on domestic politics in BiH and the observed variance in that influence over time.

1. Jurisdiction and the Structure of Multilevel Global Governance

The jurisdictional relationship between domestic and international tribunals defines the structure of the global governance system. Jurisdictional relationships determine whether the international tribunal will be able to monitor domestic governance choices, sanction them, or provide benefits to domestic actors directly, as opposed to only through the adjudication of individual criminal violations. To the extent that the jurisdictional relationship provides for such monitoring and sanctioning of governance choices, the international criminal tribunal will influence those choices.

The design of the jurisdictional relationship and the choices made by the international tribunal provide either sanctions or benefits to a national government, thereby altering the incentives facing that government. In so doing, international criminal tribunals still rely on the basic monitoring and sanctioning functions of international institutions, but they monitor and sanction the performance of a domestic judiciary or government, rather than just monitor and sanction criminal conduct through prosecution. The decision by an international criminal tribunal to assume jurisdiction, for example, carries with it costs and benefits for the domestic government. The structure of jurisdiction and the criteria on which choices to exercise that jurisdiction are made create incentives for domestic actors with respect to the functions of national institutions. Those incentives, costs and benefits imposed directly on the domestic government can, in turn, influence domestic policy choices.

A variety of jurisdictional relationships between domestic and

international tribunals are possible and each creates distinct incentives for domestic actors. Some jurisdictional relationships give an international tribunal no authority to monitor, sanction, or grant benefits directly to a domestic government and, as a result, leave the tribunal with very limited influence over domestic governance. Other jurisdictional relationships give an international tribunal considerable power to monitor and sanction domestic governance choices through the structure of incentives created by the comparative jurisdictional empowerment of the domestic and international courts.

Four jurisdictional relationships in particular deserve attention. First is a jurisdictional relationship of domestic primacy, according to which the international tribunal can only adjudicate if domestic authorities refer a case to it. A second possible relationship is simple international primacy, under which a domestic tribunal can only act when international courts do not do so.⁵⁵ A third relationship is absolute international primacy, according to which the international court must expressly approve any domestic exercise of jurisdiction. A fourth possible jurisdictional relationship is complementarity, in which international tribunals can only act where domestic courts fail to undertake genuine prosecutions of their own.⁵⁶ Each of these jurisdictional relationships creates distinct incentives for political actors and judicial officials at the domestic level. These incentives can, in turn, channel self-interested action toward changes in domestic governance. The incentive structures created by each of these four jurisdictional relationships are considered in turn.

First, a jurisdictional relationship of absolute domestic primacy allows national actors to decide when and if they will exercise jurisdiction or if, instead, they would rather pass that jurisdictional entitlement to an international tribunal. This arrangement allows domestic political actors to determine whether to endow their own courts with the legal, political and financial means to undertake international criminal prosecutions. The international tribunal essentially sits dormant, waiting for domestic officials to give it the power to prosecute. Since action by the international tribunal is fully dependent on a referral from domestic officials, the international tribunal is not in a position to monitor or sanction domestic decisions with

---

55. This is, essentially, the jurisdictional structure of the ICTY and ICTR, at least prior to the Completion Strategy. See Statute of the International Criminal Tribunal for the Former Yugoslavia, *supra* note 43; Statute of the International Criminal Tribunal for Rwanda, *supra* note 43.

56. See Rome Statute of International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3; Mohamed El Zeidy, *The Principle of Complementarity: A New Machinery to Implement International Criminal Law*, 23 MICH. J. INT'L L. 869 (2002).

respect to the exercise of jurisdiction. In fact, this jurisdictional relationship may provide incentives for domestic inaction that underlie many of the criticisms of international criminal tribunals noted above. By providing an alternative forum for prosecution that can be activated at the whim of the domestic government, this jurisdictional relationship offers a low cost alternative to the activation of national courts, allowing domestic officials to punt politically challenging or technically difficult cases on to an international forum.⁵⁷ As a result, absolute domestic primacy may result in the underutilization of domestic institutions.

Second, a jurisdictional relationship of international primacy limits domestic courts to the exercise of their jurisdiction only when the international tribunal appears not to be pursuing a particular case, though the international tribunal would retain the authority to remove the case to the international forum at any point in the proceedings.⁵⁸ This jurisdictional relationship subordinates domestic actors to choices at the international level of governance; their authority to exercise jurisdiction may be compromised at any time by international policy decisions. In essence, this relationship imposes a sanction on national officials in the form of the costs associated with an ongoing potential for the assumption of jurisdiction by and removal of a case to the international tribunal. Even where the international tribunal does not actually assume jurisdiction, the uncertainty of whether it will seek to remove the case imposes costs on domestic actors and may provide a disincentive for investment in domestic infrastructure or a particular investigation and prosecution since those efforts could be undercut by the international tribunal's assertion of primacy. This ability of the international tribunal to assume jurisdiction can function as a sanction on national governments, limiting their ability and incentives to act. Such a sanction may have powerful consequences where the international tribunal does not provide clear guidance as to the types of cases or circumstances in which it will assume jurisdiction as domestic actors have no guidelines around which to structure their own policy choices. The result of a jurisdictional relationship of international primacy may be to create incentives for domestic political authorities not to provide the domestic judiciary with resources

---

57. In such a jurisdictional relationship, the critique of Ku and Nzelibe that international tribunals create perverse incentives for national actors may well be correct. See Ku and Nzelibe, *supra* note 3, at 42.

58. The ICTY exercised this form of absolute international primacy in a particularly notorious way in the early Tadić case in which it essentially removed the case from German courts to the international tribunal. See Prosecutor v. Tadić, Case No. IT-94-I-D, Decision of the Trial Chamber on the Application by the Prosecutor for a Formal Request for Deferral (Nov. 8, 1994).

for international criminal prosecutions, precisely because there is no assurance that the international tribunal will not preempt the domestic judiciary's efforts.

A third jurisdictional relationship, absolute international primacy, requires an international tribunal or other supranational actor to affirmatively grant domestic authorities jurisdictional competence on a case-by-case basis. Such a structure is an extreme version of simple international primacy, but further conditions the exercise of domestic jurisdiction on an affirmative international authorization for domestic prosecution. A jurisdictional relationship of absolute international primacy can provide two different sets of incentives for domestic actors. First, up until the international tribunal approves the exercise of domestic jurisdiction, absolute international primacy provides a further disincentive for investment in or use of the national judiciary because action by domestic institutions is fully conditioned on international authorization. As in simple international primacy, the effect is often to impose an additional sanction on the domestic exercise of jurisdiction in the form of the real costs of seeking international approval and the psychological costs for domestic officials of subjugation to an international institution. Again, domestic authorities are hierarchically subjugated to international actors and, therefore, have little or no incentive to enhance the capacity of domestic judicial institutions. These incentives may lead domestic authorities to "under-invest in the kinds of institutional reforms necessary" to promote an effective domestic judiciary.⁵⁹ Once the international tribunal has authorized the exercise of domestic jurisdiction, the relationship returns to something close to domestic primacy, in that domestic actors can decide to exercise jurisdiction without the threat of removal by the international tribunal. The net effect of absolute international primacy will depend on how readily and how quickly the international tribunal approves the exercise of domestic jurisdiction in each case. A slow and costly process will provide a strong disincentive for domestic authorities to seek approval and use their own courts. A rapid and efficient process may provide less of a disincentive for domestic officials to undertake their own prosecutions, but still results in a net chilling of domestic prosecutions.

A final jurisdictional relationship, complementarity, involves a very different set of interactions between international and domestic institutions and provides perhaps the most powerful incentives for the activation of a domestic judiciary. In a relationship of comple-

---

59. Ku and Nzelibe, *supra* note 3, at 42.

mentarity, an international tribunal can only assume jurisdiction when domestic authorities fail to undertake genuine prosecutions themselves.⁶⁰ Such a relationship puts national authorities in the first mover position. They are able to make a first order determination of whether they wish to exercise jurisdiction themselves. In the case of complementarity, however, national authorities must make that determination with the knowledge that, should they fail to exercise jurisdiction, the international tribunal may intervene, thereby imposing considerable sovereignty costs that stem from international intervention. Should the domestic prosecution lack genuineness at any point in the proceedings, the international tribunal can intervene and assume jurisdiction itself, putting domestic officials on notice that the conduct of their own proceedings will be monitored by international actors and measured against a defined set of criteria, with intervention possible, should domestic proceedings not meet those standards.⁶¹

In this relationship of complementarity, the international tribunal performs first and foremost a monitoring function, by evaluating whether the domestic forum meets certain benchmarks: namely, whether a domestic investigation or prosecution was undertaken and, if so, whether that prosecution met standards of fairness and effectiveness. Where the domestic forum meets these standards, the international tribunal essentially grants a benefit to domestic institutions, allowing them to exercise jurisdiction with at least a tacit stamp of international approval. In contrast, where the domestic forum does not meet the standards, the international forum can assume jurisdiction, thereby imposing a sanction on domestic authorities in the form of the sovereignty costs of international intervention.

Two different incentive structures may result from complementarity. To the extent that the political and financial costs of prosecution for the domestic government are high and, particularly if

---

60. For a discussion of complementarity in the context of the Rome Statute of the ICC, see Flavia Lattanzi, *The International Criminal Court and National Jurisdictions*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A CHALLENGE TO IMPUNITY* 177 (Mauro Politi & Giuseppe Nesi eds., 2001); see also John T. Holmes, *Complementarity: National Courts versus the ICC*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 667 (Antonio Cassese et al. eds., 2002) (noting that "[i]ronically, however, the provisions of the Rome Statute itself contemplate an institution that may never be employed"); John T. Holmes, *The Principle of Complementarity*, in *THE INTERNATIONAL CRIMINAL COURT, THE MAKING OF THE ROME STATUTE ISSUES, NEGOTIATIONS, RESULTS* 41 (Roy Lee ed., 1999).

61. This is not unlike the situation that faces inferior domestic judges in a national judicial system. Such judges know that their decisions are subject to review and reversal by higher courts, should their decisions not meet requisite standards. See, e.g., Matthew Stephenson, *A Costly Signaling Theory of "Hard Look" Judicial Review*, 58 ADMIN. L. REV. 753 (2006).

the ultimate goal of domestic officials is to avoid any prosecution of a particular case, domestic authorities may remain inactive, essentially deferring to an international tribunal in hopes, perhaps, that such international tribunal will not ultimately exercise jurisdiction, resulting in no prosecution. Similarly, in the face of high costs of domestic prosecution, a national government may even actively refer a case to an international tribunal so as to transfer those financial costs to the international institution, even if it means assuming the sovereignty costs of international intervention, precisely because the political and financial costs of domestic prosecution would be even greater than the sovereignty costs of international intervention.

The second potential incentive structure that flows from complementarity occurs where domestic actors determine that the political costs of domestic prosecution are lower than the sovereignty costs that would ensue from international intervention.⁶² In such a case, domestic officials will seek to exercise jurisdiction in national courts in order to avoid the potential imposition of sovereignty costs that would follow from the intervention by an international tribunal. The calculation of such potential sovereignty costs from international prosecution depends on a realistic threat of international intervention in the case of a domestic failure to act.⁶³ Such a threat will be particularly poignant, and hence the perceived sovereignty costs exceptionally high, when an international tribunal has already begun to investigate a particular situation or is tasked by, for example, the UN Security Council with providing accountability for a particular situation. As a result, complementarity will often create incentives for domestic authorities to empower national judicial institutions to undertake genuine domestic prosecutions of international crimes and for domestic judicial officials to exercise jurisdiction. By acting first themselves, domestic actors are largely able to avoid the high sovereignty costs associated with international intervention and can reap the benefits of tacit approval of their domestic proceedings by the international tribunal.

---

62. Here "sovereignty costs" is used to refer to what Duncan Snidal and Kenneth Abbott call "the symbolic and material costs of diminished national autonomy." Kenneth Abbott, *Symposium on Method in International Law: International Relations Theory, International Law, and the Regime Governing Atrocities in International Conflicts*, 93 AM. J. INT'L L. 361, 375 (1999).

63. While, in general, the threat of intervention by an international tribunal with a complementarity jurisdictional relationships may be low, once such a tribunal has begun to investigate a particular situation or is tasked with providing accountability in a given state, then the threat of international intervention becomes high, increasing the perceived sovereignty costs of domestic inaction and the potential for such a structural relationship to promote domestic judicial development.

Table 1: Jurisdictional Relationships and Incentives for Domestic Judicial Empowerment

Jurisdictional Relationship	Legal Power of International Tribunal	Influence of International Tribunal	Incentives Created for Domestic Actors	Domestic Impact
Domestic Primacy	Prosecute only if referral by state	None	None or excuse for domestic inaction	None or inhibit domestic action
International Primacy	Prosecute when and if international officials want	Sanction domestic government with threat of international action	Deference to international forum due to uncertainty of international intervention	Under investment in and under use of domestic judicial institutions
Absolute International Primacy	Prosecute when and if international officials want; authorize domestic prosecutions	Sanction domestic government through costs of international approval	Absolute deference to international forum	Extreme under investment in and under use of domestic judicial institutions
Complementarity	International intervention only if domestic authorities fail to undertake genuine investigations or prosecutions	Monitor; sanction domestic government through assumption of jurisdiction in case of domestic failure; provide benefit to domestic government through tacit approval of domestic process	Activation of domestic judiciary when sovereignty costs of international intervention outweigh political and financial costs of domestic prosecution	Investment in and empowerment of national judicial institutions; domestic judicial officials more likely to exercise jurisdiction

2. The Pursuit of Individual Self-Interest

A second element of this model to explain the impact of international criminal tribunals on domestic governance is that actors at both the national and international levels of the system pursue their own self-interests. They are assumed to be rational actors who evaluate the potential payoffs of various policies and choose the policy option that offers them the highest payoff.⁶⁴ They do so, however, with reference to the incentives created by the jurisdictional relationships discussed above.⁶⁵ Taking into account those incentives, domestic and international actors will pursue their preferred policy options and use the institutions at their disposal to further their objectives. The particular preferences of those actors in light of the incentives created by the governance relationship will determine the policies pursued by actors at both levels of governance and, ultimately, the international tribunal's domestic impact. The fact that the broader influence of international tribunals on domestic governance flows from the pursuit of self-interest by domestic and international officials is significant because it means that such influence does not depend on an international institution actively seeking to influence domestic outcomes or on the altruistic behavior of government officials.

Concrete examples of the pursuit of individual self-interest under two different sets of systemic incentives illustrate the processes that underlie the domestic impact of an international criminal tribunal. Under a jurisdictional relationship of absolute international primacy, national courts can only exercise jurisdiction if expressly authorized to do so by the relevant international institution. Assuming that domestic government officials are rational actors, their primary interests could be assumed to be the promotion of their own careers or, in an ideal world, the improvement of the effectiveness of domestic government.⁶⁶ Ordinarily, the domestic criminal judiciary is among the levers of influence available to those officials to achieve

---

64. For an introduction to rational choice theory, see James M. Buchanan, *Politics Without Romance: A Sketch of Positive Public Choice Theory and Its Normative Implications*, in *THE THEORY OF PUBLIC CHOICE-II* 11 (James M. Buchanan & Robert D. Tollison eds., 1984). For a discussion and critique of such rational choice analysis, see DONALD P. GREEN & IAN SHAPIRO, *PATHOLOGIES OF RATIONAL CHOICE THEORY: A CRITIQUE OF APPLICATIONS IN POLITICAL SCIENCE* (1994).

65. See generally DOUGLASS C. NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE, AND ECONOMIC PERFORMANCE* (1990) (discussing how institutions can create or alter the incentive structure in the economic context).

66. See generally PUBLIC DUTIES: *THE MORAL OBLIGATIONS OF GOVERNMENT OFFICIALS* (Joel L. Fleishman et al. eds., 1981) (discussing interests and duties of government officials).

their goals or govern the state.⁶⁷ In a jurisdictional relationship of absolute international primacy, the domestic judiciary is fully dependent on external actors and, hence, it would be highly unlikely that domestic officials could advance personally or enhance the effectiveness of government by either activating or championing the judiciary. The sanction involved in requesting international permission to proceed with a case makes the judiciary an inefficient avenue through which those officials could advance their own positions or improve governance. In such a circumstance, there is little, if any, incentive for the domestic officials to invest political capital or limited financial resources in the judiciary, as other pathways of influence not subject to international control would offer more promising results. The jurisdictional relationship of absolute international primacy thus creates incentives for domestic officials who pursue their own self-interest to channel resources away from the domestic judiciary. Such incentives may even prevent the development of judicial capacity and institutional strength.

In contrast, if those same domestic officials pursue identical self-interest in a governance structure of complementarity, outcomes may be very different. If the domestic judiciary is empowered to hear any criminal case it chooses, rather than being subjugated to international institutions, there is a much greater payoff for domestic officials from investment, both political and financial, in the national judiciary. Domestic officials might well find that championing the domestic judiciary is politically beneficial and career enhancing. Moreover, if domestic officials perceive a meaningful likelihood of international intervention should the domestic judiciary be unable or unwilling to genuinely prosecute a particular case, those officials may seek to enhance the capacity and capability of the domestic judiciary so as to avoid the potentially high sovereignty costs of international intervention. In addition, officials might seek to enhance the quality of the judiciary to reap the benefits of international approval in the form of a decision by the international tribunal not to intervene. The rational pursuit of self-interest in a relationship of complementarity, particularly where an international tribunal is already seized of the situation in a country and presents a meaningful threat of imposing high sovereignty costs should domestic courts fail to undertake their own investigations and prosecutions, creates incentives for greater investment in the domestic judiciary by national officials and the political empowerment of domestic judicial institutions.

A second set of examples looks at the self-interested action of

---

67. Such influence need not come through controlling judicial outcomes, but rather could be the result of political recognition from serving as a champion of the judiciary.

international officials, again structured around the incentives created by particular jurisdictional relationships. Take, for example, officials within an international tribunal, such as the tribunal's prosecutors. They can again be assumed to have a primary interest of promoting their own careers as well as the success of the tribunal itself.⁶⁸ Success for such officials within an international organization will generally be determined by criteria externally defined, for example, by the Assembly of States Parties of the ICC or the UN Security Council, which has ultimate responsibility for the operation of the ICTY. For the ICTY, with jurisdictional primacy, that measure of success has largely been effective international prosecution.⁶⁹ International officials are, therefore, likely to devote their time and resources to enhancing the ability of the international tribunal to prosecute effectively and efficiently. International investment in, or assistance to, domestic institutions will have no payoff since externally established criteria of success firmly prioritize international prosecution. For international officials, the pursuit of self-interest within a structure of international primacy is likely to have, at best, no impact on domestic governance. In a worst case scenario, a governance structure of absolute international primacy could lead international officials, acting in their own self-interest, to seek to limit domestic prosecutions that could interfere with the work of the international tribunal.⁷⁰

In the context of a complementary jurisdictional relationship, those same international officials will have very different incentives as they pursue their own self-interest. These differences result from both alterations in the criteria of success for tribunals of complementarity jurisdiction and from the complementary jurisdictional relationship itself. International tribunals with complementary jurisdiction may actually prioritize the effective functioning of a national judiciary or, at least, the effective prosecution of international crimes in any available forum. The ICC Prosecutor has explained with reference to the complementary jurisdiction of that tribunal: "As a con-

---

68. Most officials of an international tribunal remain for only a relatively short period before moving on to other posts either in international institutions or within their own domestic governments. Such individuals will usually seek self-promotion, related to but independent from the ultimate success of the tribunal.

69. According to the UN Security Council when it established the ICTY, the Tribunal had the "sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia." S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993).

70. Domestic prosecutions could well interfere with the work of the international tribunal through, for example, compromising witnesses or due to the potential for double jeopardy if the domestic tribunal prosecuted an individual who the international tribunal subsequently chose to pursue.

sequence of complementarity, the number of cases that reach the Court should not be a measure of its efficiency. On the contrary, the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success.”⁷¹ Hence, the self-interested goals of officials in a complementary international relationship may be to assist or empower domestic judiciaries to function more effectively.⁷²

In addition to the altered perceptions of self-interest that accompany complementarity, the complementary jurisdictional relationship can give international officials a leverage point to promote more effective domestic prosecutions by monitoring national conduct and imposing sanctions on or providing benefits to national courts to encourage domestic prosecutions. In the complementarity relationship then, international officials have strong incentives to engage in active monitoring of domestic judicial activities, to intervene when needed or to stand aside where genuine national prosecutions occur.⁷³ As a result, the self-interest and incentives that generally accompany a complementary jurisdictional relationship often promote the empowerment and operation of domestic judicial institutions.

3. Norm Leadership

The final element of this model that helps to explain the broader impact of international criminal tribunals on domestic governance is norm leadership. Institutions that operate within a common functional sphere of authority⁷⁴ may provide norm leadership for one another⁷⁵ because norms—“standard[s] of appropriate behavior for actors with a given identity”⁷⁶—can be espoused by institu-

---

71. Luis Moreno-Ocampo, Chief Prosecutor of the ICC, Statement made at the ceremony for the solemn undertaking of the Prosecutor of the International Criminal Court (June 16, 2003) (available at http://www.icc-cpi.int/library/organs/otp/030616_moreno_ocampo_english_final.pdf).

72. See generally William Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*, 49 HARV. INT’L L.J. 53 (Winter 2008).

73. For a discussion of these leverage points, see generally *id.*

74. See generally Rosenau, *supra* note 50.

75. By turning to the role of norms in the third part of this model, the model simultaneously adopts a rational choice and a constructivist approach to explaining the influence of international criminal tribunals. For a discussion of mixing rational choice and constructivist approaches, see generally Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT’L ORG. 887–88 (1998) (noting that “the current tendency to oppose norms against rationality or rational choice is not helpful in explaining many of the most politically salient processes . . .”).

76. See *id.* at 891; Ronald Jepperson, Alexander Wendt, Peter Katzenstein, *Norms, Identity, and Culture in National Security*, in THE CULTURE OF NATIONAL SECURITY 33–75 (Peter Katzenstein ed., 1996). For discussions of norms in the legal literature, see ROBERT

tions at one level of governance and adopted by those at another. As institutions at the domestic and international levels of governance undertake similar functions, they may well look to one another for ideas, innovations, and best practices.⁷⁷ As a result, domestic institutions may borrow from or adopt the policies and practices of their international counterparts, and vice versa, leading to changes in both the structure and practices of institutions at both levels of governance.

The transmittal of domestic norms to the international level or international norms into domestic governance often occurs through the work of "norm entrepreneurs," who "attempt to convince a critical mass . . . to embrace new norms."⁷⁸ Within a global governance structure in which domestic and international tribunals concurrently exercise criminal jurisdiction, opportunities abound for norm entrepreneurs to borrow procedures, practices, and legal rules across governance levels and between institutions. This borrowing can, in turn, result in changes to both the operation and functioning of the institutions of domestic and international governance, in this case, courts.

One potentially powerful means by which such norm leadership can occur is through the exchanges, dialogues, and meetings of inter-judicial networks, which are growing in the context of international criminal law.⁷⁹ Anne-Marie Slaughter has extensively documented the operation of such networks in the context of constitutional courts⁸⁰ and the same kinds of interactions occur, perhaps with even greater frequency, in the context of international and domestic criminal tribunals.⁸¹ Through such networks, ideas can be exchanged, best practices borrowed, and international norms socialized into the policies and practices of domestic institutions. One clear example of such norm borrowing is the Bangalore Principles of Judicial

---

C. ELLICKSON, *ORDER WITHOUT LAW* 246–54 (1991); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 340 (1997).

77. See Finnemore & Sikkink, *supra* note 75, at 893 (noting that "many international norms began as domestic norms" and that "international norms must always work their influence through the filter of domestic structures"). While most of Finnemore & Sikkink's argument looks at the move of norms from domestic to international, the inverse is equally possible.

78. *Id.* at 895.

79. See Jenia Iontcheva Turner, *Transnational Networks and International Criminal Justice*, 105 MICH. L. REV. 985 (2007) (discussing the potential of transnational networks in international criminal justice); see also Burke-White, *supra* note 72.

80. See ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 65–103 (2005) (discussing judicial networks).

81. 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. Interview with David Tolbert, Deputy Prosecutor, ICTY, in The Hague, Neth. (July 1, 2005).

Conduct, which outline a set of best practices in judicial independence and have been highly influential in the practices of many developing country judiciaries.⁸²

Norm leadership can also be more formally embedded in the jurisdictional relationships between international and domestic tribunals. For example, a jurisdictional relationship of complementarity, in which the international tribunal can only intervene where national institutions fail to undertake genuine prosecutions, may encourage national actors to pursue genuine investigations and prosecutions of their own. As the determination of whether a national prosecution was, in fact, genuine rests with the international tribunal,⁸³ the international tribunal is in a position to lead norms for genuine prosecutions. To the degree that domestic actors find it in their own self-interest to enhance the capacity and legitimacy of domestic institutions or have domestic proceedings recognized as “genuine”, they may seek to adopt and internalize those international norms on which the international tribunal will determine whether a domestic prosecution was, in fact, genuine. The international forum can provide a benefit to domestic actors who adopt those norms by tacitly approving domestic proceedings or can sanction domestic actors who fail to adopt those norms by imposing the sovereignty costs of international intervention on them.

Overall, norm leadership provides for the transfer and exchange of policies and practices among judicial institutions at different levels of governance. These exchanges are motivated by the self-interest of domestic and international actors and the incentives created by the jurisdictional relationship between domestic and international institutions.

4. Summary

As the foregoing suggests, the incentives created by the jurisdictional relationships, the self-interested action of domestic and international actors, and norm leadership all allow international tribunals to exert profound influence on the policies and practices of the institutions of domestic governance, particularly national judiciaries. Whereas previous models of the impact of international criminal tri-

---

82. See Report of Judicial Colloquium on the Domestic Application of International Human Rights Norms, Bangalore, India, reprinted in *The Bangalore Principles on “the Domestic application of international human rights norms,”* 14 CMMW. L. BULL. 1196 (1988). For a discussion of their influence, see Michael Kirby, *International Law: Impact on National Constitutions*, 21 AM. U. INT’L L. REV. 327, 332–45 (2006).

83. See, e.g., Rome Statute of the International Criminal Court art. 17, 1998.

bunals explain how those tribunals can enhance compliance with international criminal law or deter crimes, this model accounts for far deeper influences of international tribunals on the very structure and functioning of national institutions as well as for variations in those influences over time. Part III tests this model in the context of the relationship between the ICTY and the government of BiH.

IV. TESTING THE MODEL: THE ICTY AND BOSNIA & HERZEGOVINA

The model developed above begins to provide an answer to the question raised at the end of Part I: How is it that an international criminal tribunal with jurisdiction over individuals can influence fundamental policy choices of national governments, such as whether to reform or activate national judicial institutions? More specifically, the model suggests that jurisdictional relationships between international tribunals and domestic courts may allow international tribunals to monitor and sanction domestic policy choices and thereby alter the incentives facing domestic actors, which may in turn alter domestic outcomes. The relationship between the ICTY and the institutions of BiH offers an ideal example of the ways an international tribunal embedded in a system of multilevel global governance can influence domestic policy choices far beyond deterring international crimes. While other factors, such as the growing domestic demand for a federal level judiciary in BiH, were necessary for the ultimate establishment of the State Court of BiH, the changing nature of the jurisdictional relationship between the ICTY and BiH shaped the international tribunal's influence on domestic governance in BiH.

This Part of the article has three purposes. First, it tests the model developed in Part II to explain the domestic impact of an international criminal tribunal through a detailed case study of the ICTY's influence in Bosnia & Herzegovina. Second, it seeks to demonstrate that the changes in the ICTY's jurisdictional relationship and governance structure with BiH were critical factors in the reforms to and the greater activation of the Bosnian judiciary since late 2002. Finally, this third Part seeks to rebut critiques that the ICTY has not had significant influence on domestic judicial development in Bosnia, by tracing the Tribunal's role in the establishment of the new State Court of Bosnia & Herzegovina.

The ICTY's relationship with and influence on the institutions of BiH can be best understood in two distinct phases, defined by the jurisdictional relationship between the ICTY and domestic institutions. During the first phase, which ran essentially from the ICTY's

establishment in 1993 until 2002, the ICTY had primary jurisdiction and, at times, even absolute international primacy, over international crimes committed in the Balkans. During this period, the ICTY imposed significant costs on the exercise of domestic jurisdiction, thereby chilling the development of domestic judicial institutions in BiH and the exercise of domestic criminal jurisdiction over war crimes. A second phase, which began in late 2002 with the advent of the ICTY's Completion Strategy, changed the jurisdictional relationship by allowing referral of cases back from the ICTY to domestic courts. As a result, the ICTY was able to perform the kinds of monitoring and sanctioning of domestic institutions typically seen in a jurisdictional relationship of complementarity. This new jurisdictional relationship combined with shifts in the interests of domestic and international actors, has driven the development of the domestic judiciary in BiH and, particularly, the establishment of the State Court of Bosnia & Herzegovina.

A. Phase I: The ICTY's Chilling Effect from 1993–2002

During the first phase of the ICTY's interactions with BiH, the structure of the jurisdictional relationship, the self-interest of key actors, and the lack of norm leadership all contributed to a chilling of domestic judicial reform and inhibited the activation of domestic judicial institutions. During this phase, which included the ICTY's establishment by the UN Security Council and its use of the Rules of the Road program, sanctions imposed on BiH by the ICTY created strong disincentives for investment in or activation of the BiH courts. As a result, there was relatively little development of domestic judicial institutions between 1993 and 2002. From a normative perspective that embraces post-conflict reconstruction and domestic rule of law, the ICTY's influence during this period may well have been counterproductive. Whatever the goals, however, the ICTY had a considerable impact on the structure and functioning of the institutions of domestic governance in BiH, by freezing out the use of domestic courts.

1. Jurisdictional Relationships: International Primacy and Absolute International Primacy

The initial structure of the jurisdictional relationship between the ICTY and the domestic courts of Bosnia & Herzegovina was determined by UN Security Council Resolution 827, which established the ICTY and assigned it jurisdictional primacy over the domestic

courts of the states of the former Yugoslavia. Pursuant to the resolution, the ICTY and the domestic courts of BiH have concurrent jurisdictional entitlements over crimes committed on the state's territory,⁸⁴ but the ICTY holds primary jurisdiction. Domestic courts have a secondary jurisdiction and must defer to the ICTY upon request.⁸⁵

This jurisdictional relationship allows either domestic courts or the international tribunal to prosecute international crimes committed on the territory of the Former Yugoslavia. When national courts exercise jurisdiction, however, the international forum may preempt them on its own initiative.⁸⁶ Specifically, if proceedings within the ICTY's jurisdiction are initiated in any state, the international prosecutor may request information from that state as to the nature of the proceedings.⁸⁷ Pursuant to Rule 9 of the ICTY Rules of Procedure and Evidence, the prosecutor may then seek a Request for Deferral from the trial chamber to prevent national proceedings from continuing.⁸⁸ According to the ICTY, the purpose of international primacy was to prevent an accused from being able "to select the forum of his choice, contrary to the principles relating to coercive criminal jurisdiction."⁸⁹ In the test case of jurisdictional primacy, the ICTY asserted primary jurisdiction over the domestic courts of Germany in 1993,⁹⁰ seeking the transfer of Dusko Tadic from Germany to the ICTY. While Tadic challenged the Tribunal's primacy, both the ICTY Trial and Appeals Chambers upheld its primary jurisdictional entitlement.⁹¹

---

84. Statute of the International Criminal Tribunal for the Former Yugoslavia, *annexed to* S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993).

85. *See id.* art. 9.

86. For a discussion of jurisdictional primacy, see Bartram S. Brown, *Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals*, 23 YALE INT'L L.J. 383, 395-400 (1998).

87. *See* ICTY Rules of Procedure and Evidence, Rule 8, UN Doc. IT/32/Rev.40 (July 12, 2007) [hereinafter ICTY Rules], available at <http://www.un.org/icty/legaldoc-e/index.htm>. Rule 8, unlike Rule 9 discussed below, specifically provides that compliance with these requests is to be legally binding under article 29 of the Statute.

88. *Id.* at Rule 9. Rule 9 also provides certain guidance as to the ICTY's assumption of jurisdiction, which is appropriate if the acts are being prosecuted as an ordinary crime; if national proceedings lack impartiality; or if the acts are related to a case being investigated or prosecuted by the Tribunal.

89. Prosecutor v. Tadić, Case No. IT-94-1-T, Decision on the Defence Motion on Jurisdiction, ¶ 41 (Aug. 10, 1995).

90. *See* Prosecutor v. Tadić, Case No. IT-94-1, Judgment (July 15, 1999).

91. *See* Prosecutor v. Tadić, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 58 (Oct. 2, 1995) (observing: "Indeed, when an international tribunal such as the present one is created, it must be endowed with primacy over national courts. Otherwise, human nature being what it is, there would be a perennial danger of international crimes being characterized as 'ordinary crimes' (Statute of the International Tribunal, art. 10, para. 2(a)), or proceedings being 'designed to shield the accused,' or cases

The jurisdictional relationship of primacy created strong disincentives for domestic prosecutions in BiH. Even if national courts chose to initiate proceedings, the ICTY could assert primacy and preempt national action largely at will, as it did in the Tadic case. This potential for intervention, particularly given the lack of any clear standards for when the ICTY would intervene, effectively sanctioned national officials seeking to exercise their own criminal jurisdiction. Given the potential for ICTY intervention in any domestic war crimes prosecution, national prosecutors were often reluctant to invest time and resources in cases that might well be removed to an international forum. As a result, the Tribunal narrowed “the opportunity for the development of additional mechanisms of justice, such as domestic prosecutions and truth commissions.”⁹²

In February 1996, the Rules of the Road Agreement, which stipulated that the ICTY had to review case files from Bosnia & Herzegovina, Croatia, and Serbia before domestic indictments could be issued, essentially hardened the ICTY’s jurisdictional relationship with national governments into a form of absolute international primacy.⁹³ Local judicial authorities were required to forward case files to the ICTY Office of the Prosecutor for review and approval. Without such approval, domestic prosecutors would be unable to proceed with the case. Though the intent of the Rules of the Road program—to prevent politically motivated domestic prosecutions by one ethnic group against another—may have been benign, the result was a further barrier to domestic prosecutions.⁹⁴ Again, the process of inter-

---

not being diligently prosecuted (Statute of the International Tribunal, art. 10, para. 2(b))”). Although the ICTY’s primacy was upheld, political statements from the Security Council have, at times, sought to limit its application. See Brown, *supra* note 86, at 398–400. The Russian, British, French, and American Security Council Members have, at times, all spoken of a more limited role of primacy. See *id.*

92. See Paul R. Williams & Patricia Taft, *War Crimes Research Symposium: The Role Of Justice In Building Peace: The Role Of Justice In The Former Yugoslavia: Antidote Or Placebo For Coercive Appeasement?*, 35 CASE W. RES. J. INT’L L. 219, 253 (2003).

93. See “Rules of the Road” provision of the Rome Agreement, Feb. 18, 1996, as cited in Mark S. Ellis, *Bringing Justice to an Embattled Region—Creating and Implementing the “Rules of the Road” for Bosnia-Herzegovina*, 17 BERKELEY J. INT’L L. 1, 7 (1999). The agreement provided: “Persons, other than those already indicted by the International Tribunal, may be arrested and detained for serious violations of international humanitarian law only pursuant to a previously issued order, warrant, or indictment that has been reviewed and deemed consistent with international legal standards by the International Tribunal.” *Id.*

94. See, e.g., *Politics of Revenge in Bosnia’s Una Sana Canton Systematically Violate the Dayton accords and International Law*, Human Rights Watch, Aug. 8, 1997, <http://hrw.org/english/docs/1997/08/08/bosher1541.htm> (discussing ethnically motivated detentions and prosecutions in Bosnia); see also Ellis, *supra* note 93, at 5 (noting an “intense campaign to bring individuals suspected of committing war crimes to justice. Each of the three parties has maintained exhaustive, if not accurate, files on persons among the ‘other’ group whom they ‘know’ to be war criminals”). See also *War Crimes Trials Before the Domestic Courts of Bosnia & Herzegovina, Progress and Obstacles*, *supra* note 19, at 5

national review of domestic indictments sanctioned the exercise of domestic jurisdiction sufficiently to deter national action.

Under the Rules of the Road Program the ICTY reviewed files to determine if a serious violation of international humanitarian law had occurred and, if so, whether the person accused was responsible for the crime.⁹⁵ In theory, the Tribunal would then categorize each case file and return it to relevant national authorities. Cases were marked as Category A if "the evidence [was] sufficient by international standards to provide reasonable grounds for the belief that (accused's name) may have committed the (specified) serious violations of international humanitarian law."⁹⁶ Category B was assigned if evidence was insufficient, and Category C if the ICTY was unable to determine the seriousness from available evidence.⁹⁷

The Rules of the Road program and the absolute international primacy it created may have provided a check on biased domestic prosecutions, but it also shifted the incentives of Bosnian prosecutors and court officials away from national prosecutions or domestic judicial development. Though, technically, the ICTY reviewed cases only in an advisory capacity, the High Representative interpreted the review as legally binding on domestic prosecutors.⁹⁸ This interpretation transformed the advisory role of the ICTY into a legal bar on national adjudication, absent international approval. Moreover, even when such international approval was sought, the ICTY was notoriously slow in reviewing cases, due in large part to staff limitations and competing priorities.⁹⁹ In fact, more than 2,300 of just fewer than 6,000 cases sent to the ICTY were never reviewed and were lost

---

noting the possibility of "arbitrary arrests and unfair trials").

95. See Procedures and Guidelines for Parties for the Submission of Cases to the International Criminal Tribunal for the Former Yugoslavia under the Agreed Measures of 18 February 1996 (on file with author). In making these determinations, the OTP accepts the evidence as presented, draws all inferences in favor of national prosecution, and accepts the reasonable hypotheses of the case. See Ellis, *supra* note 93, at 15.

96. *War Crimes Trials Before the Domestic Courts of Bosnia & Herzegovina, Progress and Obstacles*, *supra* note 19, at 5.

97. *Id.*

98. In one case, for example, local authorities decided to proceed with a prosecution despite a finding of insufficient evidence by the ICTY. See Ellis, *supra* note 93, at n.149. At that point the High Representative issued a press statement noting that "the responsible authorities breached their legal obligations to prosecute only those crimes where the Tribunal has found sufficient evidence under international standards." Memorandum from Peggy L. Hicks, the Office of the High Representative, to CEELI (May 25, 1998), *cited in* Ellis, *supra* note 93, at n.151.

99. See Ellis, *supra* note 93, at 19 (noting that "a shortage of resources left the Tribunal ill-equipped to review case files simply to determine whether or not they met the required evidentiary standards"). The slow pace of the ICTY's review under the Rules of the Road Agreement is an ongoing criticism in the Balkans. See Interview with Biljana Potparić-Lipa, President, Court of Bosnia & Herzegovina, in Sarajevo, Bosn. & Herz. (Aug. 9, 2005).

in administrative limbo.¹⁰⁰

Moreover, the subjugation of domestic institutions limited the payoff from investment in the judiciary for domestic officials. Since domestic courts could only prosecute when international approval was given, the domestic judiciary could not become an effective, independent institution of governance nor could it be relied upon to serve its fundamental purpose. In that context, it was far from an ideal candidate to receive attention or resources from domestic officials.

The international review procedure also increased the political costs of prosecutions for domestic judicial officials, who now had to seek external approval to issue indictments. Some Bosnian prosecutors noted the "loss of face" involved with having to request international approval and found the process "shameful."¹⁰¹ The result, according to observers, was that, "[f]or nearly five years, the 'Rules of the Road' agreement shut down all efforts by Bosnian government authorities to utilize justice to remove war criminals from powerful post-war positions."¹⁰² In the words of one former OSCE trial monitor, "the Rules of the Road program buried a lot of cases and inhibited prosecutions."¹⁰³

The record of domestic authorities in BiH prosecuting war crimes cases prior to 2004 reflects the structural disincentives for domestic prosecutions. From an essentially infinite pool of potential cases after the horrific war in Bosnia, only 5,700 cases were sent to the ICTY for review. The extent to which the Rules of the Road Program acted as a barrier to the pursuit of other cases cannot be known, but it seems likely to have contributed. Even when cases were approved by the ICTY, Bosnian officials were unlikely to bring them to trial, perhaps due to the ongoing potential of an assertion of primacy by the ICTY that would deprive domestic courts of jurisdiction. Of the 846 potential cases approved as Category A by the ICTY under the Rules of the Road Program,¹⁰⁴ only fifty-four (11%) had reached trial stage in domestic courts by January 2005.¹⁰⁵

2. The Pursuit of Self-Interest by Domestic and International

---

100. *War Crimes Trials Before the Domestic Courts of Bosnia & Herzegovina, Progress and Obstacles*, *supra* note 19, at 50.

101. Interview with Biljana Potparić-Lipa, *supra* note 99.

102. See Williams and Taft, *supra* note 92, at 253–54.

103. Telephone Interview with Dan Beckwith, Former OSCE Consultant and U.S. State Court Judge (Aug. 19, 2005).

104. *War Crimes Trials Before the Domestic Courts of Bosnia & Herzegovina, Progress and Obstacles*, *supra* note 19, at 6.

105. *Id.*

Actors

The incentive structures created by the jurisdictional relationship of international primacy in turn framed the pursuit of self-interest by officials in the ICTY and the BiH government, further impairing domestic judicial development during this first phase of the ICTY's operation. At the national level, BiH suffered from deep political divides immediately after the Dayton Accords. Unsurprisingly, the prosecution of war crimes was politically charged, with accusations of bias and ethnically motivated cases. The structure of the judiciary, at the time, was such that local prosecutors' offices were generally "dominated by the majority ethnicity," and largely had jurisdiction only over those of their own ethnicity. With little desire to prosecute their own, few cases were initiated.¹⁰⁶ Moreover, key Serb leaders in the FBiH and particularly in the RS were firmly opposed to any prosecutions, which they felt would be largely directed against Serbs.¹⁰⁷ In this context, the rational pursuit of self-interest militated against championing domestic judicial institutions, leading a quest for accountability, or even launching domestic prosecutions.

Struggles over the allocation of power within BiH between the federal government and the republics further inhibited national officials from seeking to enhance the status of the federal judiciary. Officials in both the RS and FBiH sought institutional autonomy and wanted to strengthen institutions at the regional or cantonal level at the expense of federal institutions. However, since regional courts would largely only have jurisdiction over individuals of their own ethnic group—whom they did not want to subject to criminal prosecution—there was no reason to establish strong war crimes courts. Efforts to create a federal war crimes court or enhance federal judicial power more generally were opposed by officials of the RS and FBiH because they would lead to greater federal authority at the expense of entity-level governance.

Despite clear international legal duties to prosecute international crimes,¹⁰⁸ the ICTY's primary jurisdiction gave domestic offi-

---

106. *Id.* at 4.

107. Slobodan Milošević, for example, decried the Tribunal's work as an attack on Bosnian Serbs. See Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities*, 95 AM. J. INT'L L. 7, 9 (2001). Local Serb newspapers in Bosnia were also regular critics of the ICTY and any potential domestic prosecutions. See Interview with Matais Hellman, ICTY Public Affairs Officer, in Sarajevo, Bosn. & Herz. (Aug. 5, 2005). In Serbia, Milošević regularly denied visas to tribunal prosecutors. See Williams & Taft, *supra* note 92, at 251.

108. For example, the Geneva Conventions include an affirmative obligation to search for and prosecute the perpetrators of grave breaches of international humanitarian law in international armed conflicts. See Geneva Convention Relative to the Treatment of Prisoners

cial political cover for pursuing their preferred outcomes—no prosecutions and no judicial development at the federal level. While international pressure meant that many government officials in BiH had to express at least some support for accountability to avoid international censure, they also asserted that the ICTY was a sufficient institutional response for ensuring accountability.¹⁰⁹ When not outright criticizing the ICTY, many politicians noted that the Tribunal would initiate cases where necessary and, hence, potentially divisive domestic prosecutions were not needed. Though some elements of Bosnian society did push for greater activity by domestic courts in the late 1990s,¹¹⁰ it was a common refrain in Bosnian politics that the ICTY alone was an adequate solution.¹¹¹

The shift to a jurisdictional relationship of absolute international primacy under the Rules of Road Procedure made it far easier for domestic officials in BiH to pursue their self-interest and avoid domestic accountability. The structural barrier under that program of international approval of domestic indictments made it far more difficult to undertake prosecutions in national courts. Moreover, the exceedingly slow pace of ICTY review provided yet another excuse for domestic officials to refrain from undertaking prosecutions. With little to be gained from domestic prosecutions and strong structural incentives against such cases, it is not surprising that the track record of national war crimes prosecutions in BiH prior to 2002 was so limited.

Just as self-interested action by national officials, framed by the incentives of absolute international primacy, led national officials in BiH to avoid strengthening the domestic judiciary or undertaking significant domestic prosecutions, so too did the rational pursuit of self-interest under international primacy lead ICTY officials to refrain from assisting in domestic judicial reconstruction efforts. For ICTY officials, the structural relationship of absolute international primacy and the measures of success set by the Security Council meant that there was no personal or institutional gain from promoting the development of domestic courts in BiH. In fact, such officials

---

of War part I, art. 129, Aug. 12, 1949. The ICTY has found the conflict in the former Yugoslavia to be of an international character and thus the obligations of the Geneva Conventions applicable. See *Prosecutor v. Tadić*, Case No. ICTY IT-94-I-A, Judgment, ¶ 87 (July 15, 1999).

109. See Interview with Matais Hellman, *supra* note 107. Such support was generally necessary to maintain foreign financial assistance and the good will of internationals working in Bosnia.

110. Generally these were calls for prosecutions of other ethnic groups. In effect there was a triangle of blame whereby each ethnic group blamed the other two and advocated prosecutions of the other two groups. See *id.*

111. See *id.* Hellman notes that though there was significant opposition to the ICTY, it was occasionally used as a shield for initiating serious domestic prosecutions.

had an explicit incentive to limit the number of domestic prosecutions, in case the domestic prosecution should interfere with a case presently before or potentially to be brought by the international court. In short, ICTY officials were better off not approving domestic indictments under the Rules of the Road program than they would be if they did authorize such cases.

While there is no evidence that ICTY officials intentionally sought to bar domestic prosecutions in BiH, at the very least, they chose not to devote the kinds of resources that would be necessary for the Rules of the Road Program to review domestic cases effectively. The ICTY's record in approving such cases is telling. Between 1996 and 2004, the ICTY's Rules of the Road Unit received files relating to 5,789 persons suspected of war crimes and, by September 2004, the Tribunal had categorized 3,489 such cases.¹¹² Of these, only 864 were approved for domestic trial.¹¹³ More than 2,300 cases (40%) sent to the ICTY were never reviewed and no response was sent to the Government of BiH.¹¹⁴ Such a poor track record of reviewing case files and approving domestic prosecutions indicates, at the very least, that the ICTY failed to prioritize case review under the Rules of the Road program and did not devote time or resources to ensuring that domestic prosecutions could proceed. Given the incentive structures of absolute international primacy and the interests of ICTY officials, such an outcome is understandable, if disappointing.

3. The Lack of Norm Leadership

During this first phase of the ICTY's operations, norm leadership was essentially absent in the relationships between the ICTY and domestic institutions in BiH. Domestic officials failed to look up to their international counterparts for best practices, advice, and guidance. Similarly, international officials did not seek to generate or disseminate clear sets of norms in the criminal law field for their domestic counterparts to adopt. As a result, during this first phase there was little, if any, socialization of domestic actors and institutions that could have promoted the more effective functioning of the domestic judiciary.

The lack of norm leadership can again be explained by the jurisdictional relationships and the self-interest of domestic and inter-

---

112. *War Crimes Trials Before the Domestic Courts of Bosnia & Herzegovina, Progress and Obstacles*, *supra* note 19, at 6.

113. *Id.*

114. *Id.*

national actors discussed above. International officials at the ICTY, who were evaluated on the quality and quantity of ICTY prosecutions, had neither the mandate nor inclination to offer guidance or norm leadership to domestic institutions. Efforts to develop or disseminate such norms would detract from the Tribunal's core mission. Likewise, there were few incentives for domestic officials to seek out and adopt norms for a more effective judiciary. In a jurisdictional relationship of absolute international primacy, domestic actors had nothing to gain from improving the quality of national institutions and hence little reason to look to the ICTY for norm leadership. Moreover, the interests of most individuals in the BiH government augured in favor of a weak, even incompetent, federal judiciary. As a result, national officials neither sought out nor sought to implement international norms and best practices that might have been available.

Taken collectively, the incentives created by jurisdictional relationships of international primacy and then absolute international primacy, the shared interests of domestic and international officials in a weak national judiciary, and a lack of norm leadership resulted in a severe chilling of the development and activation of domestic judicial institutions in BiH. The overall influence of the ICTY during this period was to deter domestic judicial development and limit the exercise of domestic criminal jurisdiction over war crimes through what were effectively sanctions imposed by the jurisdictional relationship of international primacy that increased the costs for domestic actors of using national judicial institutions. Though exact numbers reported vary, only something on the order of sixty separate war crimes trials, often involving multiple defendants, had reached a final verdict in BiH courts by 2004.¹¹⁵ Those cases that did go to trial were often marked by lack of independence and fairness. For example, between 1993 and 1995, "47 war crimes suspects were tried and convicted *in absentia* in the military court in the Municipality of Orasje."¹¹⁶ Many trials that did occur were politically motivated prosecutions of Serbs in the FBiH.¹¹⁷ In other cases delays were so great that justice

---

115. Of these, only two trials have been in the RS, with the remainder in the FBiH. *See id.*

116. *Id.* at 4.

117. For example, one notable trial in the District Military Court of Sarajevo involved the conviction of Sretko Damjanović for genocide and crimes against humanity in 1993. *See id.* at 4. The Human Rights Chamber of BiH eventually overturned the case in 2002 on grounds that the District Military Court "lacked a sufficient appearance of independence." *Id.* The conviction was quashed in 2002. International observers similarly condemned another trial of Ibrahim Dedović in 1997 for war crimes and crimes against humanity in the Sarajevo Cantonal Court. His conviction was overturned in a second trial in 2000. *See id.* at 4.

was not served.¹¹⁸ While some observers have lauded the fact that any trials were conducted at all, the record is generally quite poor,¹¹⁹ particularly given the overwhelming number of crimes that occurred during the conflict.¹²⁰

B. Phase II: The ICTY's Catalytic Effect from 2002 On

While the record of judicial development and domestic prosecutions in BiH prior to 2002 was poor, beginning that year, considerable new efforts were initiated to enhance the capacity and quality of domestic justice in Bosnia. Those changes can be attributed to modifications to the jurisdictional relationship between the ICTY and the national courts that flowed from the launch of the ICTY's Completion Strategy that same year, as well as the changing self-interests of domestic officials as the country stabilized and federal power was consolidated. Rather than chilling the development of the domestic judiciary, the altered jurisdictional relationship and the incentives that it created for domestic and international actors allowed the ICTY to help facilitate the development and activation of domestic criminal jurisdiction. This section traces the ways in which the ICTY Completion Strategy altered the Tribunal's interactions with BiH and contributed to the establishment of the new State Court of Bosnia & Herzegovina and, particularly, its war crimes chambers.

1. Toward a Jurisdictional Relationship Akin to Complementarity

The development of the ICTY's Completion Strategy in 2002 altered the jurisdictional relationship between the ICTY and the institutions of BiH. While the relationship of absolute international primacy during Phase I allowed the ICTY to sanction the domestic exercise of jurisdiction by increasing the costs for domestic actors seeking to prosecute,¹²¹ the Completion Strategy adopted by the UN Security Council put the Tribunal in a position to monitor domestic

---

118. For example, in the *Gulubović* case, though investigations were launched in 1994, the trial did not commence until February 2000. *Id.* at 4.

119. Interview with Dan Beckwith, *supra* note 103.

120. For a consideration of the nature of violations of international humanitarian law during the conflict in the former Yugoslavia, see *Final Report of the Commission of Experts on Violations of International Humanitarian Law in the Former Yugoslavia*, UN Doc. S/1994/674 (May 27, 1994).

121. See Williams & Taft, *supra* note 92, at 254 (observing that "the Tribunal not only failed to create an environment conducive to the growth of other mechanisms of justice, but affirmatively sought to prevent the creation of a Bosnian Truth Commission").

institutions and sanction instead the failure of those institutions to undertake genuine criminal proceedings. These new incentives created by the new jurisdictional relationship had a strong catalytic impact on the exercise of domestic criminal jurisdiction in BiH.

The changes to the ICTY's jurisdictional relationship with the courts of BiH were undertaken through the Tribunal's Completion Strategy, itself a product of demands from Security Council members for the ICTY to complete its work in a reasonable time frame such that it would not continue to consume considerable resources. The Completion Strategy, as adopted by the Security Council, required the ICTY to reduce its caseload and to encourage domestic trials as a cost-effective alternative to international prosecutions. As then-Tribunal President Claude Jorda stated in a 2002 report to the Security Council, the goal of the Tribunal became to try only "the highest-ranking political, military, paramilitary and civilian leaders and . . . [to] refer . . . certain cases to national courts."¹²² The goal was therefore to limit the work of the ICTY and develop national institutions as viable alternative fora for the prosecution of international crimes. As Herman von Habel, a Senior Legal Advisor at the ICTY, observed, "primarily we were driven by the Completion Strategy but we also had in mind motivating national courts."¹²³

The structural changes in the ICTY's jurisdiction and mandate undertaken as part of the Completion Strategy essentially shifted the governance structure from one of absolute international primacy toward a new relationship with incentives similar to those of complementarity. Technically, a jurisdictional relationship of complementarity requires limiting prosecution by an international tribunal to circumstances in which national institutions failed to undertake genuine prosecutions of their own. Although not exactly the same, the changes in the ICTY's Rules of Procedure and Evidence (RPE) undertaken as part of the Completion Strategy resulted in a jurisdictional relationship under which the ICTY could send cases back to national jurisdictions, monitor domestic proceedings, and remove cases back to the international forum only if key targets were not met. Such a relationship produces incentives very similar to those of complementarity because the international tribunal can monitor domestic proceedings and sanction the failure of national institutions to undertake genuine prosecutions.

As part of the Completion Strategy, the Rules of the Road

---

122. Press Release, ICTY President Judge Claude Jorda, Address to the United Nations Security Council U.N. Doc. JDH/P.I.S./690-e (July 26, 2002) [hereinafter Jorda July 2002 Address].

123. Interview with Herman Van Hebel, in The Hague, Neth. (July 1, 2005).

program ended on 1 October 2004, after the ICTY Prosecutor informed the Presidency of Bosnia & Herzegovina that it would “no longer be in a position to review war crimes cases and that the CBiH Prosecutor should take over responsibility for” such reviews.¹²⁴ As a result, the attendant disincentive for domestic prosecution created by the program quickly abated. National officials no longer had to seek international approval to undertake prosecutions and could proceed with cases on their own initiative. As a result, it became far easier for domestic prosecutions to proceed. In 2004, the OSCE observed a “significant increase in the number of cases proceeding before the cantonal courts in the FBiH.”¹²⁵ Specifically, fifteen war crimes cases involving twenty-four defendants proceeded to trial and verdict in 2004.¹²⁶ As early as 2005, another fourteen cases involving thirty-four defendants were pending in cantonal courts.¹²⁷ One expert from the OSCE has commented that it is now easier for cantonal courts in Sarajevo and Mostar to prosecute given that it is clear the ICTY will not be investigating those cases.¹²⁸

In addition to the termination of the Rules of the Road program, modification of the Tribunal’s RPE accomplished a fundamental change in the nature of the Tribunal’s jurisdiction. The RPE were amended to allow for transfer of cases back to national institutions, while ensuring that basic human rights standards and procedural safeguards would be met and providing for the recall of cases to the ICTY if they were not.¹²⁹ The resultant Rule 11*bis* provides that, after an indictment has been confirmed by the ICTY and upon a motion of the Prosecutor or a *prioprio motu* action by the chambers, a case can be transferred to a state “(a) in whose territory the crime was committed;” or (b) “in which the accused was arrested;” or (c) “having jurisdiction and being willing and adequately prepared to accept such a case.”¹³⁰ The amended rule further calls for the creation of a special judicial bench to evaluate motions for referral based on “the gravity of the crimes charged and the level of responsibility of the

---

124. The BiH Presidency accepted the revocation of the Rome Agreement. *War Crimes Trials Before the Domestic Courts of Bosnia & Herzegovina, Progress and Obstacles*, *supra* note 19, at 5.

125. *Id.* at 6.

126. Of these, 15 defendants were acquitted. *Id.* at 6.

127. *Id.*

128. Interview with Dorthée Marotine, OSCE Legal Advisor, in Sarajevo, Bosn. & Herz. (Aug. 3, 2005).

129. See generally Larry D. Johnson, *Closing an International Criminal Tribunal While Maintaining International Human Rights Standards and Excluding Impunity*, 99 AM. J. INT’L L. 158 (2005).

130. ICTY Rules, Rule 11*bis* (A). A similar amendment to the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda was also undertaken although here have not yet been any motions for transfer under the Rule.

accused.”¹³¹ In addition, the referral bench must be “satisfied that the accused will receive a fair trial and that the death penalty will not be imposed or carried out.”¹³² In the amendment to Rule 11*bis*, the Tribunal maintained the authority to recall a transferred case back to the ICTY at the request of the Prosecutor, giving it the ability to intervene if a national proceeding does not meet basic standards of fairness and procedure.¹³³

The ICTY’s newfound power to decide whether to transfer cases back to national courts and to recall cases that had been transferred should domestic prosecutions be inadequate gave the Tribunal considerable new leverage over the operation of domestic institutions. Rule 11*bis* put the ICTY in a position from which it could monitor the quality of the domestic judiciary, provide a benefit to national courts through the transfer of cases to them where they met certain international standards, and sanction domestic courts that failed to meet those standards through the recall of cases to the ICTY. This ability to monitor domestic judicial institutions allowed the ICTY to have far greater influence on both the quality and quantity of domestic prosecutions.

Although the jurisdictional relationship created by Rule 11*bis* is not formally one of complementarity as the ICTY still retained primary jurisdiction pursuant to Article 9(2) of its statute, the changes created structural incentives very close to those of complementarity. Specifically, the ICTY must affirmatively transfer cases back to the national jurisdictions, but only does so where national courts are competent and meet international standards. Hence, just as with pure complementarity, if national officials wish to prosecute, they must demonstrate that they can undertake genuine criminal prosecutions. Where national courts are unable to meet those standards generally, the ICTY need not transfer a case back to domestic institutions. Once a case is transferred, the ICTY is able to monitor ongoing national prosecutions and, just as in pure complementarity, where those domestic proceedings are inadequate, the ICTY can recall that case back to The Hague. Again much like a “pure” complementarity relationship, if domestic officials wish for national prosecutions to proceed, the revised jurisdictional relationship gives them incentives to enhance the quality and capacity of national insti-

---

131. ICTY Rules, Rule 11*bis* (C). Rule 28(A) was also amended to give the judges the ability to review cases to determine if the level of seniority of the accused is appropriate for prosecution before the ICTY. See Daryl A. Mundis, *The Judicial Effects of the Completion Strategies on the Ad Hoc International Criminal Tribunals*, 99 AM. J. INT’L L. 142, 146 (2005).

132. ICTY Rules, Rule 11*bis* (B).

133. ICTY Rules, Rule 11*bis* (F).

tutions and provides the international tribunal the authority to monitor and sanction domestic courts that prove inadequate.

While the amendments to the Rules of Procedure and Evidence provided sufficient legal grounds for the referral of cases to national jurisdictions, the RPE only set minimum guidelines as to when domestic courts should be deemed prepared to receive a case back from the ICTY. The Tribunal's 2002 report to the Security Council, however, offered additional considerations for making such determinations and was subsequently endorsed by the Council itself.¹³⁴ These requirements for referral back provided domestic courts with clear guidelines and targets around which to structure reform efforts, including that the "accused answer in national courts for all the crimes specified in the indictments" and that "national trials are conducted in accordance with the international norms for the protection of human rights."¹³⁵ Among the enumerated human rights protections are an adequate domestic legal framework; "the impartiality and independence of the judiciary;" "judicial experience or training" so as to be able to conduct a war crimes trial; sufficient "financial and logistical resources," and adequate "pretrial detention." Further, the Report required that "codes of criminal procedure are in line with the international conventions on the protection of human rights;" that "a code of professional conduct for the judiciary has been adopted;" that "slowness of proceedings" has been addressed; that "detainees are treated equally," and that "public proceedings are guaranteed."¹³⁶ This extensive catalogue of rights and requirements seeks to guarantee that any domestic trials will meet minimum international standards.

Significantly, the more detailed criteria included in the Tribunal's report gave domestic officials clear guidelines for structuring judicial reform efforts to ensure that national courts could meet the targets set by the ICTY for transfer of cases. Rule 11*bis* also gave the ICTY considerable leverage to encourage national courts to meet those targets. As Larry Johnson, Chief of Staff to the ICTY President, commented, "the ICTY is required to assess the quality of domestic justice."¹³⁷ In order to receive a case and retain jurisdiction once the case is transferred, the criteria of domestic preparedness set

---

134. See Mundis, *supra* note 131, at 142–44.

135. International Criminal Tribunal for the Former Yugoslavia, *Report on the Judicial Status of the International Criminal Tribunal for the Former Yugoslavia and the Prospects for Referring Certain Cases to National Courts*, ¶ 84, U.N. Doc. S/2002/678 (June 19, 2002).

136. *Id.*

137. See Interview with Larry Johnson, Chief of Staff to the President of the ICTY, in The Hague, Neth. (July 1, 2005).

by the ICTY and approved by the Security Council must be met. The transfer of cases under Rule 11*bis* gave the ICTY a means of providing benefits directly to national institutions within BiH that met the criteria for an effective judiciary.

A decision by the ICTY to refer a case to the CBiH involves an international affirmation of the quality of the Bosnian judiciary or, more particularly, the quality of the new CBiH.¹³⁸ In fact, the Bosnian government has pushed strongly to take these cases back, in part because it has recognized this legitimating effect.¹³⁹ In the words of the CBiH President: "These cases are within our jurisdiction. It is not so much that we want them, but that we have a right to try them. And when the ICTY hands them back to us it validates our work in building this court and expands our credibility."¹⁴⁰ In submissions to the ICTY, BiH has been quick to assert how its new and reformed judicial institutions meet these targets established by the Tribunal and endorsed by the Security Council. Submissions by the BiH government in the *Dragomir Milošević Case*, for example, emphasised that Bosnia "is in all respects prepared and able to deal with any case which the Chamber deems appropriate for referral."¹⁴¹ The ICTY's "carrot" of a case transfer allowed it to push national institutions to meet the benchmarks it had set for the effectiveness of a domestic judiciary.¹⁴²

The jurisdictional relationship created by Rule 11*bis* incorporates a number of feedback loops to ensure the ongoing quality of domestic courts and prosecutions. The ability of the ICTY to recall cases previously transferred to national courts allows the Tribunal to monitor and, perhaps, influence domestic proceedings. As the ICTY Referral Bench observed in the *Rašević and Todović Case*, "[t]his monitoring mechanism enables a measure of continuing oversight

---

138. In its submissions to the ICTY, Bosnia has made clear that the Court of Bosnia & Herzegovina is the only competent institution to receive the case. See *Prosecutor v. Zeljko Mejakic et al.*, Case No. IT-02-65-PT, Response by the Government of Bosnia and Herzegovina (BiH) to Questions Posed by the Specially Appointed Chamber in its Decision for Further Information in the Context of the Prosecutor's Request under Rule 11*bis* (Feb. 9, 2005).

139. See *id.*

140. See Interview with Biljana Potparić-Lipa, *supra* note 99.

141. *Prosecutor v. Milošević*, Case No. IT-98-29/1-PT, Response by the Government of Bosnia & Herzegovina (BiH) to Questions Posed by the Specially Appointed Chamber in its Order for Further Submissions on the Gravity of the Crimes and the Level of Responsibility of the Accused, at 3-4 (Feb. 9, 2005). Note that in this case the Government of BiH opposed transfer on the ground that the level of responsibility of the accused was sufficiently high that he should be tried before the international forum. For a more detailed argument of the preparedness of the Bosnian judiciary, see *Prosecutor v. Mejakic, Gruban, Fuštar & Knežević*, Response by the Government of Bosnia & Herzegovina (BiH) to Questions Posed by the Specially Appointed Chamber in its Decision for Further Information in the Context of the Prosecutor's Request under Rule 11*bis* (Feb. 9, 2005) (on file with author).

142. See Interview with Larry Johnson, *supra* note 137.

over trial proceedings should a case be referred.”¹⁴³ The result is not only to catalyze domestic prosecution, but also to encourage national courts to meet a relatively high standard of justice.¹⁴⁴ The Organization on Security and Cooperation in Europe monitors all trials before the new CBiH¹⁴⁵ and reports back to the ICTY on a regular basis.¹⁴⁶ The ICTY Referral Bench may decide to recall a case that does not meet fair trial requirements or in which the accused is not tried on the charges specified in the international indictment.¹⁴⁷ In cases involving a possible constitutional violation, review is also possible before the Constitutional Court of Bosnia & Herzegovina,¹⁴⁸ which can directly apply the European Convention on Human Rights.¹⁴⁹ Finally,

143. Prosecutor v. Rašević & Todović, Case No. IT-97-25/1-PT, Decision on the Referral of Case under Rule 11bis, ¶ 84 (July 8, 2005).

144. See Interview with David Tolbert, *supra* note 81. The Tribunal has been careful to note its ability to recall cases in its 11bis decisions as a way to ensure compliance. In the Stanković case, for example, the tribunal noted that if fair trial requirements were not met, “then a referral order may be revoked by this tribunal.” Prosecutor v. Stanković, Case No. IT-96-23/2-PT, Corrigendum to Decision on Referral of Case under Rule 11bis, ¶ 68 (May 27, 2005).

145. The OSCE has already been involved in extensive monitoring of trials at the cantonal and district levels. See *War Crimes Trials Before the Domestic Courts of Bosnia & Herzegovina, Progress and Obstacles*, *supra* note 19. The OSCE has recruited and trained Bosnian staff in trial monitoring.

146. The exact recipient of such reports has yet to be determined as it is necessary to ensure that the prosecution, defense, and chambers all receive reports in a like fashion. Interview with Dan Beckwith, *supra* note 103.

147. See ICTY Rules, Rule 11bis.

148. See CONST. BOSN. & HERZ. art. VI(3)(b) (“The Constitutional Court shall also have appellate jurisdiction over issues under this Constitution arising out of a judgment of any other court in Bosnia & Herzegovina”).

149. See CONST. BOSN. & HERZ. art. II(2) (“The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia & Herzegovina. These shall have priority over all other law.”); see also Interview with David Feldman, *supra* note 15 (suggesting that such a challenge was entirely possible). The Constitutional Court has, in fact, reviewed the constitutionality of the State Court itself. See Decision on the Law of the Court of Bosnia & Herzegovina is Hereby Declared to be in Conformity with the Constitution of Bosnia & Herzegovina, Case No. U26/01, (Sept. 28, 2001). The decisions of the ICTY trial and appeals chambers to refer a case to Bosnia or recall it from Bosnia, however, would be beyond the jurisdiction of the Constitutional Court. The Constitutional Court has routinely held that it does not have the power to review the decisions of international institutions or the Dayton Accords themselves. See Interview with David Feldman, *supra* note 15. For Constitutional Court jurisprudence limiting the powers and jurisdiction of the court with respect to international agencies or the Dayton Accords, see Decision, The Appeal of the Office of the Public Attorney of the Federation of Bosnia & Herzegovina against the Decision of the Human Rights Chamber of 11 March 1998 in Case No. CH/96/30, S.D. v. The Federation of Bosnia & Herzegovina, Case No. U7/98, (finding that “[t]he Constitutional Court of Bosnia & Herzegovina does not have appellate jurisdiction over decisions of the Human Rights Chamber for Bosnia & Herzegovina” because it is an equal institution established under the Dayton Accords). The Constitutional Court has clearly stated that it cannot review a decision of the High Representative as his powers were conferred through an international agreement. See Ruling, The Appeal of 37 Representatives of the House of Representatives of the Parliament of the Federation of Bosnia & Herzegovina against the Decision of the High Representative

if all domestic remedies are exhausted, an appeal to the European Court of Human Rights remains a possibility. Collectively these feedback loops create an extremely robust appellate review procedure and generate strong incentives for domestic judicial actors to provide a high quality of justice that can withstand both domestic and international scrutiny.

The nature of this new jurisdictional relationship and the influence it gives the ICTY to monitor or sanction domestic courts is well stated by the ICTY President, Claude Jorda. In his 2002 report to the Security Council, he advocated the creation of a three-tier judicial architecture:

The first tier, the International Tribunal, essentially handles the major political . . . leaders . . . . The second tier, the State Court, chiefly handles intermediary-level accused who would be referred by the International Tribunal . . . . The third tier, the local courts, handles low-ranking accused tried in accordance with the Rome Agreement. Within this structure, the International Tribunal would be responsible for overseeing the proper conduct of the second-tier trials and the State Court the third-tier trials.¹⁵⁰

This framework, Jorda argued, could both “steer the action of the international community” and promote trials by “a centralised State Court sitting in Sarajevo.”¹⁵¹

By August 2005, the ICTY Prosecutor had already sought the referral of ten cases back to BiH. Of these ten requests, the ICTY sent a significant majority back to BiH pursuant to Rule 11*bis*¹⁵² and only denied one request. In order to evaluate these requests and examine the domestic institutions that would receive cases, a special Referral Bench was established, with one judge from each of the

---

of Bosnia & Herzegovina No. 86/01 of 23 February 2001 is Rejected, Case No. U37/01, OFFICIAL GAZETTE OF BiH (Bosn. & Herz.).

150. Jorda July 2002 Address, *supra* note 122.

151. *Id.* For the Prosecutor’s view of this proposal, which accords closely with that of Jorda, see Press Release, Office of the Prosecutor of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, Address by the Prosecutor of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, Mrs. Carla Del Ponte to the United Nations Security Council (Oct. 30, 2002), available at <http://www.un.org/icty/pressreal/p709-e.htm>.

152. See Prosecutor v. Janković, Case No. IT-96-23/2-PT, Decision on Referral of Case under Rule 11*bis* (July 22, 2005); Prosecutor v. Mejakić, Gruban, Fustar & Knežević, Case No. IT-02-65-PT, Decision on Prosecutor’s Motion for Referral of Case Pursuant To Rule 11*bis* (July 20, 2005); Prosecutor v. Rašević & Todović, Case No. IT-97-25/1-PT, Decision on the Referral of Case under Rule 11*bis* (July 8, 2005); Prosecutor v. Stanković, Case No. IT-96-23/2-PT, Corrigendum to Decision on Referral of Case under Rule 11*bis* (May 27, 2005).

three trial chambers of the ICTY.¹⁵³ In addition, two Senior Legal Officers were tasked with working on the referral cases. In evaluating the quality of the Bosnian judiciary, the Referral Bench has relied upon detailed submissions of the parties, amicus briefs filed by the Government of BiH,¹⁵⁴ and reports from the OSCE.¹⁵⁵

This referral bench monitors proceedings before the BiH judiciary for the ICTY and thereby determines whether domestic courts meet the criteria for referral. The first referral decision, the *Stanković Case*, examined in detail the preparedness of the Bosnian judiciary to receive cases and undertake fair and effective prosecutions. Issues considered included which court in BiH would receive the case, the applicable substantive law, the non-imposition of the death penalty, general fair trial rights, the ability of BiH to offer a trial without undue delay, the availability of witnesses, and the monitoring of any domestic trials that occur.¹⁵⁶

In the *Stanković* decision, the Tribunal commented favorably on the creation of the CBiH and new domestic legislation facilitating prosecution of international crimes. Likewise, it affirmed a procedure through which indictments sent to BiH would be forwarded to the Prosecutor's Office of the CBiH. The CBiH Prosecutor shall, in turn, "adapt the ICTY indictment to make it compliant with the BiH Criminal Procedure Code" and forward it "to the State Court of BiH."¹⁵⁷ With respect to fair trial rights, the Referral Bench announced, after enumerating a long series of requirements, that it "considers that the legal structure of Bosnia & Herzegovina, as it now stands, is sufficient to safeguard the right of the Accused to a

---

153. The Referral Bench consists of Judge Alphons Orie, Presiding, and Judges O-Gon Kwon and Kevin Parker.

154. In all of the cases to date, defense has sought to avoid referral back, preferring instead trial before the ICTY. This is not at all surprising given both the quality of justice and the significant differences between imprisonment in Bosnia & Herzegovina and the states that generally incarcerate ICTY convicts. In some cases, the defense has sought, as an alternative, transfer to Serbia. See, e.g., *Prosecutor v. Rašević & Todović*, Case No. IT-97-25/1-PT, Decision on the Referral of Case under Rule 11bis, ¶ 27, 28 (July 8, 2005). In that case, Rašević sought transfer to Serbia on grounds that it was the state in which the accused was arrested, a valid state for transfer pursuant to Rule 11bis. Todović argued that based on his Serbian nationality he should also be transferred to Serbia and Montenegro.

155. See *id.* ¶ 109, (noting "the standing of the OSCE and the neutrality of its approach ought to ensure that the reports it provides will adequately reflect Defense as well as Prosecution issues").

156. *Prosecutor v. Stanković*, Case No. IT-96-23/2-PT, Corrigendum to Decision on Referral of Case under Rule 11bis, (May 27, 2005).

157. *Id.* ¶ 24. The relevant legislation is Law on Transfer of Cases from the International Criminal Tribunal for the Former Yugoslavia to the Prosecutor's Office of Bosnia & Herzegovina and the use of Evidence Collected by the International Criminal Tribunal for the Former Yugoslavia in Proceedings Before the Court of Bosnia & Herzegovina, OFFICIAL GAZETTE OF BiH 61/04 (Bosn. & Herz.) [hereinafter Law on Transfer of Cases].

fair trial.”¹⁵⁸ The Bench concluded: “being satisfied on the information presently available that the Accused should receive a fair trial and that the death penalty will not be imposed or carried out . . . referral . . . should be ordered.”¹⁵⁹

The affirmation of the ability of the CBiH to provide a fair trial and the subsequent referral of significant cases from the ICTY back to BiH has, in fact, provided a clear mark of international legitimation for the BiH judiciary. While opinions of the ICTY differed greatly in Bosnia and the ICTY has been subject to considerable criticism, there was general consensus in BiH that the willingness of the ICTY to send cases back to domestic courts was a significant legitimator. The CBiH has received very favorable attention in the local press, particularly with respect to its organized crime prosecutions.¹⁶⁰ The ICTY decisions under Rule 11*bis* have been largely welcomed in Sarajevo.¹⁶¹ In the words of Mustafa Bisić, Assistant Minister of Justice for the Execution of Criminal Sanctions, “the referral of cases gives the State Court new clout. It is seen now as a real court.”¹⁶²

The jurisdictional relationship created by Rule 11*bis* allowed the ICTY to monitor domestic courts, to provide benefits to national courts based on the performance of those institutions, and to sanction domestic courts that failed to meet minimum requirements through the recall of cases back to The Hague. In so doing, the new jurisdictional relationship created a set of incentives that essentially mirrored those of complementarity. Domestic officials had new reasons to seek improvement in the quality and capacity of national institutions; international officials had the leverage to promote such improvement.

2. The Congruence of Domestic and International Self-Interest

A growing domestic interest in the establishment of national criminal courts provided an essential addition to the incentives created by the new jurisdictional relationship under Rule 11*bis* to catalyze the Bosnian domestic judiciary. Alone, even the new incentives created by Rule 11*bis* would not likely have catalyzed the reform of

---

158. Prosecutor v. Stanković, Case No. IT-96-23/2-PT, Corrigendum to Decision on Referral of Case under Rule 11*bis*, ¶ 68 (May 27, 2005).

159. *Id.* ¶ 96.

160. Interview with Refik Ilodžić, Public Affairs Director, Court of Bosnia & Herzegovina, in Sarajevo, Bosn. & Herz. (Aug. 9, 2005).

161. *Id.* For some examples of local reporting, see Press Release, Fena, ICTY Decides to Refer Case against Mejakic, Gruban, Fustar and Knezević to BiH (July 20, 2005).

162. Interview with Mustafa Bisić, Assistant Minister of Justice, in Sarajevo, Bosn. & Herz. (Aug. 8, 2005).

domestic judicial institutions because neither domestic nor international officials had strong interests in a more effective Bosnian judiciary throughout most of the 1990s. For the incentives created by the jurisdictional relationship under Rule 11*bis* to have any catalytic effect, there had to be meaningful domestic demand for national prosecutions. Lacking such demand, the prospect of referral back of cases to national courts would not promote domestic judicial reform, precisely because domestic officials would not have wanted to receive cases or undertake their own prosecutions. By 2002, however, the self-interest of both domestic and international officials began to shift in favor of more domestic prosecutions and the development of a more robust national judicial infrastructure. These shifts in domestic preferences, when channeled through the new incentives created by Rule 11*bis*, provided a powerful catalytic force for the reform and activation of the domestic judiciary in BiH.

Beginning in the late 1990s, a range of new political pressures in BiH led domestic actors, particularly at the federal level, to recognize the possibility of personal political gain as well as more effective governance through an enhanced federal level judiciary. Although the Constitution of Bosnia & Herzegovina vested federal authorities with law enforcement powers, in the post-Dayton period no federal institutions existed to fulfill this function.¹⁶³ Subsequently, however, federal authorities consolidated power, and support began to materialize for the creation of a federal judiciary with criminal jurisdiction.

A number of factors contributed to this growing domestic demand for federal authority, generally, and federal criminal courts more specifically. First, over time the need for devolved power at the entity level to moderate ethnic tensions—a hallmark of the Dayton accords—declined as ethnic tensions cooled.¹⁶⁴ Second, continuing criticism of and lack of faith in the poor quality and ethnic domination of entity level judicial institutions meant that the future stability of the state depended on the existence of a less biased federal level judiciary.¹⁶⁵ Third, the Constitutional Court took significant steps during its first term to strengthen federal institutions, enhancing federal power such that a federal judiciary became possible.¹⁶⁶ As a result,

---

163. See *supra*, text accompanying notes 19–20.

164. See GENERAL FRAMEWORK AGREEMENT, *supra* note 12.

165. See Consultants' Report to the OHR: The Future of Domestic War Crimes Prosecutions in Bosnia & Herzegovina, May 2002, annex I at 1 (on file with author) [hereinafter Consultants' Report] (observing that "there appears to be little confidence that such cases can be tried impartially, independently, and free of political, criminal or other influence or without ethnic bias").

166. Interview with David Feldman, *supra* note 15, at 5. See, e.g., Decision, The Ap-

powerful domestic interests were aligned for the establishment and activation of domestic criminal jurisdiction in BiH.

As a result of these developments, on 12 November 2000 the OHR, which still had executive lawmaking authority—enacted The Law on the Court of Bosnia & Herzegovina, establishing a federal court of first instance.¹⁶⁷ In addition, a new Code of Criminal Procedure was enacted, specifying the general criminal process in BiH, the powers of the various parties, and the rights of accused at trial.¹⁶⁸ At this stage, the CBiH had only limited criminal jurisdiction (notably not including war crimes), administrative jurisdiction over acts of the federal government, and appellate jurisdiction over its own decisions.¹⁶⁹

Beginning in late 2002, domestic interest groups pushed for

---

peal of the Office of the Public Attorney of the Federation of Bosnia & Herzegovina against the Decision of the Human Rights Chamber of 11 March 1998 in the Case No. CH/96/30, S.D. v. The Fed'n of Bosn. & Herz., Case No. U 7/98 (Const. Ct. Bosn. & Herz. 1999) (affirming the power of the Human Rights Chamber for Bosn. & Herz.). The existence of the Court of BiH was itself challenged before the Constitutional Court. *See also* Decision, The Law on the Court of Bosnia & Herzegovina, OFFICIAL GAZETTE BiH 29/00) is hereby declared to be in conformity with the Constitution of Bosnia & Herzegovina, Case No. U 26/01 (Const. Ct. Bosn. & Herz. 2001) (finding that the Dayton Accords granted federal powers to establish a state court and that "the establishment of the Court of Bosnia & Herzegovina can be expected to be an important element in ensuring that the institutions of Bosnia & Herzegovina act in conformity with the rule of law . . ."). *See also* Consultants' Report, *supra* note 165, at 37.

167. Other legislation imposed by the High Representative at this time included: HR Decision Enacting the Law on Amendments to the Law on the Court of Bosnia & Herzegovina, OFFICIAL GAZETTE BiH 24/02 (Bosn. & Herz.); HR Decision Enacting the Law Re-amending the Law on the Court of Bosnia & Herzegovina, OFFICIAL GAZETTE OF BiH 3/03 (Bosn. & Herz.); Decision Enacting the Law on Further Re-amending the Law on the Court of Bosnia & Herzegovina, OFFICIAL GAZETTE OF BiH 37/03 (Bosn. & Herz.); HR Decision Enacting the Law on the Amendments to the Law on Court of Bosnia & Herzegovina, OFFICIAL GAZETTE OF BiH 4/04 (Bosn. & Herz.); HR Decision Enacting the Law on the Prosecutor's Office of Bosnia & Herzegovina, OFFICIAL GAZETTE OF BiH 24/02 (Bosn. & Herz.), *available at* http://www.ohr.int/decisions/judicialrdec/default.asp?content_id=27652; HR Decision Enacting the Law on Amendments to the Law on the Prosecutor's Office of Bosnia & Herzegovina, OFFICIAL GAZETTE OF BiH 3/03 (Bosn. & Herz.), *available at* http://www.ohr.int/decisions/judicialrdec/default.asp?content_id=29093; HR Decision Enacting the Law on Re-amending the Law on the Prosecutor's Office of Bosnia & Herzegovina, OFFICIAL GAZETTE OF BiH 37/03 (Bosn. & Herz.), *available at* http://www.ohr.int/decisions/judicialrdec/default.asp?content_id=31102; HR Decision Enacting the Law on the Judicial Police of Bosnia & Herzegovina, OFFICIAL GAZETTE OF BiH 3/03 (Bosn. & Herz.), *available at* http://www.ohr.int/decisions/judicialrdec/default.asp?content_id=29090; HR Decision Enacting the Criminal Procedure Code of Bosnia & Herzegovina, OFFICIAL GAZETTE OF BiH 3/03 (Bosn. & Herz.); HR Decision Enacting the Law on Protecting Witnesses under Threat and Vulnerable Witnesses, OFFICIAL GAZETTE OF BiH 3/03 (Bosn. & Herz.).

168. *See* HR Decision Enacting the Criminal Procedure Code of Bosnia & Herzegovina, OFFICIAL GAZETTE OF BiH 3/03 (Bosn. & Herz.).

169. *See* Law on the Court of Bosnia & Herzegovina, OFFICIAL GAZETTE OF BiH 16/02 (Bosn. & Herz.) arts. 13–15.

the expansion of the State Court's jurisdiction to hear organized crimes and war crimes cases. With the arrival in 2002 of Paddy Ashdown, the new High Representative, the fight against organized crime became a top priority and a new judicial infrastructure was needed to address the growing threat presented by organized crime groups.¹⁷⁰ Expanding the jurisdictional reach of the CBiH was an obvious solution.¹⁷¹ By this time, even some entity level officials in the FBiH and the RS were more willing to accept a special court to deal with war crimes as well as organized crime so that ethnically charged cases would not land on their doorsteps. As an official at the Ministry of Justice explained, "the nature of the criminal acts in question is such that it is not enough to have judicial bodies at the entity level. They are needed at the state level as well."¹⁷² Finally, as frustration with the ICTY grew, federal level officials began to push for domestic prosecutions of war crimes as an alternative to the international tribunal. In the words of the President of the State Court, "the victims are citizens of Bosnia & Herzegovina. We have a moral, ethical and legal right to prosecute ourselves."¹⁷³

During 2002 and 2003, these domestic pressures percolated through the Bosnian government, yet endowing the State Court with war crimes jurisdiction was not without opposition. Some entity level officials, particularly in the RS, resisted the creation of a federal court, which they believed might be biased against Serbs. Others contested the legality of a federal court of first instance under the constitutional framework established by the Dayton Accords.¹⁷⁴ In addition, funding a domestic war crimes court remained a critical problem given the serious constraints on the Bosnian federal budget and the limited interest of donor states in funding additional criminal tribunals.

When set against the backdrop of the new incentives created

---

170. Interview with John Peyton, *supra* note 25, at 6.

171. *See id.*

172. *See* Interview with Mustafa Bisić, *supra* note 162, at 36. The 2002 Consultants' Report further observed: "[I]n meetings with representatives of the Federation and Brčko District, there was considerable support for a special state level court to deal with war crimes cases. In Republika Srpska there was support for special courts to deal with war crimes at the Entity level." Consultants' Report, *supra* note 165, at 37.

173. *See* Interview with Biljana Potparić-Lipa, *supra* note 99, at 25. For an official ICTY statement indicating the readiness of Bosnian courts to receive cases, see Prosecutor v. Mejakić, Case No. IT-02-65, Decision for Further Information in the Context of the Prosecutor's Request under Rule 11*bis* (Feb. 9, 2005).

174. The issue was argued before the Constitutional Court of Bosnia & Herzegovina in 2000 and the power of the state to create a federal level judiciary was upheld in 2001. *See* Decision, The Law on the Court of Bosnia & Herzegovina, OFFICIAL GAZETTE BiH 29/00 is hereby declared to be in Conformity with the Constitution of Bosnia & Herzegovina, Case No. U 26/01 (Const. Ct. Bosn. & Herz. 2001).

by the governance structure of Rule 11*bis*, the interests of domestic actors—who were now coming to favor a federal level war crimes court—proved extremely powerful. Federal level officials in BiH could benefit from the enhancement of domestic judicial institutions and greater federal power through the creation of a special war crimes chamber. In so doing, the federal government could prove to both national and international audiences that the federal institutions in Bosnia were capable of even the most demanding criminal prosecutions and that BiH had effectively recovered from the aftermath of conflict. With the end of the Rules of the Road program, a clear statement of the types of cases the ICTY would prosecute, and the possibility of transfer of cases back to BiH, national officials could count on a relatively independent judiciary and could benefit from championing the cause of a revived Bosnian judiciary. Simultaneously, federal officials could wrest power away from entity level institutions by establishing a federal level criminal court, particularly one that had been given the stamp of approval by the ICTY through the transfer of cases back to it. The result was a new and powerful domestic interest block in BiH pushing for a federal war crimes court and the more general enhancement of domestic judicial institutions.

The advent of the ICTY's Completion Strategy also altered the self-interest of international officials at the ICTY, who soon found that their own mission could be furthered through a more effective domestic judiciary in BiH. In 2001 and 2002, key donor states became frustrated with the costs of the ICTY nearly a decade after the end of the war in Bosnia. As a result, the Security Council pushed the ICTY to complete its work by 2008 through the aforementioned Completion Strategy.¹⁷⁵ However, the ICTY lacked the capacity or resources to prosecute many of the lower level perpetrators who were either indicted or already in custody.¹⁷⁶ In response, as part of its Completion Strategy, the ICTY limited future indictments to more senior figures, expanded the use of plea bargains to reduce caseload, and considered the possibility of referring cases back to domestic jurisdictions.¹⁷⁷ As ICTY President Claude Jorda

---

175. See, e.g., State Department Noon Briefing, Richard Boucher, State Department Spokesman (Jan. 28, 2002), available at <http://www.usembassy-israel.org.il/publish/peace/archives/2002/march/030106.html>.

176. The prevalence of lower level indictees and detainees was largely the result of the Tribunal's early prosecutorial strategy. At that time, the apprehension of higher level suspects was not possible, so then prosecutors Richard Goldstone and Louise Arbour focused instead on lower level suspects who could be apprehended. See Interview with Richard Goldstone, in Princeton, N.J. (Nov. 14, 2003); David Sloss, *Hard Nosed Idealism and U.S. Human Rights Policy*, 46 ST. LOUIS L. J. 431, 438 (2002).

177. Jorda July 2002 Address, *supra* note 122, at 30; Judge Claude Jorda, *Address to the UN Security Council*, ICTY Press Release JDH/P.I.S./708-c (Oct. 30, 2002) [hereinafter

admitted as early as 2001, "The cases of lesser importance for the Tribunal could, under certain conditions, be 'relocated', that is, tried by the courts of the states created out of the former Yugoslavia . . . . This solution would . . . considerably lighten . . . the International Tribunal's workload . . . ." ¹⁷⁸ But, Jorda cautioned, "for it to be possible to 'relocate' the cases . . . the judicial systems of the states of the former Yugoslavia must be reconstructed . . . . The national courts must be in a position to accomplish their work with total independence and impartiality." ¹⁷⁹

With the international community's new goal for the ICTY to complete its work in a tight timeframe, officials in the ICTY and Security Council member states recognized that the establishment of viable domestic institutions in BiH was a critical priority and that the evaluation of their own performance would turn, in part, on the ability of domestic courts in BiH to undertake prosecutions of international crimes. With these newfound motivations, ICTY officials quickly began to examine how domestic institutions in BiH could be enhanced so as to relieve the ICTY of its hefty caseload.

Throughout late 2001 and early 2002, the possibility of and prerequisites for transferring cases back to national jurisdictions was considered at both the ICTY in The Hague and the OHR in Sarajevo. ¹⁸⁰ A May 2002 report by a group of expert consultants ¹⁸¹ (Consultants Report) evaluated the possibilities for domestic trials and recommended "the establishment of an International Humanitarian Law (IHL) Division within the Court of Bosnia & Herzegovina" to be charged with "the prosecution of cases referred to Bosnia & Herzegovina by the ICTY and investigation and prosecution of lower level offenders." ¹⁸² The report provided the basis for the eventual organization of the war crimes chamber, calling for a trial chamber consisting of three judges, one of whom would be international and

---

Jorda October 2002 Address]. For a discussion of plea bargaining, see Marlise Simons, *Plea Deals Being Used to Clear Balkan War Tribunal's Docket*, N.Y. TIMES, Nov. 18, 2003, at A1; Michael Bohlander, *Plea-Bargaining before the ICTY*, in *ESSAYS ON ICTY PROCEDURE AND EVIDENCE IN HONOUR OF GABRIELLE KIRK McDONALD* 151 (Richard May, et al. eds., 2001).

178. Judge Claude Jorda, *Address to the UN Security Council*, ICTY Press Release [Nov. 7, 2001], JD/P.I.S./641-e [hereinafter Jorda November 2001 Address].

179. *See id.*

180. Interview with David Tolbert, ICTY Deputy Prosecutor, in The Hague, Neth. (July 1, 2005).

181. The consultants were Peter Bach (Den.), Kjell Björnberg (Swed.), John Ralston Austl.) and Almiro Rodrigues (Port.). *See Consultants' Report*, *supra* note 165, at 37. For an analysis of the report, see Michael Bohlander, *The Transfer of Cases from International Criminal Tribunals to National Courts*, 14 CRIM. L. FORUM 59 (2003).

182. Consultants' Report, *supra* note 165, at 37.

the others from different ethnic groups.¹⁸³ A special international humanitarian law prosecutor's office was also proposed, with joint domestic and foreign staff.¹⁸⁴ The plan further called for a public defense office and an international registry to manage the Court.¹⁸⁵

The Consultant's Report recognized the need for significant modifications to domestic law and practice in Bosnia & Herzegovina if the plan were to be realized. The report suggested a number of new laws to be drafted with international assistance, including a new criminal code, a code of criminal procedure, and a law on victim and witness protection.¹⁸⁶ All international aspects of the Court were to be temporary, lasting for a period of four to five years to facilitate training and implementation such that the Court would ultimately be a purely national institution.¹⁸⁷

Drawing on this Consultant's Report, the final ICTY Completion Strategy presented to the Security Council in July 2002 included explicit plans for vesting the CBiH with war crimes jurisdiction.¹⁸⁸ The plan noted, "of the approximately one hundred individuals to be indicted by 2004, 50 might be tried by the courts of Bosnia & Herzegovina."¹⁸⁹ Yet, ICTY President Jorda observed, "despite the gradual re-establishment of democratic institutions and the return to peace in the country, the local courts are still faced with significant structural difficulties."¹⁹⁰ The best solution, determined during an early summer 2002 visit of President Jorda and Prosecutor Del Ponte to Sarajevo, was "establishing within the State Court of Bosnia & Herzegovina a Chamber with special jurisdiction to try serious violations

---

183. *See id.*

184. *Id.* annex 9.

185. *Id.* at 19–20.

186. *Id.* annex 14.

187. *See generally* Consultants' Report, *supra* note 165, at 37. As the October 2004 Project Implementation Plan states, a "major objective of the Project is to introduce international professional support into the management and litigation functions of the Court and Prosecutor's Office over the course of the five-year project . . . . The ultimate absorption of War Crime Chamber's capacity into the justice system of Bosnia & Herzegovina and its national funding system is essential to the mandate of the project." *See* Project Implementation Plan Progress Report, *supra* note 29, at 7.

188. Jorda July 2002 Address, *supra* note 122, at 30. Jorda observed the goal was to "prosecute as a priority before the International Tribunal, those presumed responsible for crimes which most seriously violate international public order and to give certain cases of lesser significance to the national courts."

189. *Id.*

190. Among the problems Jorda recognized were "the excessive compartmentalization of the judicial systems of the Federation and Republika Srpska, the lack of cooperation between the two entities, the political influence brought to bear on judges and prosecutors, the often "mono-ethnic" composition of the local courts, the difficulty of protecting the victims and witnesses effectively, the court personnel's lack of training and the backlog of cases at the courts." *Id.*

of international humanitarian law.”¹⁹¹ The Security Council President immediately endorsed “the report’s broad strategy for the transfer of cases involving intermediary and lower-level accused to competent national jurisdictions as likely to be in practice the best way of allowing the ICTY to achieve its current objective of completing all trial activities at first instance by 2008.”¹⁹²

This plan, and the pressures that gave rise to it, provided the necessary international interests to complement the growing domestic demand for the establishment of a federal level war crimes court in Bosnia. International officials, like their domestic counterparts, now had every reason to advocate for and assist with the development of an effective domestic war crimes court in BiH. Likewise, they were now operating under a jurisdictional relationship that could provide selective incentives for domestic institutional development and sanction the failure of domestic institutions to meet internationally set targets.

3. Norm Leadership and the Establishment of the State Court of BiH

Once incentives and interests were aligned toward the development and use of domestic judicial institutions in Bosnia, the actual establishment of a war crimes chamber in the CBiH was driven by a process of norm leadership whereby international actors provided domestic institutions with norms, best practices, and even legislation to guide the development of national institutions. While the ICTY played an important part in generating the norms adopted by BiH, the process of norm leadership was spearheaded by a number of organizations, including the ICTY itself, the OHR in BiH, and the internationalized registry within the newly created State Court. Simultaneously, domestic officials looked to their international counterparts for leadership and guidance, eagerly embracing the proffered norms from the international level of governance in response to the incen-

---

191. The benefit of this approach is that, “aside from meaning that the International Tribunal could be relieved of a part of its caseload, this solution would guarantee that international humanitarian law was applied uniformly at the state level and address the issue of the separation of the two entities’ judicial system.” *Id.*

192. Statement by the President of the Security Council, U.N. Doc. S/PRST/2002/21 (July 23, 2002). The Security Council itself has made the call for transfer of cases a refrain in resolutions relating to the two tribunals. See S.C. Res. 1503, ¶ 7, U.N. Doc. S/RES/1503 (Aug. 23, 2003) (reaffirming that the ICTY’s goal should be “concentrating on the prosecution and trial of the most senior leaders suspected of being most responsible for crimes within the ICTY’s jurisdiction and transferring cases involving those who may not bear this level of responsibility to competent national jurisdictions, as appropriate, as well as the strengthening of the capacity of such jurisdictions”).

tives provided by the jurisdictional relationship of Rule 11*bis*.

Recognizing the coalescence of domestic and international interests around the establishment of a new federal criminal court in BiH, in May 2002, the Office of the High Representative established a number of working groups on particular issues that would have to be addressed for such a court to succeed.¹⁹³ ICTY officials actively participated in many working group meetings, allowing the international tribunal to perform an important norm-leadership role.¹⁹⁴ The working groups' proposals and a package of necessary legislation¹⁹⁵ were considered in two joint meetings between the OHR and the ICTY in January and March 2003.¹⁹⁶ As the proposals were generally well received by all parties,¹⁹⁷ the stage was set for the implementation of the project. These initial meetings facilitated deep and lasting interactions between the ICTY, the OHR, and BiH officials, which would eventually offer structure, guidance, and support for the establishment of the new court.

After joint approval of the proposals by the OHR and ICTY, in June 2003 the OHR was given the institutional lead in project implementation.¹⁹⁸ OHR made clear that the project would only proceed if two years of funding were secured in advance. To that end, donors' conferences were held during the summer of 2003 in Sarajevo and in October 2003 at the ICTY.¹⁹⁹ Approximately €16 million was secured, with the United States providing just over half the initial budget.²⁰⁰ While this was only a portion of the larger five-year proposed budget that had, by that time, expanded to €60 million,

---

193. The working groups were a multi-agency effort with representation from international institutions, NGOs, and officials from the government of BiH. The groups were responsible for issues such as legal reform, witness protection, building renovation, review of cases, war crimes investigations, and staffing and training. These working groups included representatives from the Ministry of Justice of BiH, the State Court, the ICTY Office of the Prosecutor, the ICTY Chambers and the OSCE, among others. *Id.*

194. *See id.* It is worth noting that the ICTY did not always have a common voice in the process as OTP, Chambers and Registry often had different interests and provided sometimes-conflicting advice in the process. Interview with Mechtild Lauth, Judicial Affairs Section Chief, CBiH, in Sarajevo, Bosn. & Herz. (Aug. 9, 2005).

195. The proposed legislation included a revised Law on the Court of Bosnia & Herzegovina, a Law on the Office of the Prosecutor of BiH, a Law on Transfer of Cases, a Law on the Protection of Victims and Witnesses, and a new Criminal Code. *See id.*

196. *Id.*

197. In an inter-agency process the proposals were also shared with a number of other institutions including international prosecutors and judges as well as the Ministry of Justice of BiH. *Id.*

198. *See id.*

199. *See id.*

200. The US provided €7.959 million. Other major contributors included the United Kingdom (€1.132 million), Germany (€1.7 million) and the Netherlands (€1 million). Some of these funds came in the form of pledges that have yet to be paid. *See* Project Implementation Plan Progress Report, *supra* note 29, at 35.

it was a sufficient for the OHR to proceed.

Thereafter, the package of legislation developed jointly by Bosnian officials and international actors was sent to the Parliament of BiH by way of the Ministry of Justice. Although, in 2000, the High Representative used his plenary powers to impose the legislation establishing the CBiH, in 2004 he instead sent legislation for the War Crimes Chamber through the BiH parliament so as to enhance the legitimacy of the new war crimes chamber.²⁰¹ The new alignment of domestic interests in favor of a federal war crimes chamber made the passage of that legislation possible. Six months of debate, negotiation and amendment followed, with significant pressure from the OHR, ICTY officials, and from Michael Johnson, the new international Registrar of the CBiH.²⁰² The final package of legislation, including laws related to the structure of the war crimes chamber, the operation of the prosecutor's office, and the transfer of cases from the ICTY, was passed in November and December 2004.²⁰³

Simultaneously, a new federal criminal code was enacted. Drawing on international norms and precedents, the code incorporated the major international crimes of genocide, war crimes, and crimes against humanity.²⁰⁴ Chapter VII of the Bosnian Criminal

---

201. See Interview with Mechtild Lauth, *supra* note 194; Interview with John Peyton, *supra* note 25. Over time the High Representative has tried to put more legislation through standard domestic channels rather than use the power of imposition. OHR has indicated that they believe even the initial legislation would have passed had it been sent through parliament, but that there was a desire to avoid a political confrontation with the Republika Srpska.

202. See Interview with Mechtild Lauth, *supra* note 194. The High Representative provided significant pressure with respect to organized crime jurisdiction, which remained his priority. Johnson, in contrast, pushed hard for the establishment of the war crimes chamber.

203. The package included three major laws. See Law on Amendments to the Law on the Court of Bosnia & Herzegovina, OFFICIAL GAZETTE OF BiH 35/04 (Bosn. & Herz.). This law provided for the establishment of a special war crimes division within the CBiH. See also Law on Transfer of Cases, *supra* note 157. The Law on Transfer of Cases allows for cases to be transferred from the ICTY to the CBiH, gives the Prosecutor of BiH the power to reform an ICTY indictment to bring it into conformity with Bosnian procedure and specified that an accused's time in custody at the ICTY shall not count toward custodial limits of Bosnia law. In addition the law made clear that evidence gathered by the ICTY would be admissible before the CBiH and that facts established by legally binding decisions of the ICTY shall be controlling in the CBiH. See also Law on Amendments to the Law on the Prosecutor's Office of Bosnia & Herzegovina, OFFICIAL GAZETTE OF BiH 35/04 (Bosn. & Herz.); Law on Amendments to the Law on the Prosecutor's Office of Bosnia & Herzegovina, OFFICIAL GAZETTE OF BiH 61/04 (Bosn. & Herz.). These two laws created a special war crimes division within the Office of the Prosecutor of the CBiH and provided for the appointment of international prosecutors during the transitional period.

204. See Criminal Code of Bosnia & Herzegovina ch. XVII, OFFICIAL GAZETTE OF BiH 3/03 (Bosn. & Herz.). For other relevant laws, see Law on Amendments to the Criminal Code of Bosnia & Herzegovina, OFFICIAL GAZETTE OF BiH 61/04 (Bosn. & Herz.). A number of other laws relevant to the establishment of the War Crimes chambers were also passed, though they are of lesser importance. For a complete collection of legislation, see

Code is modeled closely on the Rome Statute and specifies "Crimes Against Humanity and Values Protected by International Law."²⁰⁵ Picking up where the ICTY Statute and Rome Statute of the ICC leave off, the new Bosnian law also draws on ICTY case law to provide a far more specific definition of the constituent elements of international offenses.²⁰⁶ Again this legislation was a joint effort of domestic and international officials, who, respectively, offered and embraced international norms and legal rules regarding the prosecution of war crimes.

To facilitate the international elements of the CBiH, in December 2004 an agreement was reached between Bosnia & Herzegovina and the OHR on the establishment of an internationalized registry for the war crimes chamber.²⁰⁷ While the CBiH itself is domestic, the war crimes Registry is an international institution embedded in the Bosnian judiciary. For the four-year transitional period, the Registry was tasked with staff appointments, building management, and court operation.²⁰⁸ On May 1, 2005, the High Representative appointed the first international judges and the new Court was ready to begin operations.²⁰⁹

The Court is specifically designed to promote the quality of long-term capacity building in BiH. During the transition period, the Court operates as a hybrid tribunal with a mandate not only of prosecution but also "to empower the people and institutions of Bosnia & Herzegovina with the necessary management and technical tools and financial and material resources . . . to carry out the task of bringing to justice perpetrators of crimes."²¹⁰ The goal again is for the inter-

---

BENCH BOOK OF THE COURT OF BOSNIA & HERZEGOVINA (2005 ed.) (on file with author).

205. Criminal Code of Bosnia & Herzegovina ch. XVII, OFFICIAL GAZETTE OF BiH 3/03 (Bosn. & Herz.). Officials involved in the drafting process note that both the ICTY Statute and the Rome Statute were instrumental in shaping the international criminal law provisions of the new criminal code. Interview with Almiro Rodrigues, Judge, Court of Bosnia & Herzegovina, in Sarajevo, Bosn. & Herz. (Aug. 5, 2005, Aug. 8, 2005).

206. For example, article 172 of the Criminal Code provides detailed definitions of key elements including attack directed against any civilian population, extermination, deportation, and torture. See Criminal Code of Bosnia & Herzegovina, *supra* note 204, at art. 172.

207. See Agreement between the High Representative for BiH and Bosnia and Herzegovina on the Establishment of the Registry for Section I for War Crimes and Section II for Organized Crime, Economic Crime and Corruption of the Criminal and Appellate Division of the Court of BiH and the Special Department for War Crimes and the Special Department for Organized Crime, Economic Crime and Corruption of the Prosecutor's Office of Bosnia & Herzegovina, OFFICIAL GAZETTE OF BiH 16/02, International Agreements 11/04 (Bosn. & Herz.).

208. See *id.* arts. 2, 4. For a detailed explanation of the work of the Registry to date, see Project Implementation Plan Progress Report, *supra* note 29; Open Letter from Michael Johnson (June 22, 2005) (on file with author).

209. See Open Letter from Michael Johnson, *supra* note 208.

210. Project Implementation Plan Progress Report, *supra* note 29, at 4.

national element of the court to offer norms and best practices, which their domestic colleagues can adopt. Once that judicial transplant is accomplished, the international elements of the court can be withdrawn.

The largest international component of the court is the Registry, responsible for the court's infrastructure, organization, and premises, as well as legal support. As an internationalized component of the CBiH, the Registry performs dual functions, both overseeing the Court's administration and leading international norms for other elements of the court to adopt. To date, the Registry has undertaken numerous improvements to the Court's physical plant likely to be of lasting benefit, including refurbishing the entire court building²¹¹ and constructing a detention center.²¹² It has also developed state-of-the-art technology for each courtroom and a data management system.²¹³ In addition, the Registry has conducted both international and domestic outreach.²¹⁴ So far 110 journalists have been accredited to the court, sixty NGOs have been involved in consultations, and meetings have been held with key constituencies across the country.²¹⁵ Finally, the Registry is training national personnel to take over standard duties of security, victim and witness protection, and budgeting.²¹⁶

Most elements of the Court have been internationalized such that an international structure parallels the domestic one with the intent that, over time, the international structure can be withdrawn and tasks handed across to functionally identical national personnel who are already in place. Each of the two internationalized trial chambers consists of two international and one Bosnian judge. An international Judicial Support Section Chief, backed by a domestic counterpart, supports the entire trial division.²¹⁷ The Court also includes an appeals chamber, with review power on questions of fact and law, comprised of three international and two Bosnian judges.²¹⁸

The Office of the Prosecutor of the CBiH War Crimes Section

---

211. Project Implementation Plan Progress Report, *supra* note 29, at 49–52.

212. See Open Letter from Michael Johnson, *supra* note 208.

213. This analysis is based on personal observations of the courtroom technology in August 2005.

214. Interview with Refik Hodžić, *supra* note 160.

215. See Open Letter from Michael Johnson, *supra* note 208.

216. Interview with Michael Johnson, Registrar of the CBiH, in Sarajevo, Bosn. & Herz. (Aug. 4, 2005).

217. See also Project Implementation Plan Progress Report, *supra* note 29; Interview with Mechtild Lauth, *supra* note 194.

218. Law on the Court of Bosnia & Herzegovina art. 15, OFFICIAL GAZETTE OF BiH 29/00 (Bosn. & Herz.). The appellate division is supported by a legal officer (Bosnian), two interpreters (both Bosnian), two law clerks (one international and one Bosnian), and two interns (one international and one Bosnian). Project Implementation Plan Progress Report, *supra* note 29, at 42.

is also designed to encourage capacity building and transfer of best practices from the ICTY. The office consists of five mixed national and international trial teams assigned to different geographical areas.²¹⁹ A national Head of Administration and support staff backs the teams.²²⁰ In addition, the Prosecutor's Office has a designated liaison, responsible for cooperation with the ICTY and with other States in the region.²²¹ The prosecutorial teams are currently reviewing more than 8,000 cases for which files already exist and the first indictment was handed down in the *Simsic Case* in June 2005.²²² As ICTY *11bis* referrals are finalized, the CBiH Prosecutor's office works with the ICTY to make those indictments compatible with Bosnian law and formally issue them. Again, the structure is designed to allow incorporation of international practices into the domestic prosecutor's office.

On the criminal defense side, the CBiH has sought to build the capacity and skills of Bosnian lawyers and socialize them with international norms. The Criminal Defense Section (Odsjek Krivice Odbrane – OKO), initially under temporary international leadership,²²³ has trained Bosnian lawyers in criminal defense and international law,²²⁴ assisted with the transition to an adversarial judicial model, and developed an accreditation program for Bosnian lawyers.²²⁵ Again, ICTY officials have reached out to assist with training and support. Defense before the CBiH is conducted solely by Bosnian-trained lawyers, who are supported by geographically organ-

---

219. Each team includes a head domestic prosecutor, an international prosecutor, a national investigator, two legal associates (one national and one international) and a national case coordinator. See Project Implementation Plan Progress Report, *supra* note 29, at 53. The geographic regions are Northwest BiH, Central Bosnia, Eastern Bosnia, Sarajevo and Eastern Herzegovina, and Neretva and Western Herzegovina.

220. The staff presently includes four data management and trial support staff (two of whom are international) as well as five national interpreters. See *id.*

221. Interview with Ramiz Huremagić, Deputy Prosecutor of Bosnia & Herzegovina, in Sarajevo, Bosn. & Herz., (Aug. 8, 2005).

222. Indictment of June 28, 2005, Prosecutor v. Boban, Case No. KT-RZ-2/05 (Ct. of Bosn. & Herz. 2005).

223. OKO is under the stewardship of Rupert Skilbeck, a British barrister from 36 Bedford Row Chambers for a six month to one year initial term. Skilbeck was previously defense advisor for the Special Court in Sierra Leone. He is author of Rupert Skilbeck, *Building the Fourth Pillar: Defense Rights at the Special Court for Sierra Leone*, 1 ESSEX HUMAN RIGHTS REVIEW 66 (2004), available at <http://projects.essex.ac.uk/EHRR/archive/pdf/54.pdf>. Interview with Rupert Skilbeck, *supra* note 28.

224. Detailed training modules have been developed and local Bosnian experts have been employed to run the training sessions themselves. Interview with Rupert Skilbeck, *supra* note 28.

225. *Id.* Accreditation requires either that lawyers have tried a serious criminal case before the CBiH or more than two such cases at the cantonal or district level or that the attorneys attend a 100 hours of training sponsored by OKO. In addition, annual continued legal education credits are to be implemented.

ized defense assistance teams at OKO.²²⁶

Throughout the development of the CBiH, ICTY officials have sought promote the adoption of international norms in domestic practice. Specifically, the ICTY has provided judges, legal assistance, and training for the CBiH. Pursuant to a 24 January 2003 amendment to the Law on the Court of Bosnia & Herzegovina, for a four year transitional period as many as six of the court's fifteen judges may be international.²²⁷ One of the first international judges, the Portuguese jurist, Almiro Rodrigues, is a former ICTY judge. He has served as a norm entrepreneur in the War Crimes Chamber.²²⁸ In fact, while at the ICTY, Judge Rodrigues himself confirmed many of the indictments that are now being referred back to the CBiH. He commented: "having confirmed these indictments I am very familiar with the law and even the facts of these cases. I am sharing that knowledge and making sure that the trials here meet the same standards they would at the ICTY."²²⁹ Personnel exchange at lower levels is also frequent. For example, two of the junior staff members at the OKO Defense Assistance Office are former ICTY employees or interns.²³⁰

The ICTY has also helped facilitate a number of training sessions for officials of the CBiH as well as entity level judges and prosecutors that have helped embed international norms at the domestic level. Though the ICTY lacks the resources to organize these trainings (often referred to as consultations) directly, it recognizes their importance and participates actively in them.²³¹ For example, in July 2005, a delegation of judges and prosecutors from Sarajevo visited The Hague for discussions with their international counter-

---

226. Attorneys must be a current member of either the bar association of the RS or FBiH, have expertise in the relevant areas of law, and completed sufficient continuing professional training. See Additional Rules of Procedure for Defense Advocates Appearing before Section I For War Crimes and Section II for Organized Crime, Economic Crime and Corruption of the Court of Bosnia & Herzegovina, Odsjek Krivicne Odbrane, Sarajevo (on file with the author).

227. The law provides that "[d]uring a transitional period, a maximum number of six (6) international judges may be appointed to the Special Panels for Organized Crime, Economic Crime and Corruption within the Criminal and Appellate Division. International judges shall not be citizens of Bosnia & Herzegovina or of any neighboring state. The transitional period shall last not more than four years." See Law Re-amending the Law on the Court of Bosnia & Herzegovina art. 12, OFFICIAL GAZETTE OF BiH 42/03 (Bosn. & Herz.).

228. See Interview with Biljana Potparić-Lipa, *supra* note 99. She noted that having "the international judges present helps our understanding of international criminal law, gives us more confidence, and allows our decisions to have an international character, while we can remain firmly a domestic court. This is a good thing for the transitional period."

229. Interview with Almiro Rodrigues, *supra* note 205.

230. See Interview with Rupert Skilbeck, *supra* note 28.

231. See Interview with Matais Hellman, *supra* note 107.

parts.²³² Throughout the spring of 2005, the CBiH hosted judicial and prosecutorial training sessions on international criminal law and criminal procedure with ICTY involvement.²³³ High-level delegations from the ICTY participated in trainings and consultations in Sarajevo, Mostar, Zagreb, and Belgrade during 2004.²³⁴ These sessions have again promoted the exchange of expertise and knowledge, allowing norm leadership from international to domestic institutions.

The ICTY has also taken part in a number of public events that have directly sought to enhance the perceived legitimacy of the new Court. For example, on March 9, 2005 the War Crimes Chamber of the CBiH was formally inaugurated in an event that brought ICTY President Theodore Meron and ICTY Prosecutor Carla del Ponte together with CBiH President Madzida Kreso, CBiH Chief Prosecutor Marinko Jurcevic, and CBiH Minister of Justice Slobodan Kovac.²³⁵ The event provided an opportunity both to raise the profile of the new court and to allow exchange of information and experience between ICTY officials and their domestic counterparts.

In the development of the CBiH, Bosnian officials have also sought to embrace, where possible, the work and experience of the ICTY. The library of the CBiH includes a complete collection of the ICTY's jurisprudence²³⁶ and all of the judges in the War Crimes Chamber have been briefed on that jurisprudence.²³⁷ CBiH Judge Almiro Rodrigues commented that "the ICTY's jurisprudence will have a profound effect on us. Though it is persuasive rather than binding, it provides the critical foundation on which we will build."²³⁸ The ICTY's jurisprudence and past investigative work should have a significant impact both on the indictments the Bosnian prosecutor decides to bring and on the case law of the CBiH itself. This judicial dialogue is likely to help preserve the uniformity of the two tribunals' jurisprudence, while avoiding the potential dangers of inconsistent holdings and legal fragmentation.²³⁹

---

232. See Interview with David Tolbert, *supra* note 81.

233. Interview with Almiro Rodrigues, *supra* note 205.

234. See Interview with Matais Hellman, *supra* note 107. These training sessions were often linked to the ICTY's "Bridging the Gap Program" through which prosecutors came to Bosnia to share their work with affected communities. See ICTY, Bridging the Gap Between the ICTY and Communities in Bosnia & Herzegovina, Program CD, Oct. 9, 2004, (on file with author).

235. See Open Letter from Michael Johnson, *supra* note 208.

236. Interview with Mirela Mehic, Librarian, Court of Bosnia & Herzegovina, in Sarajevo, Bosn. & Herz. (Aug. 8, 2005). The library is housed in a local computer database to facilitate ease of access even if Internet connections are not reliable. *Id.*

237. Interview with Almiro Rodrigues, *supra* note 205.

238. *Id.*

239. For a discussion of the dangers of legal fragmentation and the ways in which an inter-judicial dialogue can preserve uniformity, see William W. Burke-White, *International*

After its establishment, the CBiH has continued to draw on norms developed by the ICTY in its own jurisprudence and practice, despite differences in the applicable law before the two tribunals.²⁴⁰ The CBiH applies the Criminal Code of Bosnia & Herzegovina with respect to violations of federal law and cannot apply international law directly.²⁴¹ Yet, the CBiH can accept facts established by legally binding decisions of the ICTY.²⁴² In addition, evidence collected by the ICTY and the statements of witnesses before the ICTY are admissible in proceedings before the CBiH.²⁴³ This unique legal relationship allows ICTY decisions to have direct impact in the CBiH.

Although the jurisprudence of the ICTY is not formally binding on the courts of Bosnia & Herzegovina, it has already proven to be an important authority before domestic courts. The first war crimes trial before the CBiH was the prosecution of Iraqi-born Abduladhim Maktuf for war crimes involving the abduction of civilians in 1993.²⁴⁴ Although the trial proceeded before the Organized Crime Chamber, rather than the War Crimes Chamber, ICTY jurisprudence was instrumental in the Court's analysis and Maktuf's eventual conviction.²⁴⁵ For example, the CBiH accepted the ICTY's determination that the conflict in the Balkans was of an international character, citing to the ICTY's *Blaskic Case* and *Kordic & Cerkez Case*. In addition, the Court relied heavily on evidence presented in trials before the ICTY in finding Maktuf guilty of violations of the Geneva Con-

---

Legal Pluralism, 25 MICH. J. INT'L L. 963, 971 (2004) ("This dialogue has important implications for the unity of the international legal order as it provides actors at all levels with means to communicate, share information, and possibly resolve potential conflicts before they even occur").

240. The ICTY applies international law, as specified in its statute, and only looks to domestic law in "determining the terms of imprisonment." See STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA arts. 1-5, 24, May 25, 1993. In contrast, courts in Bosnia & Herzegovina apply a number of different legal instruments, all of which derive from the Criminal Code of the Socialist Federal Republic of Yugoslavia. See Criminal Code of the Socialist Federal Republic of Yugoslavia, OFFICIAL GAZETTE OF SFRJ 44/76 (Yugo.). Cantonal courts in the FBiH apply the Federation Penal Code; district courts in the RS apply the Serb Penal Code; and the CBiH applies a federal penal code. The relevant instruments are Criminal Code of the Federation of Bosnia & Herzegovina, OFFICIAL GAZETTE OF BiH 3/03 (Bosn. & Herz.); and Criminal Code of the Republika Srpska, OFFICIAL GAZETTE OF THE RS 49/03 (Bosn. & Herz.). In addition, the semi-independent Brcko District applies the Criminal Code of the Brcko District, OFFICIAL GAZETTE OF THE BRCKO DISTRICT, 10/03 (Bosn. & Herz.).

241. See Law on the Court of Bosnia & Herzegovina, OFFICIAL GAZETTE OF BiH 16/02 arts. 13-15, 34 (Bosn. & Herz.).

242. Law on Transfer of Cases, *supra* note 157, art. 4.

243. *Id.* arts. 3, 5.

244. Prosecutor v. Maktuf, Case No. K-127/04, Verdict of July 1, 2005 (Ct. of Bosn. & Herz. 2005).

245. The case began as an organized crime case, but due to the insufficiency of evidence on organized crime charges, Maktuf was convicted of war crimes for which there was better evidence.

ventions.²⁴⁶

Beyond jurisprudential references, norms developed in the ICTY Office of the Prosecutor have shaped the form and substance of indictments at the domestic level. As part of its Completion Strategy, the ICTY is making available to domestic authorities its investigation files in a number of cases that never reached trial in The Hague.²⁴⁷ Though there are often delays in the delivery of this material, it is serving as the basis for indictments in cases before the CBiH.²⁴⁸ For example, the first indictment issued by the War Crimes Chamber against Boban Simsic is, in part, based on a file transferred from the ICTY.²⁴⁹ The indictment, which charges Simsic with war crimes and crimes against humanity perpetrated against the civilian population in Visegrad in 1992, relies explicitly on ICTY jurisprudence, especially the ICTY *Vasiljevic Case*.²⁵⁰

In all aspects of its creation, the CBiH has sought to borrow the norms, procedures, and best practices of international institutions specifically so as to meet the standards for referral of cases back from the ICTY discussed above. Each element of the Court—from the applicable law to the structure of the prosecutor's office, and from the criminal defense section to the information technology unit—closely parallels the requirements set forth in the ICTY Completion Strategy and the early decisions of the ICTY Referral Bench.²⁵¹ International actors, whether in the ICTY itself, the Office of the High Representative or the internationalized Registry of the CBiH have actively sought to promote the adoption of such norms into the CBiH practice. The result has been a clear incorporation of international standards for a high quality justice system. The new CBiH is thus a product of the norms led by the international community, the incentives flowing from a jurisdictional relationship similar to complementarity under Rule 11*bis*, and the self-interested motivation of actors within the ICTY and the government of BiH.

---

246. For example, the statement of witness Dalibor Adzaip, used in the trial, was given at a trial before the ICTY on Sept. 7, 2004. See *Prosecutor v. Maktuf*, Case No. K-127/04, Verdict of July 1, 2005 (Ct. of Bosn. & Herz. 2005). Such admission of witness statements and evidence from the ICTY was allowed by article 5 of the Law on Transfer of Cases, *supra* note 157.

247. Interview with David Tolbert, ICTY Deputy Prosecutor, in The Hague, Neth. (July 1, 2005). A special team has been established for this purpose. Law on Transfer of Cases, *supra* note 157.

248. Interview with Ramiz Huremagic, Deputy Prosecutor of Bosnia & Herzegovina, in Sarajevo, Bosn. & Herz. (Aug. 8, 2005).

249. *Id.*

250. *Prosecutor v. Boban*, Case No. KT-RZ-2/05, Indictment of June 28, 2005 at 11 (Ct. of Bosn. & Herz. 2005). The cited ICTY case is *Prosecutor v. Vasiljević*, Case No. IT-98-32-T, Judgment (Nov. 29, 2002).

251. See *supra* text accompanying notes 135–136.

V. CONCLUSION: INSTITUTIONAL DESIGN AND THE DOMESTIC IMPACT OF INTERNATIONAL TRIBUNALS

The interactions between the ICTY and the institutions of Bosnia & Herzegovina between 1993 and 2007, and particularly the creation of the State Court of Bosnia & Herzegovina, illustrate three significant points. First, despite criticism of its lack of domestic impact, the ICTY has had significant influence on BiH, far beyond deterring international crimes. In fact, the ICTY has deeply affected the structure and operation of domestic judicial institutions in BiH. Second, a theoretical model based on the incentives created by the jurisdictional relationship between international and domestic institutions, the pursuit of self-interest by domestic and international actors, and norm leadership by international institutions goes far to explain how an international criminal tribunal can affect core domestic governance choices, such as the creation and activation of a criminal justice mechanism. Third, the nature of the jurisdictional relationship between domestic and international courts is a key factor in explaining the variance in the direction and intensity of an international criminal tribunal's domestic impact. In short, the design of international criminal tribunals and, particularly, their jurisdictional relationship with national courts matters.

While the ICTY has been broadly criticized for its limited or even its (early) counterproductive impact on domestic judicial development in the Balkans, the Tribunal's interactions with Bosnia, documented here, demonstrate that it has actually exercised considerable domestic influence. From the normative perspective of post-conflict reconstruction, that influence was, at least initially, not always positive. During the first phase of the Tribunal's operation, the jurisdictional relationship of absolute international primacy under the Rules of the Road program compounded the lack of domestic or international interests in a strengthened domestic judiciary and presented a significant barrier to the consolidation and activation of Bosnian courts. However, a subsequent adjustment to the jurisdictional relationship accomplished by Rule 11*bis* created incentives similar to complementarity. These new incentives reinforced a growing domestic demand for federal criminal prosecutions and served as a strong catalyst for the development and use of the Bosnian judiciary to prosecute international crimes. The net result was the establishment of the State Court of Bosnia & Herzegovina with war crimes jurisdiction. That court might never have been created and certainly would not have taken its particular form, but for the influences of the ICTY and its altered jurisdictional relationship under the

Completion Strategy.

The CBiH, which was the primary result of the ICTY's catalytic impact in Bosnia, is certainly not without its own problems. The infrastructure of the Court is not complete and there are no federal level detention centers as yet.²⁵² Until a federal level prison is operational, incarceration of convicts will remain a significant concern. The skills and training of domestic personnel are questionable and further training is needed.²⁵³ Equality of arms presents a serious concern²⁵⁴ and, despite the efforts of OKO, it is uncertain whether an adequate defense can be offered.²⁵⁵ Funding for the CBiH is likewise an ever-present issue²⁵⁶ and a considerable portion of pledged funds have not been received from donor states.²⁵⁷ Yet despite these challenges, the new court is already contributing to accountability in the Balkans and offers real promise to help end impunity in the region. It has already convicted more than seven accused for war crimes and crimes against humanity as well as a number of other indictees for organized crime offenses.²⁵⁸

---

252. Until the proposed federal prison is built, anyone convicted by the CBiH would have to serve his/her sentence in an FBiH or RS prison. These prisons are notoriously poor and raise serious dangers of ethnic bias. Rupert Skilbeck referenced serious detention problems. See Interview with Rupert Skilbeck, *supra* note 28. Construction of a federal prison for the State Court is now underway, with the cornerstone laid in August 2006. See Press Release, The Cornerstone Ceremony Inaugurating the Construction of the BiH Prison was held Today (Aug. 12, 2006), <http://www.sudbih.gov.ba/?id=51&jezik=e>.

253. Although many have lauded the quality of Bosnian lawyers, *see, e.g.*, Interview with Dan Beckwith, *supra* note 103, the transition to the adversarial system has not been easy and few have relevant war crimes prosecution experience. See Interview with Rupert Skilbeck, *supra* note 28.

254. For a discussion of equality of arms problems in other hybrid courts, see Burke-White, *supra* note 239, at 65–71.

255. Equality of Arms is guaranteed in the CODE OF CRIMINAL PROCEDURE, Aug. 1, 2003 art. 14, (Bosn. & Herz.). But, OKO's budget is less than one third of that for the international staff at the CBiH Office of the Prosecutor alone. Interview with Rupert Skilbeck, *supra* note 28. Moreover, the structure of defense payments in Bosnia is nowhere near that of the ICTY, meaning that there is likely to be a significant decline in defense resources when cases are transferred. No funding is available for defense investigation. Defense lawyers are not paid for pretrial work, offering no incentives for pretrial motions but instead to argue such issues during the trial itself, thereby delaying proceedings. *Id.*

256. While the Court is far less expensive than the ICTY, its costs are likely beyond the resources of the Bosnian domestic budget. For example, the five year proposed budget for the CBiH of €60 million is less than six months of the ICTY operating budget, which regularly runs to more than €100 million annually. For the complete budget proposals for the CBiH, see *Project Implementation Plan Progress Report*, *supra* note 29.

257. Interview with Michael Johnson, *supra* note 216. Of particular concern to many officials at the CBiH is the fact that, while the ICTY has handed off a portion of its caseload equivalent to approximately two years of trials, it has provided no direct financial contribution to the Bosnian court. *Id.*

258. See Press Release, Ct. Bosn. & Herz., Niset Ramić Convicted of War Crimes against Civilians and Sentenced to 30 Years Long Term Imprisonment (July 17, 2007), <http://www.sudbih.gov.ba/?id=457&jezik=e>; Press Release, Ct. Bosn. & Herz., Goran and

The evidence of the ICTY's impact on domestic judicial development in Bosnia not only challenges the conventional wisdom about the ICTY's domestic influence, but also suggests a new way of thinking about the role and function of international criminal tribunals. To the degree that such tribunals are embedded in a global governance structure along with national courts, their jurisdictional relationship with domestic institutions may allow them to monitor, sanction, and provide benefits directly to national governments with respect to not just substantive norms of international criminal law, but also to the very structure and function of domestic judiciaries. While this role of an international tribunal is rooted in basic institutional theory, the global governance architecture allows an international criminal tribunal to wield broader influences on domestic outcomes by directly altering the incentive structures for national officials and domestic institutions. Where the preferences of domestic actors align with the incentives created by that jurisdictional relationship, the result can be a profound influence on the development, use and functioning of domestic judicial institutions.

The model suggested in Part II provides such a theoretical account of how an international criminal tribunal, embedded in a structure of multilevel global governance, can more broadly influence the structure and function of domestic institutions based on the relative jurisdictional competencies of national and international courts. In this model, the international tribunal uses the suasion created by its jurisdictional relationship to alter the incentives for national actors, who, in turn, pursue their own self-interests, taking into account the new incentive structures. As a result, those officials may create new domestic institutions or change the operation of existing institutions, including the national judiciary. Finally, processes of norm leadership allow for the transmission of international best practices, policies, and legal rules from an international tribunal to domestic institutions. The model, born out by the ICTY's impact in BiH, provides a coherent account of the impact of the ICTY on domestic judicial development in Bosnia.

More broadly, the jurisdictional relationship between the

Zoran Damjanović Convicted of War Crimes against Civilians (June 18, 2007), <http://www.sudbih.gov.ba/?id=436&jezik=e>; Press Release, Ct. Bosn. & Herz., Radmilo Vuković Convicted of War Crimes against Civilians (Apr. 16, 2007), <http://www.sudbih.gov.ba/?id=406&jezik=e>; Press Release, Ct. Bosn. & Herz., Marko Samardžija Convicted and Sentenced to 26 Years Imprisonment (Mar. 11, 2006), <http://www.sudbih.gov.ba/?id=269&jezik=e>; Press Release, Ct. Bosn. & Herz., Nikola Kovačević Convicted and Sentenced to 12 Years Imprisonment (Mar. 11, 2006), <http://www.sudbih.gov.ba/?id=268&jezik=e>; Press Release, Ct. Bosn. & Herz., Nedo Samardžić Found Guilty and Sentenced to 13 Years and 4 Months Imprisonment (Apr. 7, 2006), <http://www.sudbih.gov.ba/?id=133&jezik=e>.

ICTY and the institutions of Bosnia & Herzegovina helps explain the variation in the ICTY's domestic influence over time. The pronounced shift from the ICTY's chilling effect on the exercise of domestic jurisdiction in Bosnia during its first phase into a catalytic effect during the second phase of its operation is due both to changes in the nature of the jurisdictional relationship and shifts in the preferences of domestic and international actors. A jurisdictional relationship of absolute international primacy generated strong disincentives for either domestic or international officials to empower and activate national institutions. In contrast, a jurisdictional relationship closer to complementarity provided significant incentives for those same actors, whose own preferences were shifting simultaneously due to exogenous domestic factors, to catalyze domestic judicial development and utilize national courts to prosecute war crimes.

The importance of the structure of the jurisdictional relationship on the direction and intensity of the domestic impact of the ICTY underscores the significance of the institutional design of international criminal tribunals and has implications that reach far beyond the work of the ICTY. A jurisdictional relationship akin to complementarity alone may not lead to domestic institutional development such as the creation of the State Court in Bosnia. The interests of both international and domestic officials were critical factors. But, the nature of the jurisdictional relationship, and to some degree the interests of international officials, are within the control of the diplomats and lawyers who create and operate international criminal tribunals. To the extent the international community seeks to use international courts to promote domestic institutional development, it must strategically design such tribunals so that they are both embedded in a common system of governance with domestic institutions and generate strategic incentives for the development and activation of domestic judiciaries. The evidence provided here and the early examples of the operation of the ICC in the Democratic Republic of Congo²⁵⁹ indicate that governance relationships of complementarity, or that create incentives similar to complementarity, as is the case with Rule 11*bis*, are most likely to promote the consolidation and activation of domestic judiciaries in weak or post-conflict states. The design choices made by those lawyers and diplomats in the international court will then shape the incentives of domestic and international actors pursuing their own self-interest and may ultimately influence their policy choices in favor of reform and activation of domestic criminal courts.

---

259. See generally Burke-White, *supra* note 8 (discussing the impact of the International Criminal Court in the Democratic Republic of Congo).

For the lawyers and diplomats creating new international criminal tribunals, one lesson is clear: a jurisdictional relationship of complementarity, or something close to it, will in most cases be a far more effective way of promoting domestic judicial development than would a relationship of international primacy or absolute international primacy.²⁶⁰ For already existent international criminal tribunals, such as the ICC, the experience of the ICTY in BiH offers strategies for how such tribunals can use their complementary jurisdiction more effectively to promote the efficient functioning of national courts.²⁶¹ International officials in other tribunals such as the ICC need to recognize that the nature of their tribunals' jurisdiction and their policy choices with respect to the exercise of jurisdiction have the potential to directly influence fundamental governance choices of the states in which they operate. To the degree the ICC, which has complementary jurisdiction, seeks to promote the activation of international courts, at least in cases involving international crimes, ICC officials ought to use their ability to monitor, sanction, and provide benefits to national governments as a tool of leverage to catalyze domestic judiciaries.

While the ability of international criminal tribunals to directly monitor and sanction the conduct of national governments, documented herein, gives such tribunals considerable influence over national governments, officials within such tribunals must still recognize their own limitations. The positive story of the ICTY's eventual impact in BiH would not have been possible but for a fundamental change in the perceived interests of domestic actors in Bosnian society. International criminal tribunals may be able to change how those interests are articulated by structuring the incentives domestic actors face through the strategic use of the tribunals' jurisdictional entitlements. Ultimately, however, the domestic interests of national officials are an exogenous variable, to which international tribunals will have to respond. Such officials will have to look for opportunities in an ever changing domestic political landscape and identify the right times and situations in which their policy choices may be best able to structure the incentives of domestic actors toward preferred outcomes, such as the development of a more robust and active national

---

260. This is not to say that complementarity will always be the best jurisdictional relationship. Other goals, such as avoiding biased domestic prosecutions, may at times take precedence over encouraging domestic institutional development. Over time, however, priorities may change and international criminal tribunals may be well served by modifying their jurisdictional relationships with national governments toward relationships such as complementarity that are more likely to facilitate domestic judicial development.

261. For a broader discussion of how the ICC can more effectively use complementarity to promote domestic judicial development, see Burke-White, *supra* note 72.

court system.

In short, the story of the ICTY's role in BiH and the establishment of the State Court of Bosnia & Herzegovina provides compelling evidence that the institutional design and jurisdictional relationships of international tribunals are powerful means through which international actors may be able to influence domestic policy outcomes. While there are certainly limits to that power, international criminal tribunals, if properly designed and operated, have the potential to play a significant role in post-conflict reconstruction and national institutional development that goes far beyond mere retribution and deterrence.