

Mobilizing International Networks for Domestic Accountability

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In these comments, I suggest that we should evaluate international criminal tribunals (“ICTs”) as one aspect of an international criminal law environment that includes numerous, diverse actors with commitments to transitional justice. While ICT institutional design is critically important, some of the domestic accountability concerns that [International Criminal Tribunals and Domestic Accountability](#) raises may be most effectively addressed by mobilizing other actors within these broader international criminal law networks.

Patryk Labuda’s *International Criminal Tribunals and Domestic Accountability* is a valuable contribution to the literature on the relationship between domestic legal systems and ICTs. I particularly want to acknowledge the book’s significant conceptual contributions, which include a new typology of ICT-state relations, as well as its systematic interrogation of the field’s preconceptions about how the relationships between ICTs and states *should* function in principle by methodically examining how they *do* function in fact, all supported by empirical research of impressive scope and depth.

The Role of Institutional Design

Among the several central themes of the book, I want to focus here on just one. *International Criminal Tribunals and Domestic Accountability* contends that the aim of international criminal law is not solely to promote criminal prosecutions and convictions as such. Rather, it is meant to support robust accountability that incorporates procedural fairness and the non-impunity of politically powerful actors. However, the structure and dynamics of the relationships between ICTs and states currently do not produce incentives for states to imbue national processes with procedural safeguards and apolitical case selection.

This is a significant issue, and *International Criminal Tribunals and Domestic Accountability* comprehensively explains how the institutional design of ICTs has enabled politically motivated national trials. I have found in my own work that institutional design is essential to [persuasive influence](#) between ICTs and national courts, as well as the [perceived domestic legitimacy](#) of ICTs and [collaboration between nationals and internationals](#) within hybrid ICTs. Thus, I agree that design is an important consideration.

However, in reading this book, I was also struck by the limited range of mechanisms available to ICTs to sway national actors’ choices. An ICT might attempt to maintain influence over national trials by being willing to engage in iterative strategic conflict, as suggested by *International Criminal Tribunals and Domestic Accountability*. But the book also acknowledges that the primary lever that an ICT has to influence state

behavior is the threat of prosecution, which is highest at the beginning of an ICT's mandate and then diminishes sharply once an ICT has committed its resources to particular cases. The book identifies the International Criminal Tribunal for Rwanda ("ICTR") as an example of a court that extended this mode of influence through the rule 11 *bis* process of transferring cases to national courts during its completion strategy. But while the ICTR may have nurtured a greater ability to effectively engage in iterative strategic conflict with national authorities by inadvertently overcommitting to more cases than it could hear, that is not a tactic that an ICT reasonably could deploy deliberately. Thus, because ICTs have such limited modes of power available to them, what can be accomplished by reforming ICTs' institutional design is also inherently limited; while that design can certainly be honed to maximize ICTs' effectiveness, it cannot accord to ICTs mechanisms of influence that they do not otherwise possess.

However, ICTs do not operate in isolation. They are immersed in an environment of other actors with commitments to promoting the aims of international criminal law. While taking ICT institutional design seriously, we should also consider the roles that these other actors within international criminal law networks might play in addressing the domestic accountability concerns that *International Criminal Tribunals and Domestic Accountability* raises.

I would suggest that regional organizations and rule-of-law institutions have the requisite expertise and mechanisms of influence to promote robust domestic accountability in cooperation with ICTs more effectively than ICTs could do alone. Because *International Criminal Tribunals and Domestic Accountability* focuses on three courts that do not have affiliations with regional organizations (the ICTR, the International Criminal Court ("ICC"), and the Special Court for Sierra Leone ("SCSL")), the possibility of a significant role for regional organizations is not addressed by its case studies. The book does address the role of civil society, NGOs, and other rule-of-law organizations in its analysis of positive complementarity, as noted below.

The Role of Regional Organizations

Two of the most recent ICTs, the Kosovo Specialist Chambers ("KSC") and the Extraordinary African Chambers, have been [regionalized hybrid courts](#) that have been sponsored by regional organizations: the European Union ("EU") and the African Union ("AU") respectively. Because the EU and AU have ongoing economic and political relationships with their member states and aspiring members, they have a wide range of incentives available to encourage states to engage in fair procedures and to charge even politically powerful actors with international crimes when appropriate. One indicator of whether regional organizations' influence might produce the prosecution of highly placed political actors is the resignation from office of former Kosovo President Hashim Thaçi [to face charges](#) before the Kosovo Specialist Chambers ("KSC"). However, it is also important to note that using such leverage to strongly pressure a state into action can itself be costly to transitional justice and reconciliation aims; the pressure that the EU placed on Kosovo to establish the KSC and the subsequent prosecution of highly placed political officials has reportedly caused [controversy and a backlash against the court](#) within Kosovo.

Notwithstanding this risk, for ICTs affiliated with regional organizations like the EU or AU, domestic accountability mechanisms may be more effectively influenced by those regional organizations directly than by reforming the design of the ICTs.

Of course, many past and current ICTs do not have affiliations with regional organizations. As noted above, the book's case studies of the ICC, ICTR, and SCSL concern courts that lack such affiliations, and probably some future ICTs will also be unaffiliated with regional organizations. However, both the [EU](#) and [AU](#) have expressed substantive commitments to transitional justice that extend beyond the individual tribunals with which they are affiliated. Although the relationship would be more attenuated, they could elect to use their economic and political leverage even in situations unconnected with the ICTs they sponsor.

The Role of Rule-of-Law Institutions

Organizations that work on rule of law initiatives represent another set of actors with the expertise and capabilities to directly facilitate robust domestic accountability mechanisms in particular ways that are not the primary expertise of ICTs.

International Criminal Tribunals and Domestic Accountability discusses the role that civil society, NGOs, and foreign development agencies have come to play in implementing rule of law reforms related to international criminal law. As the book describes, this capacity-building and legal reform function was at one point conceptualized as a form of positive complementarity that the ICC might directly undertake itself. However, the interest of international donors in supporting such initiatives, the expertise of international organizations, NGOs, and civil society in supporting these kinds of reforms, and these entities' existing relationships with national actors, all produced this alternative allocation of responsibility. Indeed, some of these organizations found international criminal law and ICTs to be a galvanizing force for their interest in promoting rule of law reform generally.

Here, as in the past, rule of law organizations are strongly placed to take on the role of facilitating robust domestic accountability, particularly where fair procedures are concerned. Indeed, such organizations are already engaging in some requisite activities, such as [trial monitoring](#) of national war crimes trials. Furthermore, dovetailing with the earlier discussion of the role of regional organizations, the EU and AU could provide human and financial resources and technical expertise for such initiatives under the auspices of their commitments to transitional justice. Here, as in the capacity-building context that was the subject of positive complementarity initiatives, the role that the ICC and other ICTs can most effectively play is to produce models and technical expertise in the course of their own work.

Overall, *International Criminal Tribunals and Domestic Accountability* persuasively argues that the development of predominantly cooperative relationships between ICTs and national authorities has come at a cost, encouraging states to hold national trials without scrutinizing their quality or their prosecutorial selection processes. The book's incisive analysis identifies particular characteristics of institutional design that have contributed to this result and proposes important reforms. By identifying the problem of unintended diversionary complementarity, the book also nudges us to think expansively in addressing it. Here, I suggest that although institutional design

is critically important to effective engagement between ICTs and domestic actors, reforms to institutional design can only do so much to address this issue, because ICTs' expertise and forms of leverage are themselves limited. Accordingly, ICTs will be most effective when they recognize and rely on other actors, like regional organizations and rule-of-law institutions, whose own expertise, capabilities, and commitments make them well-suited to contribute to robust domestic accountability.

