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REASSESSING THE ROLE OF INTERNATIONAL CRIMINAL LAW: REBUILDING NATIONAL COURTS THROUGH TRANSNATIONAL NETWORKS

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Abstract: The international community has long debated its role in redressing grave atrocities like war crimes and crimes against humanity. This Article suggests that this debate has focused too much on trials in international and hybrid courts as the primary conduit for international contributions to justice in post-conflict states. It proposes that the international community should look instead to national courts as the primary venue for such trials and to transnational networks as an effective mechanism for international involvement. Key characteristics of this model include: (1) reliance on transnational networks to convey international criminal law and international resources into national settings; (2) hybrid international-national processes in which international actors play a supporting, rather than a controlling, role; and (3) integration of international support for atrocity trials into broader efforts to rebuild national judicial systems.

INTRODUCTION

Ten years after the adoption of the International Criminal Court's Rome Statute,¹ the role of international criminal law in post-conflict justice is ripe for reassessment. Early claims that international criminal

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¹ See *generally* Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

courts would end impunity for atrocities have long been dismissed as overblown.² Indeed, as the ad hoc international criminal courts for Yugoslavia and Rwanda work toward completion of their mandates, it has become evident that their accomplishments have been both limited and lopsided, with a decided tilt toward international approbation and influence rather than on-the-ground domestic impact in the concerned states.³

As these limits have become apparent, advocates of international criminal law have sought to redefine its role in post-conflict justice, by shifting focus from international trials as such to international courts' influence upon national trials and domestic legal systems. Within the United Nations, discussion of the completion strategies for the ad hoc tribunals turns again and again to "legacy" and "outreach," although the prospects for a significant domestic role for these tribunals are relatively remote at this late date.⁴ Hybrid tribunals with panels that include both foreign and domestic judges have been introduced in Kosovo, Sierra Leone, Timor-Leste, and elsewhere, with "mixed" results.⁵ Now, even before the International Criminal Court ("ICC") has held its first trial, some scholars have conceded that it cannot hope to play its desired transformative role through its own trials; accordingly, they have proposed that it should instead refocus its energies on interactions with hybrid and national tribunals.⁶

While these developments represent a fundamental challenge to the *raison d'être* of international criminal tribunals, this is but the latest turn in the longstanding debate over the role of international criminal law and the appropriate balance between international and national

² This conclusion has been reached by supporters and detractors alike. See, e.g., William W. 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, 53-54 (2008); Jack Goldsmith, *The Self-Defeating International Criminal Court*, 70 U. CHI. L. REV. 89, 89 (2003); Jenia Iontcheva Turner, *Nationalizing International Criminal Law*, 41 STAN. J. INT'L L. 1, 3-4 (2005).

³ Jane E. Stromseth, *Pursuing Accountability for Atrocities After Conflict: What Impact on Building the Rule of Law?*, 38 GEO. J. INT'L L. 251, 268-69, 276 (2007); Turner, *supra* note 2, at 24-26.

⁴ Stromseth, *supra* note 3, at 269-79; Turner, *supra* note 2, at 28-29; Press Release, U.N. General Assembly, Presidents of Tribunals for Rwanda, Former Yugoslavia Address General Assembly, Ask for Continued Support as Completion Dates Approach, U.N. Doc. GA/10636 (Oct. 15, 2007) [hereinafter Continued Support]; see also *infra* notes 21-43 and accompanying text.

⁵ Stromseth, *supra* note 3, at 281; see also *infra* notes 55-78 and accompanying text.

⁶ See Burke-White, *supra* note 2, at 54; Turner, *supra* note 2, at 29; see also *infra* notes 55-78 and accompanying text.

courts in addressing atrocities.⁷ As this debate has developed, the focus of the discussion seems to have shifted from the core issue—how the international community can best contribute to post-conflict justice in affected states—to the question of the role of international courts. Indeed, the debate now seems to center particularly on whether and how to preserve a central role for these international courts in which the international community has invested so much hope.⁸ This shift is especially striking in light of the fact that one of the ICC’s core design elements, complementarity, embedded in the very structure of the court the principle of deference to national tribunals.

I suggest here that we should return to first principles and reassess the role of international criminal law and the international community from the ground up. Rather than considering post-conflict justice from the perspective of international courts and asking what role they might ideally play, I propose that we should examine carefully how international law has actually influenced domestic legal systems in post-conflict settings and develop justice models shaped from these realities. In so doing, I conclude that international courts have a useful role to play, but one that is substantially more circumscribed than that proposed by some supporters (and thus, I would argue, more in accord with the ICC’s original, complementarity-oriented design). Instead of relying primarily on international or even hybrid courts, I suggest that we should look to national courts as the primary venues for atrocity trials and to transnational networks as the best conduit for the international community and international criminal law to play a constructive role.

To that end, in this Article I examine a particular set of interactions between the international legal community and the domestic legal system in the Democratic Republic of the Congo (“DRC” or “Congo”). The atrocities that have taken place in the DRC are at the heart of the controversy over the effectiveness of international courts. The International Criminal Court’s first trial, prosecuting a Congolese militia leader for war crimes for using child soldiers, was to have started in June 2008.⁹ Its jeopardized progress stands in the public eye

⁷ Compare Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1, 7 (2005) (arguing against independent international tribunals), with M. Cherif Bassiouni, *The Time Has Come for an International Criminal Court*, 1 IND. INT’L & COMP. L. REV. 1, 34–35 (1991).

⁸ See Burke-White, *supra* note 2, at 58; Turner, *supra* note 2, at 51.

⁹ Press Release, ICC, The Trial in the Case of Thomas Lubanga Dyilo Will Commence on 23 June 2008 (Mar. 13, 2008), available at http://www.icc-cpi.int/pressrelease_details&id=348&l=en.html.

as the first test of the ICC's long-debated effectiveness.¹⁰ But there is more than this at stake for international criminal law in the Congo. The ICC's Rome Statute has already had a tangible impact on trials within the DRC, where some domestic military courts have used the Statute in prosecuting defendants for war crimes and crimes against humanity.¹¹ They are the first national courts in the world to apply the Rome Statute directly in criminal trials.

Understanding how the Congolese courts came to deploy international law in these atrocity trials requires us to adopt a relatively complex model of the relationships between national and international courts and between national and international criminal law, one that embraces the indirect conduits, the highly individualistic and resource-intensive means, and the inconsistent results that characterize the reality of transitional justice in post-conflict settings. Key characteristics of this model include: (1) reliance on transnational networks to convey international criminal law and international resources into domestic settings, rather than on international courts; (2) hybrid international-national processes in which international actors play a supporting, rather than a controlling, role; and (3) integration of international support for atrocity trials into broader efforts to rebuild national judicial systems.

ICC supporters might like to see the Rome Statute's use in domestic courts in the Congo as evidence that the ICC has succeeded already in spreading its influence far beyond its own trials to the inner workings of national tribunals. This development, however, cannot be credited to the ICC itself, which has limited its activities in the Congo to pursuing and promoting its own investigations. It has had little if any institutional

¹⁰ As of the time of the final edit of this article, the case had been stayed because the prosecution failed to turn over potentially exculpatory evidence to the defense. *See* Prosecutor v. Lubango Dyilo, Case No. ICC-01/04-01/06, Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54(3)(3) Agreements (Oct. 21, 2008), available at <http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-1486-ENG.pdf>. It is uncertain whether the court will ever permit the prosecutor to proceed with the case. Prosecutor v. Lubango Dyilo, Case No. ICC-01/04-01/06, Decision on the Release of Thomas Lubanga Dyilo (Oct. 21, 2008) [hereinafter Decision on the Release of Lubanga Dyilo], available at <http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-1487-ENG.pdf>.

¹¹ *See generally* Auditeur Militaire v. Ngoy, No. RMP 154/PEN/SHOF/05, RP 084/2006, Tribunal Militaire de Garnison [Military Garrison Court] Mbandaka, Apr. 12, 2006 (Dem. Rep. Congo) [hereinafter Ngoy case] (on file with author); Auditeur Militaire v. Massaba, No. RMP 242/PEN/06, RP 018/2006, Tribunal Militaire de Garnison [Military Garrison Court] Ituri, Mar. 24, 2006 (Dem. Rep. Congo) [hereinafter Massaba case] (on file with author). *But see* Auditeur Militaire v. Katamisi, RMP 249/KK/05, RP 011/05, slip op. at 5–6, Tribunal Militaire de Garnison [Military Garrison Court] Kindu, Oct. 26, 2005 (Dem. Rep. Congo) [hereinafter Katamisi case] (on file with author).

influence upon the involved national courts. The Rome Statute serves here as a source of law, and the DRC's decision to ratify the Rome Statute and to self-refer its situation to the ICC has created positive background conditions that encourage national trials. But the ICC as an institution has been bypassed by transnational networks of UN officers, NGOs, embassy officials, local lawyers and judges. These networks have been working avidly to support these national trials in a variety of ways, including promoting the use of international law.

Nor does this importation of international criminal norms fit into a triumphalist account of ever-increasing domestic compliance with international law, in which transnational networks bring about a decisive transformation of national law. Domestic authorities, not international ones, were and remain predominant in the Congo, and what has taken place there is a domestically controlled process in which transnational networks have played a facilitative and supportive role. Furthermore, the incorporation of international norms has been uneven and partial. These few trials are exceptions to the general rule of impunity for Congo's ubiquitous atrocities, and political interference has sidelined trials both before and after those in which the Rome Statute has figured prominently. But for exactly these reasons, it is all the more crucial to explore the dynamic interactions between international and national laws, institutions, and actors that have produced these unexpected pockets of justice (or, at least, of legal process).

Furthermore, the efforts of these transnational networks to advance domestic atrocity trials and to promote the use of international law within them have not been isolated ones. Rather, they have been embedded in and interdependent with efforts to rebuild the national judicial system. Seeking justice for war crimes and crimes against humanity drew attention to the lack of a functioning legal system in the DRC and both catalyzed and focused redevelopment. In practical terms, to hold trials, courtrooms were needed, as well as judges, prosecutors and defense attorneys. Imperfections in the trials have highlighted areas of needed reform and created focal points for advocacy; for example, lacunae in the laws against sexual violence came to light, and advocates pressed for passage of new legislation remedying the gaps. The organizations and individuals that make up these transnational networks are working for post-conflict justice in the broadest possible sense: the development of a national justice system that can hear cases concerning all the myriad instantiations of injustice stemming from the conflict, from the instances of extreme violence that constitute war crimes and crimes against humanity to problems of contested

property rights, internally displaced persons, and newly endemic sexual violence.

How justice for genocide, war crimes, and crimes against humanity should best be pursued is a contentious and long-debated topic that raises fundamental questions concerning the respective roles of international and national laws and actors. Part I of this Article briefly reviews the recent development of this issue, from the international community's development of international courts to the turn to hybrid courts, followed by the most recent shift in emphasis from international trials as such to international influence.

Part II examines the international-national interaction in the Democratic Republic of Congo, making use of my firsthand research in the DRC. I visited Kinshasa in June and July 2006, conducting interviews with members of the international and domestic legal communities, attending public meetings, and gathering court judgments and other documents not otherwise available.¹² Two aspects of the scope of this study should be noted at the outset: it is focused upon national courts, not local courts or other local justice mechanisms,¹³ and these national courts are military courts, not civilian ones.¹⁴ The reason for these choices is simple enough: this is where atrocity trials

¹² See *infra* note 79 (explaining this Article's research method).

¹³ There is a vigorous debate about the role of local justice mechanisms vis-à-vis national and international trials. See, e.g., Lars Waldorf, *Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice*, 79 TEMP. L. REV. 1, 9 (2006); Jennifer Widner, *Courts and Democracy in Postconflict Transitions: A Social Scientist's Perspective on the African Case*, 95 AM. J. INT'L L. 64, 65 (2001). Although this debate is important, I will not engage with it in any depth. I am concerned here with the influence of international law, and international influence on truly local entities in the DRC is quite limited due to the mechanisms by which it is spread and the relative isolation of local institutions. Furthermore, the comparative merits of local justice systems are highly context-dependent. Accordingly, to the extent that I use the word "local" in discussing national or hybrid tribunals, it is meant to indicate that they are more local than international tribunals and not to refer to sub-national systems.

¹⁴ In a country with a fully functioning system of civilian courts and a parallel system of military courts, one would not necessarily regard military courts as the country's "national courts." In the DRC, however, the civilian court system has been decimated and is nonexistent in many parts of the country. The military courts are in effect functioning as national courts for some purposes, including holding atrocity trials like those discussed in this Article. The use of the military courts as national courts can be and has been criticized, but there is no doubt that this is how they are functioning in the DRC. Thus, my treatment of military courts as national courts in this Article reflects this reality and is neither an endorsement of the use of military courts as such nor a claim that military courts are necessarily the equivalent of a national court system in other contexts. See *infra* notes 95–124 and accompanying text.

are being heard, and it is accordingly where international interveners concerned with such trials are focusing their efforts.

Part II first examines the judgments in three exemplary atrocity trials. Two of the three courts used the Rome Statute, at least in part; the third used only national law. Comparing these judgments reveals a number of tangible effects of the national courts' choice of law: the courts using the Rome Statute tended to adopt international definitions of crimes, international due process standards, and protections for victims and witnesses, at least as they describe it in their judgments. Looking beyond those judgments to the process by which the Rome Statute was promoted in the DRC explodes any simple construct of the relationship between the International Criminal Court and domestic courts or of the mechanisms by which international law is incorporated in domestic settings. International law did not enter these cases through traditional means such as legislative implementation or consideration of international jurisprudence, nor even through the direct involvement of the ICC. Rather, the use of international law and the trials themselves were spurred by the work of transnational networks on the broader goals of post-conflict justice and rebuilding the national justice system. Theories of international lawmaking, such as theories of transnational networks,¹⁵ transnational legal process,¹⁶ policy-oriented jurisprudence,¹⁷ and legal pluralism,¹⁸ focus attention on critical aspects of these networks that enabled them to convey international law effectively in a chaotic post-conflict context. Two factors are particularly important: (1) what I call the networks' "functional hybrid" character, strategically incorporating elements of the international and the national, and (2) the fact that formal authority and effective control are maintained in domestic hands.

Finally, the Conclusion returns to some of the fundamental questions that were raised in Part I and that lurk beneath the discussion of the Congolese trials in Part II. In particular, some readers may harbor doubts that international support for national trials is wise in light of the deficiencies of many post-conflict national justice systems. Indeed,

¹⁵ See generally Anne-Marie Slaughter, *Sovereignty and Power in a Networked World Order*, 40 STAN. J. INT'L L. 283 (2004).

¹⁶ See generally Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996).

¹⁷ See generally W. Michael Reisman et al., *The New Haven School: A Brief Introduction*, 32 YALE J. INT'L L. 575 (2007).

¹⁸ See generally Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155 (2007).

in this Article, I detail some of the problems of the Congolese national courts, which are non-existent in some areas and suffer from political interference, corruption, and a lack of resources in others.

Nonetheless, I contend that, in spite of these legitimate concerns, the international community should endorse, promote, and support national trials—and what’s more, that this may be the most important contribution the international community can make to the cause of post-conflict justice. In my view, we must take as a given that trials in post-conflict countries are likely to be less than optimal in a variety of ways. The question that we should consider is: in light of that, how can we best promote the goals of post-conflict justice? Thus far, the common approach has been to hold constant as an irreducible, non-negotiable value our commitment to trials that meet international due process standards and to do what it takes to achieve that commitment in the immediate term: that is, to hold trials in international courts insofar as possible and to discourage and criticize national trials that do not meet international standards.¹⁹ I suggest here that the ordinary failings of national tribunals do not present a sufficient reason for international withdrawal. To the contrary, the ultimate successful functioning of national legal systems should be treated as the most important goal of post-conflict justice,²⁰ and atrocity trials present an opportunity for investment in these systems.

This view is informed, not by idealism about the likelihood of comprehensive post-conflict legal and judicial reform, but rather by an amalgam of belief and skepticism: belief in the grave importance of such reform, and skepticism about the prospects for achieving other frequently cited goals of post-conflict justice (reconciliation, deterrence, truth-telling, and so on) through criminal trials, whether international or national. In my assessment, the best that can be hoped for in the Congo is a few trials that hold a few people accountable. National trials will not be of the high-ranked and powerful, for those people will be able to shield themselves from prosecution through some combination of monetary and political influence; rather, they will be of

¹⁹ See Kevin Jon Heller, *The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process*, 17 CRIM. L.F. 255, 280 (2006); see also David Luban, *A Theory of Crimes Against Humanity*, 29 YALE J. INT’L L. 85, 142–43 (2004). But see MARK A. DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW 7 (2007) (critiquing this approach).

²⁰ For a comprehensive discussion of post-conflict development of rule of law following international interventions, see generally JANE STROMSETH ET AL., CAN MIGHT MAKE RIGHTS? BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS (2006).

the low-ranking soldiers and militia members who carried out the atrocities and have no such pull. International trials, although aimed at higher ranks, will take only those who can no longer protect themselves in this higher arena. Neither national nor international trials will be procedurally pristine, and although international trials will likely hew to higher due process standards than national ones, long delays in moving to trial and drawn-out procedures will undermine public faith in the proceedings. Trials, national and international, will not deter the continued commission of atrocities in the current conflict in eastern Congo, which has only escalated since the instigation of legal sanctions internationally and nationally.

Therefore, the goal in the Congo cannot be justice absolute, ideal and untarnished, but rather must be partial justice—justice for at least some victims, through imperfect processes, with the meager but nonetheless ambitious aim of ending the certainty of impunity, rather than ending impunity itself. With the carefully tailored intervention of the international community in national trials, more trials will be held, and they will be fairer trials than they would have been otherwise. Most important, with the intervention of the international community in national trials, there will be urgently needed international investment into the reconstruction of the domestic legal system. Of course, it is not a single step from investment in national trials to the successful restoration of an entire legal system. Furthermore, I do not mean to suggest that all international intervention is necessarily constructive; to the contrary, the history of deliberate manipulation and unintended consequences of such intervention is long enough that any such efforts should be careful indeed. Nor do I argue that the international community should support any and all national trials without criteria or distinction. But I do contend that it is only by investing in weak, corrupt, and deeply flawed national courts that the international community can promote what should be the ultimate goal of post-conflict justice efforts: rebuilding national justice systems.

I. THE ROLES OF INTERNATIONAL, NATIONAL, AND HYBRID COURTS

The international community has long debated the proper role for international law and international institutions in addressing grave atrocities. Its latest response has been to create international courts: first ad hoc tribunals, and then the International Criminal Court. As the limits of these international tribunals have become evident, however, attention has turned first to hybrid courts and now to interactions between the International Criminal Court and either hybrid or na-

tional courts. In my view, these developments track in a positive direction. They move away from a view of international and national courts as competing alternatives and toward the development of institutions that allow for greater interaction between international and national actors; they also move away from the expectation that the responsibility for trials could be or should be shifted to the international arena and toward an expectation that national courts must shoulder the primary burden of holding such trials. I propose that we should take this progression a step further by recognizing: (1) that the international community can and does act through institutions other than courts and (2) that the benefits of hybridization and international-national interaction may be better achieved through some of these other mechanisms.

A. International Courts as a Substitute for National Courts

Supporters of international criminal courts envisioned them playing a transformative role in international criminal law. For a long time, of course, the responsibility for trying cases of war crimes, genocide, and crimes against humanity rested with national authorities, as for forty years after Nuremburg there were no more international tribunals.²¹ The new international criminal courts—first the ad hoc tribunals and then the International Criminal Court—were intended to be the mechanism by which the international community could reassert its interest and compensate both for post-conflict states' failures to prosecute these crimes and for the inadequacies of their national courts. High hopes indeed were held out for the creation of a permanent International Criminal Court. The ICC would embody the international community's conviction that these crimes are international in character and must not merely be condemned rhetorically but also criminalized and punished in fact by the international community. In effect, it would mark a dramatic step toward the end of impunity for international crimes.²²

Now that we have had the opportunity to observe international courts in operation, these high expectations have been tempered by the reality of their imperfect performance. Rather than offering a clearly superior alternative to national courts in practice, international courts contend with political pressures, due process violations, and other problems that overlap to some extent with those faced by na-

²¹ See WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 5–15 (3d ed. 2007).

²² See SCHABAS, *supra* note 21, at 20; Bassiouni, *supra* note 7, at 33–34.

tional courts. There are many threads in the discussion of the relative merits of national and international courts, from the effects of trials on political and security concerns to questions of community healing and collective memory, among others.²³ For purposes of this brief background discussion, I will focus on the functionalist and normative arguments raised in favor of international and national courts.²⁴

In functionalist terms, international courts are frequently held out in the literature as more likely to be impartial, have well qualified judges and staff, develop uniform international law, uphold due process norms, and be viewed as satisfactory by the international community. National courts are often described as acting in closer proximity to the victim population, with the result that their actions are more likely to be known by that population; however, they have also been described as unlikely to be capable of holding fair trials, at risk of political influence, and prone to creating disparate substantive standards that risk undermining the development of common international norms.²⁵ Of course, these descriptions are contestable and have been contested, particularly as international courts have proliferated and their activities in practice have become available for criticism.²⁶

It is true that a post-conflict state's own judicial system is often damaged or compromised in some respects. However, the extent and nature of this damage or compromise varies considerably: Kosovo's courts are not Congo's are not Rwanda's, and so on. Of these, each had a different court system with different strengths and weaknesses pre-conflict (generalizing broadly, discrimination in Kosovo, corruption in

²³ E.g., M. Cherif Bassiouni, *Searching for Peace and Achieving Justice: The Need for Accountability*, 59 LAW & CONTEMP. PROB. 9, 15 (1996); Diane Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2539 (1991); Ruti G. Teitel, *Transitional Justice Genealogy*, 16 HARV. HUM. RTS. J. 69, 83–84 (2003).

²⁴ The development of universal jurisdiction laws in a few states and several high profile cases complicated the common wisdom on international and domestic courts and drew extensive commentary. See generally Lelia Nadya Sadat, *Redefining Universal Jurisdiction*, 35 NEW ENG. L. REV. 241 (2001); Beth Van Schaack, *Justice Without Borders: Universal Civil Jurisdiction*, 99 AM. SOC'Y INT'L L. PROC. 120 (2005). However, because my focus is on the interaction between international law and national courts within post-conflict states, I do not address universal jurisdiction cases here.

²⁵ STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW 159–61 (1997); José E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365, 375–76 (1999) (describing but not adopting these views); Antonio Cassese, *On the Current Trends Toward Criminal Prosecution and Punishment of Breaches of International Humanitarian Law*, 9 EUR. J. INT'L L. 2, 2, 5–7 (1998).

²⁶ DRUMBL, *supra* note 19, at 129–33; Alvarez, *supra* note 25, at 395–403; Stromseth, *supra* note 3, at 268–69.

Congo, and political interference and inadequate legal training in Rwanda).²⁷ Each suffered a different kind of conflict (Kosovo's insurgency and invasion, Congo's long wars, Rwanda's genocide) that did different sorts of harm to the judicial system (Kosovo's was dismantled, Congo's fell into dysfunction, and many of Rwanda's lawyers and judges were killed).²⁸ As a result, each has different levels of structural integrity, resources, and personnel; different interests shared with different parts of the population; and different levels and kinds of political interference—and these are only three examples. Such details are of course crucial in assessing national court systems' capabilities.

On the other hand, the presumptions of legitimacy and competence accorded to international courts by supporters seem to be less grounded in reality. They are also less likely to be shared by domestic observers. This, as much as the pragmatic difficulty of effective publicity and outreach to a domestic audience from a distant international locale, is a fundamental problem that has undermined the ad hoc international tribunals' effectiveness in Rwanda and the former Yugoslavia. Disparate international and domestic views on international courts may be inevitable since, as José Alvarez argues, in spite of rhetoric about “the need for accountability to victims, U.N. fora, including the ad hoc tribunals, are in reality most accountable to their direct patrons—the international community.”²⁹ When international institutions are viewed by national communities as taking one side in a dispute, as in the former Yugoslavia, decisions by international judges in international courts like the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) are not likely to be viewed as impartial by those communities, whatever international observers may think.³⁰ This le-

²⁷ See MARK BASKIN, PEARSON PEACEKEEPING CTR., LESSONS LEARNED ON UNMIK JUDICIARY 14 (Pearson Paper No. 8, 2002) (describing Kosovo); William A. Schabas, *Justice, Democracy, and Impunity in Post-Genocide Rwanda: Searching for Solutions to Impossible Problems*, 7 CRIM. L.F. 523, 531 (1996) (describing Rwanda); Laura A. Dickinson, Comment, *The Promise of Hybrid Courts*, 97 AM. J. INT'L L. 295, 297 (2003) (describing Kosovo); Human Rights Watch, Rwanda: Human Rights Developments, http://www.hrw.org/reports/1994/WR94/Africa-06.htm#P258_112461 (last visited Sept. 27, 2008) (describing Rwanda); Human Rights Watch, Zaire: Human Rights Developments, http://www.hrw.org/reports/1996/WR96/Africa-11.htm#P843_201190 (last visited Sept. 27, 2008) (describing the Congo).

²⁸ See U.N. Human Rights Council, *Report of the Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy, Addendum: Preliminary Note on the Mission to the Democratic Republic of the Congo*, ¶¶ 1–5, U.N. Doc. A/HRC/4/25/Add.3 (May 24, 2007); Elena A. Baylis, *Parallel Courts in Post-Conflict Kosovo*, 32 YALE J. INT'L L. 1, 10–11 (2007); Schabas, *supra* note 27, at 533 (discussing Rwanda).

²⁹ Alvarez, *supra* note 25, at 410.

³⁰ BASKIN, *supra* note 27, at 12, 21.

gitimacy gap tends to be compounded by the exercise of prosecutorial discretion in choosing a few defendants from the many involved in the atrocities, as well as discretionary prosecutorial and judicial decisions concerning charging and sentencing, as Mark Drumbl and Mark Osiel have observed.³¹ Finally, in spite of the expectation that the ad hoc international tribunals would offer a guarantee of due process for defendants, their proceedings have not been beyond critique on this front either, as is perhaps inevitable in this quickly evolving area of international law.³²

Thus, a comparison of the relative merits of international and national courts, from a functionalist perspective, suggests that the apparent legitimacy gap between them is less clear cut than it at first appeared. Moreover, the disparate conditions of national tribunals, the complex political and social situations in post-conflict states, and the varying relationships of the international community to these states all indicate that generalizations about the pros and cons of national and international courts will not necessarily be applicable in any particular situation.³³

Some part of the debate over the proper roles of international and national institutions has also been normative, concerning the nature of the values and interests at stake. Some argue that international crimes are international by virtue of their nature as heinous atrocities and that the international community accordingly has an interest in prosecuting that supersedes local interests. So understood, national trials fail to properly account for or redress the crimes committed.³⁴ A contrasting view gives greater emphasis to the immediate harm done

³¹ See Mark A. Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99 NW. U. L. REV. 539, 593 (2005); Mark Osiel, *The Banality of Good: Aligning Incentives Against Mass Atrocity*, 105 COLUM. L. REV. 1751, 1815 (2005). See generally José E. Alvarez, *Rush to Closure: Lessons of the Tadic Judgment*, 96 MICH. L. REV. 2031 (1998) (critiquing the ICTY on similar grounds). Mark Osiel suggests that international prosecutors' very efforts to "signal impartiality" by prosecuting defendants from all sides of a conflict tend to undercut the legitimacy of international tribunals in the eyes of the affected national communities by marrying a "seeming symmetry" of defendants with an actual asymmetry in the scope and intensity of defendants' participation in the atrocities. Osiel, *supra*, at 1815. Mark Drumbl contends that "selectivity and indeterminacy" in the prosecutions and punishments pursued in the international tribunals undermine their ability to achieve their core aims before the relevant domestic audience. Drumbl, *supra*, at 593.

³² Alvarez, *supra* note 31, at 2061–67.

³³ DRUMBL, *supra* note 19, at 181–205; Alvarez, *supra* note 25, at 369–70; Stromseth, *supra* note 3, at 260–61.

³⁴ E.g., Luban, *supra* note 19, at 124–36 (discussing and critiquing this view); Jenia Iontcheva Turner, *Transnational Networks and International Criminal Justice*, 105 MICH. L. REV. 985, 986, 989 (2007).

and thus to the local interest in justice, construed either as the personal interests of the victims or as the broader interests of the affected communities.³⁵

As with the functionalist line of argument, much of the normative debate is overgeneralized and insufficiently connected to post-conflict states' on-the-ground realities. Of course, there are often both local and international interests in cases of war crimes, genocide, and crimes against humanity. These include the immediate harms suffered and moral outrage at those harms, as well as immediate and in some cases widespread or even international destabilization and insecurity, to name a few. But just as all conflicts are not identical, the relative nature and intensity of local and international interests necessarily vary as well. The context-dependent nature of these interests renders futile attempts to generalize about their relative significance across cases. Arguably, claims about moral outrage are not context-dependent, but surely they are also by their nature incommensurable.³⁶

But what is more important for purposes of this discussion is that there is no necessary correlation between the location of an interest and the best venue for securing that interest. That is, the fact that a community (whether local, national, or international) has interests at stake does not necessarily mean that those interests will be served by trials held by that community's institutions. Local interests may better be served in international courts if local institutions are hampered by conflicting local interests, corruption, or incapacity, for example. Similarly, international interests may be better served in national courts if the judgments of international tribunals will not reach domestic audiences. Thus, just as the relative strength of international, local, and national interests varies from situation to situation, so also does the capacity of international, local, and national institutions to fulfill those interests.³⁷

³⁵ Indeed, proponents of this view tend to prefer truly local tribunals, in which the affected community itself defines and controls the justice process, to national tribunals, which are in many instances not truly local. *See* Waldorf, *supra* note 13, at 2–5, 85–87 (expressing a preference for local processes for limited purposes).

³⁶ In particular, while I recognize the international community's sense of moral outrage as a basis for concern with justice for atrocities, I am not persuaded that its collective sense of horror presents an interest that can supersede local ones. Surely its horror is not more compelling than that of the immediate victims. *Cf.* DRUMBL, *supra* note 19, at 6. Mark Drumbl discusses a similar set of concerns in the introduction to his study of sentencing and punishment in international and national tribunals. *See id.*

³⁷ A multi-country empirical study of victims' attitudes revealed divided and nonexclusive support for international and domestic solutions. *See* DRUMBL, *supra* note 19, at 42.

Nor are the interests at any level necessarily singular, opposing, or mutually exclusive. To the contrary, at all levels—international, national, and local—there tend to be multiple actors with different interests, as discussed below in the case of the DRC. The extent to which international, national, and local interests synchronize or are in tension seems to vary considerably as well.³⁸ Thus, as with pragmatic arguments about institutional function, generalizations about these interests are not likely to tell us much about how they will be served by choosing either international or national venues for particular atrocity trials.

The idea that I promote here—that relying upon a strict dichotomy between national and international institutions and interests is neither accurate nor useful—is not a new one. Rather, it pervades international legal theories such as policy-oriented jurisprudence, legal pluralism, transnational legal process, and global governance, all of which suggest—in different ways and to different ends—that the relationships between international and national institutions are dynamic and interactive, complex and multiple.³⁹ Why then has a reliance on these universalized characteristics lingered so long in this debate? This suggests a more fundamental critique.

Not only are the above descriptions not necessarily accurate or useful when applied to particular situations, they rest on an erroneous underlying set of assumptions: that national and international courts are in competition as potential venues for trials and that an assessment of their strengths and weaknesses should be directed at choosing between them for this purpose. To the contrary, the idea that international and national courts are competing for trials is virtually always incorrect. The debate over which courts will handle trials better addresses only those cases that international courts are actually in a position to try—that is to say, a bare handful. There are typically hundreds or thousands of perpetrators (and in some instances vastly more)⁴⁰ who could be tried in any given situation, and there is no possibility that any international tribunal will try more than a few of

³⁸ See Waldorf, *supra* note 13, at 74–82; Dickinson, *supra* note 27, at 301.

³⁹ See Melissa A. Waters, *Normativity in the “New” Schools: Assessing the Legitimacy of International Legal Norms Created by Domestic Courts*, 32 *YALE J. INT’L L.* 455, 455–57 (2007) (noting this commonality also). The dichotomy between international and national institutions and the presumed hierarchy between them is contested by international law scholars in other areas as well. *E.g.*, Joel R. Paul, *Holding Multinational Corporations Responsible Under International Law*, 24 *HASTINGS INT’L & COMP. L. REV.* 285, 286 (2001).

⁴⁰ See Scott Straus, *How Many Perpetrators Were There in the Rwandan Genocide? An Estimate*, 6 *J. GENOCIDE RESEARCH* 85, 95 (2004).

them (nor, of course, that national tribunals will try more than some modest percentage either). When we refer to a choice between international and national tribunals, therefore, we are talking about only a very small subset of all the cases out there in the world.

There are two important consequences of this fact: first, the treatment of international and national courts as alternatives in any practical sense is inapposite in the vast majority of cases. As a consequence, while many scholars have considered the question of the circumstances under which the ICC should defer to national tribunals under its complementarity provisions, this question should not be allowed to characterize or dominate our understanding of the relationship between international and national courts.⁴¹ Although the question of deference to national tribunals is crucial for any case that the ICC is actually considering pursuing, these cases are few and far between.

However, hidden within this debate is a real choice with a different set of consequences: a choice about where to allocate international resources. At the most superficial level, in light of the relative costs of trials in international and national tribunals, there is a decision about the number of cases to be heard. The resources that might be used to hear only a few cases in an ad hoc international tribunal could be used to put on some multiple of that number of cases in a national tribunal, or to provide some limited level of support for an even greater number of national cases.

More importantly, in light of the structural and developmental effects of pursuing such cases, a choice about where to commit resources for immediate prosecutions has substantial long-term effects on the capacities of the affected court systems. Thus, the relevant inquiry is not merely which venue we prefer for the small number of trials that an international institution might be able to handle, nor even whether we prefer a smaller or greater number of cases. Rather, we should be asking where and to what end we want to invest our financial, human, and other resources—in developing international institutions or in rebuilding domestic ones?⁴²

⁴¹ *E.g.*, SCHABAS, *supra* note 21, at 182–86; Heller, *supra* note 19, at 255–57; Madeleine MORRIS, *Complementarity and Its Discontents: States, Victims, and the International Criminal Court*, in INTERNATIONAL CRIMES, PEACE, AND HUMAN RIGHTS: THE ROLE OF THE INTERNATIONAL CRIMINAL COURT 177, 178 (Dinah Shelton ed., 2000).

⁴² Of course, the commitment of such resources is not in itself sufficient to rebuild decimated national systems; rather, atrocity trials present a focal point for such efforts that must be part of a more comprehensive reform and redevelopment. *See generally* STROMSETH ET AL., *supra* note 20.

All in all, the focus on dichotomies between international and national institutions represents a distraction from more important questions.⁴³ It has tended to misdirect the conversation away from fruitful, pragmatic inquiry about the details of each situation and into an abstract and disengaged debate over the theoretical benefits of each form of institution. It has tended to obscure the important differences among national courts and to deter inquiry into the strengths and weaknesses of particular systems. It has tended to focus attention on immediate outcomes rather than on the goals of long-term investment and development of judicial systems. By posing international and national courts as opposing alternatives, it has also tended to hamper creative thinking about productive interaction between the international legal community and national systems, and this is where another group of scholars has picked up.

B. *Hybrid Courts*

The first embodiment of a new way of thinking about the interrelationships between international and domestic tribunals was the development of hybrid courts employing both international and national judges, attorneys, and staff in Kosovo, East Timor, and Sierra Leone. These tribunals undermine the international-national dichotomy, representing a conscious effort to combine some of the benefits of each court structure by bringing international and local expertise and skills together in a single tribunal.⁴⁴ Thus, supporters of hybrid courts contend that they combine international legitimacy with greater efficiency and proximity to affected populations, more opportunity for influence upon the domestic legal system, and knowledge of both international and domestic law.⁴⁵

While the debate over international versus domestic courts seemed to assume that both international and national courts are static entities, possessing a given, known set of positives and negatives, hybrid courts

⁴³ This line of argument echoes those made by scholars in a range of areas of international and transnational law who have identified a complex set of interactions between international, national, and sub-national systems that do not follow strict hierarchical lines. *E.g.*, Robert B. Ahdieh, *Dialectical Regulation*, 38 CONN. L. REV. 863, 864–65 (2006); Paul Schiff Berman, *Dialectical Regulation, Territoriality, and Pluralism*, 38 CONN. L. REV. 929, 940 (2006).

⁴⁴ See Sarah M.H. Nouwen, “Hybrid Courts”: *The Hybrid Category of a New Type of International Crimes Courts*, 2 UTRECHT L. REV. 190, 213 (2006).

⁴⁵ See William W. Burke-White, *A Community of Courts: Toward a System of International Criminal Law Enforcement*, 24 MICH. J. INT’L L. 1, 24 (2002); Turner, *supra* note 2, at 37–39; Dickinson, *supra* note 27, at 300.

offer a venue for interaction and mutual influence.⁴⁶ Accordingly, advocates propose measuring the success of international involvement by the results of these relationships, and in particular, by their effects beyond the individual cases on the reconstruction of the national judicial system. For example, William Burke-White sets out as “successes” of the hybrid courts in East Timor the reconstruction of courthouses and other buildings and the mutual learning by East Timorese and foreign judges comprising the special panels hearing cases.

Although I wholeheartedly approve of this fundamental shift in conceptualizing international-national court relations, I nonetheless think that hybrid courts have thus far failed to fulfill their promise. Among all the possible critiques of hybrid courts,⁴⁷ one is particularly important for our discussion here: the foreign judges in hybrid tribunals are often unable to carry out the weighty tasks assigned to them. The responsibility for producing the benefits of hybrid courts over national courts in these accounts rests primarily on the shoulders of the involved international judges. It is they who will introduce international norms and maintain standards of due process and impartiality, and they who will rub shoulders with their local counterparts on a day-to-day basis, sharing crucial knowledge and experience.⁴⁸

But although expertise is no small part of foreign judges’ purported “value added” to the proceedings, hybrid courts do not typically deliver the foreign expertise they promise. There are very few judges who have both an in depth knowledge of international law and extensive trial experience, much less knowledge of the correct “family” of law (civil or common, depending on the circumstances).⁴⁹ In addition, it can be extremely difficult to persuade those few foreign jurists with such qualifications and experience to take up positions in conflict and post-conflict zones.⁵⁰ Furthermore, unless a judge with all these qualifications also happens to have the relevant language skills,

⁴⁶ See Burke-White, *supra* note 45, at 63.

⁴⁷ For example, like ad hoc international courts, hybrid courts must be established for each new crisis, incurring startup costs and delays. Also, hybrid tribunals may in fact offer little connection to the national population depending on their provenance, location, and practices such as whether they apply international or national law. See Nouwen, *supra* note 44, at 214. Furthermore, while their international colleagues may perceive international judges as impartial, their domestic counterparts may disagree. See BASKIN, *supra* note 27, at 35.

⁴⁸ See Dickinson, *supra* note 27, at 304.

⁴⁹ BASKIN, *supra* note 27, at 23; Cesare P.R. Romano, *The Judges and Prosecutors of Internationalized Criminal Courts and Tribunals*, in INTERNATIONALIZED CRIMINAL COURTS 235, 254 (Cesare P.R. Romano et al. eds., 2004).

⁵⁰ BASKIN, *supra* note 27, at 23; see Romano, *supra* note 49, at 254.

the level of interaction among the foreign and domestic judges will be sharply limited by the need for constant translation.

Consequently, the foreign judges who actually serve in hybrid tribunals frequently do not have the necessary experience and knowledge to fulfill the important role that hybrid courts demand of them. In Sierra Leone, although most of the judges have lengthy judicial experience of some kind, only two of the eight foreign judges on the court appear to have any experience whatsoever with international criminal law. Of the five foreign judges serving in the court's trial chambers, at least two appear to have no experience whatsoever presiding over a trial court.⁵¹ The UN Mission in Kosovo ("UNMIK") also struggled to recruit international judges to Kosovo to serve on hybrid panels there. National judges complained bitterly about foreign judges' lack of experience and lack of interaction on the bench,⁵² and the overall level of interaction between international and national judges in Kosovo has apparently been quite low.⁵³

This is not to suggest that hybrid courts will necessarily perform worse than national courts in meting out justice in individual cases. As described above, national courts also frequently struggle with problems of limited expertise and experience amongst their judges; indeed, these are the very reasons that mixed panels of national and foreign judges were proposed in the first place.⁵⁴ But it does seem that hybrid courts do not typically offer the distinct advantages touted by their supporters—importation of expertise, transfer of knowledge and skills, and intensive transnational interaction—and they are far from an ideal solution to the problems faced by national courts.

In spite of these flaws, hybrid tribunals do offer a venue in which interaction between international and national actors is not merely possible but necessary to the functioning of the tribunal. Thus, I do not suggest that hybrid institutions should be rejected wholesale. Rather, it is important to consider carefully the factors affecting the success of hybrid institutions' transnational interchange. Hybrid courts demand of their international participants immersion into difficult living conditions in foreign states, management of complex trials in contentious

⁵¹ See Special Court of Sierra Leone, Chambers, <http://www.sc-sl.org/chambers.html> (last visited Sept. 27, 2008).

⁵² Whether correct or not, these complaints indicate a dearth of positive relations and good feelings among the international and domestic jurists serving together in Kosovo. BASKIN, *supra* note 27, at 10, 21.

⁵³ *Id.* at 35.

⁵⁴ See Dickinson, *supra* note 27, at 303–04, 307.

political and social settings, and effective communication with foreign counterparts. It is certainly understandable in hindsight that mid- and late-career professionals who have not committed themselves to such experiences as a career choice are unlikely to be the best people to handle such a role.

Of course, some of these factors might be hoped to change in the future: for example, as international and hybrid tribunals addressing international crimes proliferate, one might expect a larger corps of judges with expertise in international criminal law to develop as well. Certainly, the effectiveness of hybrid courts could be improved by greater attention to this concern. Nonetheless, the difficulty of enticing mid- and late-career jurists to the living conditions common in post-conflict countries for trials that may last for years is, in my view, likely to remain an extremely salient factor.

This suggests that hybrid institutions might perform more successfully if they were structured so as to rely instead on personnel who are at an earlier stage in their career, who are committed to an expatriate lifestyle, and who are likely to have had the opportunity to gain the relevant expertise. This is not a model that hybrid courts are likely to be able to use; rather, it suggests that other sorts of hybrid institutions and processes might be more effective at promoting constructive transnational interactions and conveying international resources into post-conflict domestic systems.

C. *The ICC and Interactions with Other Courts*

As the International Criminal Court has become active, conducting investigations, issuing arrest warrants, and preparing for its first trial, efforts to reconstitute the role of international courts have now turned to the ICC and its relationship with other tribunals. For the ICC had no sooner been created than both supporters and critics quickly identified aspects of the Rome Statute that seemed to guarantee sharp limits to the ICC's effectiveness in trying perpetrators and a continued reliance on national courts. Some of these concerns are familiar from the discussion of international and national courts above. For example, limited capacity and resources could prevent the ICC from pursuing more than a few cases and hamper effective prosecution in those it chooses to pursue. Others are particular to the ICC, such as its complementarity regime, which enables states to shield their citizens from prosecution by a sufficient show of investigation and/or prosecution. At the outset, many also assumed that states where the ICC crimes were commonplace occurrences would not ratify, leaving the ICC bereft of

jurisdiction over crimes committed within their borders, absent another connection to a state party or a Security Council referral.⁵⁵

There is no doubt that the potential for the ICC's impact as a trial court is limited, not only for the listed reasons but also because it will likely face difficulties with domestic perceptions of legitimacy and fairness like those that the ad hoc tribunals have experienced. Indeed, such questions have already arisen in the DRC, where the public has long questioned the Lubanga case as being a highly selective prosecution of a single midlevel defendant for a crime—using child soldiers—that virtually all participants in the conflict committed and that many view as relatively minor in the face of other extensive and widespread atrocities.⁵⁶ An ICC trial chamber's order that Lubanga be released because of the prosecution's failure to disclose potentially exculpatory evidence can only have exacerbated public concern over the ICC's legitimacy.⁵⁷ Faced with an array of complex, chaotic situations and able to proceed only at a deliberate pace and to prosecute only a few people, the ICC is at risk of being written off as irrelevant just as it begins its work.

Nevertheless, although the ICC will be hard pressed to fulfill expectations for its role as a trial court, it has received more cooperation than expected from national governments thus far, with the notable exception of the Sudan.⁵⁸ Many states have voluntarily participated in

⁵⁵ See, e.g., Goldsmith, *supra* note 2, at 91–94; Steven R. Ratner, *The International Criminal Court and the Limits of Global Judicialization*, 38 TEX. INT'L L.J. 445, 452 (2003); Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 459 (2000); see also José E. Alvarez, *The New Dispute Settlers: (Half) Truths and Consequences*, 38 TEX. INT'L L.J. 405, 420–21 (2003); Mahnoush H. Arsanjani & W. Michael Reisman, *The Law-In-Action of the International Criminal Court*, 99 AM. J. INT'L L. 385, 386 (2005).

⁵⁶ Interview with Paul Madidi, Pub. Info. & Outreach Officer, ICC, in Kinshasa, Dem. Rep. Congo (July 6, 2006) [hereinafter Madidi Interview] (notes on file with author). Although Lubanga was for a long time the only person facing prosecution, as of March 2008 there are two additional Congolese defendants, and both have been charged with other crimes beyond the use of child soldiers. See International Criminal Court, Case Information Sheet, The Prosecutor vs. Germain Katanga, http://www.icc-cpi.int/library/cases/DRC-18-10-07_En.pdf (last visited Sept. 27, 2008); Press Release, ICC, Third Detainee for the International Criminal Court: Mathieu Ngudjolo Chui (Feb. 7, 2008), available at http://www.icc-cpi.int/pressrelease_details&id=329&el=en.html.

⁵⁷ This decision was reversed and remanded for reconsideration on appeal; at the time of the final edit of this Article, the case was stayed, and the trial chamber had not yet ruled on the issue on remand. Decision on the Release of Lubanga Dyilo, *supra* note 10.

⁵⁸ See, e.g., Press Release, ICC, ICC Prosecutor: "Massive Crimes Continue to Be Committed in Darfur Today, Sudan Is Not Complying with Security Council Resolution 1593 and Is Not Cooperating with the Court" (Dec. 5, 2007), available at <http://www.icc-cpi.int/press/pressreleases/307.html>.

the Rome Statute treaty regime, including a number of states with ongoing conflicts involving crimes of the sort the ICC might investigate and prosecute.⁵⁹ Further, the assumption that, even if they ratified the Rome Statute, states would necessarily resist ICC involvement in their conflicts and post-conflict justice processes was proved false by Uganda, the DRC, and the Central African Republic, all of which have self-referred situations to the ICC.⁶⁰ It is true that the Ugandan government has since shifted its position on ICC involvement in efforts to reach a peace agreement.⁶¹ This illustrates an important point for understanding the phenomenon of surprising national cooperation with the ICC: the complexity and multiplicity of national positions. Rather than acting as monolithic entities with a single interest (maintaining maximum sovereignty), these states have pursued more complex sets of interests, driven by internal factions and individual actors with competing concerns. Some of these domestic actors have at times found it useful to draw in international institutions.⁶² Others, at times, have not. But at no time have domestic actors been driven solely by an interest in sovereignty or by any other single unified interest.

This voluntary cooperation with the ICC has raised hopes for the ICC's effectiveness in several senses.⁶³ Most important for purposes of

⁵⁹ For example, in addition to the DRC, Afghanistan, Central African Republic, Chad, and Uganda are parties. ICC, The States Parties to the Rome Statute, <http://www.icc-cpi.int/asp/statesparties.html> (last visited Sept. 27, 2008).

⁶⁰ Press Release, ICC, President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC (Jan. 29, 2004), *available at* http://www.icc-cpi.int/pressrelease_details&id=16&l=en.html; Press Release, ICC, Prosecutor Receives Referral Concerning Central African Republic (Jan. 7, 2005), *available at* http://www.icc-cpi.int/pressrelease_details&id=87&l=en.html; Press Release, ICC, Prosecutor Receives Referral of the Situation in the Democratic Republic of Congo (Apr. 19, 2004) [hereinafter ICC April 2004 Press Release], *available at* http://www.icc-cpi.int/pressrelease_details&id=19&l=en.html. Of course, whether the ICC will be able to play a role in Uganda is now in question. See Jeffrey Gettleman & Alexis Okeowo, *Rebels Delay Landmark Peace Deal in Uganda*, N.Y. TIMES, Apr. 11, 2008, at A10.

⁶¹ Gettleman & Okeowo, *supra* note 60.

⁶² See *supra* note 60. Involving international actors may be useful to pressure others, to increase their own relative strength or to create international ties. See, e.g., Burke-White, *supra* note 45, at 30, 36 (discussing Cambodia). In the DRC, for example, there is a sense that President Kabila's relatively clean-handed government benefited from the threat that ICC prosecutions posed to his political opponents. See William W. Burke-White, *Complementarity in Practice: The International Criminal Court as Part of a System of Multi-Level Global Governance in the Democratic Republic of Congo*, 18 LEIDEN J. INT'L L. 557, 565-66 (2005) [hereinafter Burke-White, *Complementarity*].

⁶³ It seems that in at least some instances states will voluntarily turn over defendants and cooperate with investigations so that the ICC will be more likely to successfully pursue at least those prosecutions. (Thus far, this has been true in the DRC but not so in Sudan.)

this discussion is the hope that, even if the ICC were not able to make its mark through its own trials, it might be able to purvey its influence with these surprisingly receptive national audiences by affecting the trials held by more localized courts.⁶⁴ After all, national institutions are not all cut from one cloth either, and the same political elites who found it in their interest to cooperate with the ICC might also find it in their interest to promote national trials.

Accordingly, some ICC advocates are drawing from the idea of dynamic international-national interaction that was introduced in the hybrid court context to suggest that, to succeed, the ICC will have to pursue more active engagement with national and/or hybrid courts. Some of these proposals suggest moderate levels of interaction. For example, Laura Dickinson advocates a model centered around hybrid courts that would handle lower level cases in lieu of national courts.⁶⁵ In this model, the ICC would engage in some modest joint efforts with these hybrid courts but would remain focused primarily on its own trials.

Other proposals would amount to a total shift in the ICC's mandate, in which the ICC would redirect its energies from its own trials to participating in and/or supporting hybrid or national courts. Jenia Turner has suggested that the ICC reorganize itself as a "traveling court," recasting its primary role as participating in local trials with local lawyers and judges in specially created hybrid courts.⁶⁶ In a similar vein, William Burke-White has proposed a system of "proactive complementarity" in which the ICC would "encourage, and perhaps even assist" with prosecutions in national courts.⁶⁷ In what he calls the "strongest version" of his proposal, the ICC would be heavily involved in encouraging national trials by pressing political actors to hold them, providing technical

It also seems that the ICC may well be having some general effect in shifting the incentive structure and perceived interests of post-conflict states.

⁶⁴ Some fear that this cooperation indicates the abrogation of domestic responsibility to prosecute and the use of the ICC for the political purpose of undercutting political opponents. Antonio Cassese, *Is the ICC Still Having Teething Problems?*, 4 J. INT'L CRIM. JUST. 434, 436 (2006); Paola Gaeta, *Is the Practice of "Self-Referrals" a Sound Start for the ICC?*, 2 J. INT'L CRIM. JUST. 949, 952 (2004); see also Arsanjani & Reisman, *supra* note 55, at 387 n.9. However, this fear seems to be somewhat misplaced, since two of the three self-referrals thus far were at the request of the ICC Prosecutor, who had independently decided to open an investigation into those situations under his own authority if a referral were not forthcoming from the state in question. Luis Moreno-Ocampo, Keynote Address at the Future of Human Rights at the Samuel Dash Conference on Human Rights at Georgetown University Law Center: The Role of the International Criminal Court in Preventing Mass Atrocities (Apr. 8, 2008) (notes on file with author).

⁶⁵ Dickinson, *supra* note 27, at 308–09.

⁶⁶ Turner, *supra* note 2, at 17, 22–23, 35–36.

⁶⁷ Burke-White, *supra* note 2, at 56.

assistance and support for them, and working on domestic judicial reform.⁶⁸

Perhaps recognizing the pragmatic realities that make it unlikely that these ambitious proposals will be implemented, both Burke-White and Turner also offer more moderate suggestions. In Burke-White's more limited version, the court would play an essentially hortatory role consisting mainly of encouragement rather than assistance.⁶⁹ Likewise, Turner suggests that, if national governments are willing but unable to prosecute, ICC officials could provide logistical support and expertise to domestic officials, investigators, prosecutors, and judges.⁷⁰ Both recognize that the ICC might profit from making use of transnational networks for these purposes.⁷¹

There are a number of important aspects of this discussion for our purposes. First, both Burke-White and Turner treat national courts as the primary venues for atrocity trials. Indeed, while Turner reaches this conclusion reluctantly, encouraging national courts to prosecute is at the core of Burke-White's analysis in all its versions.⁷² Their turn toward renewed consideration of national courts and in particular toward a focus on the interactions between national courts and their international counterparts is in my view a positive one. It represents a more realistic assessment of the prospects for development of post-conflict justice. For one thing, national courts are and will continue to be on the front lines when it comes to trying defendants for atrocities within their jurisdictions. Hybrid and international courts are simply too few and too slow to take on the lion's share of this work.

Beyond this, if our focus is upon conveying international norms and resources into national systems, contrary to popular opinion, the foreign judges imported by hybrid courts often do not provide a good conduit for either one. I should be clear: this is not to suggest that national courts will necessarily do a better job than hybrid courts at, for example, trying individual cases efficiently or maintaining due process norms. They might do equally well or better; however, they might very well do worse. But if our ultimate goal is to rebuild national court systems, as I contend it should be, supporting atrocity trials in national

⁶⁸ See *id.* at 86. Burke-White considers his proposal to be within the literal terms of the ICC's mandate, but, as noted below, he concedes that it may not have been the intent of the drafters. See *id.* at 76; see also *infra* notes 76–77 and accompanying text.

⁶⁹ Burke-White, *supra* note 2, at 85–86.

⁷⁰ Turner, *supra* note 2, at 30–35.

⁷¹ Burke-White, *supra* note 2, at 98; Turner, *supra* note 2, at 32.

⁷² See Burke-White, *supra* note 2, at 57–58; Turner, *supra* note 2, at 30–35.

courts provides an opportunity to work toward this goal. Furthermore, other hybrid mechanisms—what I call “functional hybrids”—are a better means for doing so.⁷³

I am skeptical, however, of Turner’s and Burke-White’s proposals that the ICC itself might devote any substantial resources to assisting with national trials, much less undergo the substantial reorganization and reorientation that their proposals would seem to require. For one thing, the ICC is currently fully engaged in its own process of institution-building to develop its capacity to prepare for and hold trials.⁷⁴ Indeed, resource limitations are no small part of the reason that Burke-White ultimately endorses a less active role for the ICC in national prosecutions.⁷⁵

Certainly Turner’s and Burke-White’s arguments that such a major shift in direction lies within the ICC’s mandate may be intellectually appealing to some. However, it took a series of long, hard-fought negotiations for the states parties to reach agreement on this mandate. As such, I doubt that the states parties will be amenable to a fundamental reinterpretation that Burke-White concedes “may not have been envisioned by the drafters of the Rome Statute.”⁷⁶ The ICC Prosecutor certainly does not share their views. Luis Moreno-Ocampo has stated publicly that the ICC will not involve itself in national trials, except to the very limited extent of possible information-sharing if the safety of victims and witnesses can be assured.⁷⁷

My most fundamental concern with these proposals is that they are concerned primarily with how to make the ICC successful as an institution in promoting post-conflict justice. What I wish to do here is to return our attention to the core question of how the international legal community as a whole can best promote the goals of post-conflict justice, whether through the ICC or some other way. When we focus upon the goal of influencing and rebuilding national courts, as I argue we should, there are better mechanisms for the international legal community to participate in these processes than the ICC or, for that mat-

⁷³ See *infra* notes 233–318 and accompanying text.

⁷⁴ See ICC, *Report on the Activities of the Court*, ¶¶ 66–71, delivered to the Sixth Session of the Assembly of States Parties to the Rome Statute, U.N. Doc. ICC-ASP/6/18 (Oct. 18, 2007) [hereinafter 2007 ICC Report], available at http://www.icc-cpi.int/library/asp/ICC-ASP-6-18_English.pdf; *The Court’s Strategic Plan*, NEWSLETTER (ICC), Nov. 2006, at 4, available at http://www.icc-cpi.int/library/about/newsletter/files/ICC-NL6-200511_En.pdf.

⁷⁵ Burke-White, *supra* note 2, at 98.

⁷⁶ *Id.* at 76.

⁷⁷ Group Meeting with Luis Moreno-Ocampo, Prosecutor, ICC, at Human Rights Inst., Georgetown Univ. Law Ctr., Wash., D.C. (Apr. 8, 2008).

ter, any international or hybrid court. This is not to say that the ICC has no role to play in post-conflict justice, but rather, that it should not be trying to play this role. Most importantly, we should not be trying to foist this role upon it in an attempt to mitigate its other weaknesses and salvage its reputation, instead of focusing on how to best achieve our ultimate aims.

Thus, I am not convinced that the ICC should reorient itself toward influencing national courts, even if it could. Importantly, in spite of their early favor for models centered on direct intervention by the ICC, in the end both Burke-White and Turner suggest that it is through transnational networks that the ICC might most effectively purvey its influence.⁷⁸ I am not in accord with their prescriptions for retooling the ICC or their emphasis on a central role for that institution as opposed to other international actors. Nonetheless, I build upon their descriptions of dynamic, multilevel relationships between national courts and international actors, particularly insofar as they look beyond the ICC to the roles of international institutions and transnational networks.

For although the early refocusing of attention on the role of hybrid courts was welcome, those considering this issue may have dismissed national courts too quickly and defined the potential mechanisms of international influence too narrowly by focusing on the hybrid court context. The recent trials in military courts in the DRC have been affected by the ICC, but through relatively indirect lines of influence, in particular, through the intervention of international institutions and transnational networks. The Rome Statute and associated ICC documents have created content to be transferred, and the ICC's activities have raised consciousness of the need for and possibility of criminal trials for atrocities. From there, international institutions and transnational networks have taken up the task of transferring this information to local actors, persuading them it is important, and providing the necessary assistance to enable them to use it.

These views provide a jumping-off point for the remainder of this Article. For while hybrid courts provide one institutional structure for interactions between international and national actors, there are other hybrid mechanisms by which such interaction could take place.

⁷⁸ Burke-White, *supra* note 2, at 98; Turner, *supra* note 34, at 990.

II. TRANSNATIONAL INTERACTION IN THE DRC

A. *Post-Conflict Congo*

In the last ten years, the DRC has been the site of horrific atrocities and virtually absolute impunity for those who committed them.⁷⁹ There are no precise figures for the number of people who have died since armed conflict began in eastern Congo in 1996, but a good estimate set the death toll at 3.9 million as of 2004, with tens of thousands continuing to die each month—and these are just the dead, not the many injured, ill, and displaced.⁸⁰ This conflict, dubbed “Africa’s World War,” is the deadliest since World War II.⁸¹

⁷⁹ A note on my research method: I visited the DRC on a research trip in June and July 2006. While there, I attended private meetings and public programs held by representatives of national governments and international organizations; conducted formal interviews with representatives of the Congolese government, foreign governments, international organizations, and local nongovernmental organizations; had informal discussions with representatives of these groups and with members of the public; and gathered documents, ranging from case judgments to laws to brochures, that are not available outside the Congo and, in some instances, not publicly available within the country.

My initial contacts were selected for their expertise in some aspect of the Congolese legal system or post-conflict justice and for their accessibility through personal contacts. Further informants were selected in the field using a purposive sampling approach, on the basis of their potential to add new information or perspectives to my understanding of the system. This approach can be particularly effective for research such as this, in which the goal is to obtain information and insights from knowledgeable individuals concerning the technical aspects of a complex social system like the courts. My choice of informants was limited by their availability during the volatile pre-election period of summer 2006 and by their willingness to speak to me about such a sensitive subject.

Of course, there is always a risk of selection bias in the choice of informants for any study. Here, I was more successful in obtaining interviews and documentary information from representatives of international and foreign organizations than from representatives of the Congolese government and legal community, although I met with members of all of these communities. By triangulating interview, observation, and documentary information from multiple international, foreign, and domestic sources, I have attempted to mitigate this emphasis on foreign sources as much as possible. This difficulty, I think, illustrates a widespread but often unacknowledged problem in the field of post-conflict justice and in the relevant scholarship: foreign participants and observers often lack detailed information about national and local views.

All meetings were conducted in French or English. Because of the sensitivity of this subject matter, some informants requested anonymity and are not identified herein. My informants do not endorse my analysis or my conclusions, nor are they responsible for any errors I may have made.

⁸⁰ See generally Benjamin Coghlan et al., *Mortality in the Democratic Republic of Congo: A Nationwide Survey*, 367 LANCET 44 (2006).

⁸¹ Anne Penketh, *Rwanda Threatens to Reignite Africa’s Bloodiest Conflict*, INDEPENDENT, Dec. 17, 2004, at 23; Simon Robinson & Vivienne Walt, *The Deadliest War in the World*, TIME, June 5, 2006, at 38.

The first war in Congo began as a foreign-supported rebel movement to overthrow longtime President Mobutu Sese Seko in 1996. After that rebellion succeeded, eastern Congo resurged into a second war, characterized by an explosion of militia fighting driven by funding and troops from six neighboring countries. This militia warfare has never been entirely quelled. Fighting continues in eastern Congo today despite a 1999 peace agreement, a 2002 power-sharing agreement, the 2006 democratic elections of a national legislature and president, and the presence of the world's largest UN peacekeeping force, Mission des Nations Unies en République Démocratique du Congo ("MONUC").⁸²

Among the numerous causes of Congo's two wars and ongoing conflict, at least three are critical for understanding the dynamics in the country. These three factors have operated synergistically to escalate the scale and intensity of the violence in the country and to undermine the capacity of government institutions to suppress that violence or address its consequences. The Congo contains a vast wealth of mineral resources in copper, cobalt, coltan, diamonds, and gold, which has long made it an attractive target for intervention by foreign powers and for violence and graft by domestic actors.⁸³ Within the country, former President Mobutu's thirty-year kleptocratic reign universalized corrupt acquisition of personal wealth as the mechanism of governance at the cost of any development of institutions or infrastructure.⁸⁴ And finally, from outside the DRC, the genocide in Rwanda spurred the flight of millions of refugees and génocidaires into eastern Congo and the Rwandan army's consequent incursions into eastern Congo in the mid-1990s.⁸⁵

What is important to understand, for our purposes, are certain critical consequences of this history that will render any effort to achieve justice for the attacks suffered by civilians inevitably inadequate and incomplete: (1) the ubiquity of the atrocities that characterized the

⁸² See generally GlobalRights.org, Global Rights in Democratic Republic of Congo (June 2006), http://www.globalrights.org/site/PageServer?pagename=www_afr_index_41; International Crisis Group, Democratic Republic of Congo, <http://www.crisisgroup.org/home/index.cfm?l=1&id=1174> (last visited Sept. 27, 2008); Médecins Sans Frontières, MSF in Democratic Republic of Congo, <http://www.msf.org/msfinternational/countries/africa/democraticrepublicofcongo/index.cfm> (last visited Sept. 27, 2008).

⁸³ ROBERT B. EDGERTON, *THE TROUBLED HEART OF AFRICA: A HISTORY OF THE CONGO*, at xiv, 158 (2002).

⁸⁴ See *id.* at 198, 213–15.

⁸⁵ See *id.* at 219–20. See generally ADAM HOCHSCHILD, *KING LEOPOLD'S GHOST: A STORY OF GREED, TERROR, AND HEROISM IN COLONIAL AFRICA* (1998); MICHELA WRONG, *IN THE FOOTSTEPS OF MR. KURTZ: LIVING ON THE BRINK OF DISASTER IN MOBUTU'S CONGO* (2001).

war and that continue in the ongoing conflict;⁸⁶ (2) the virtually universal impunity thus far for those who perpetrated those atrocities;⁸⁷ (3) the limited capacity of both the national and international legal systems to address these atrocities;⁸⁸ (4) the deep suspicion in the DRC of foreign motives for any proposed involvement in Congolese affairs;⁸⁹ and (5) the similarly strong distrust among the Congolese people of domestic government institutions.⁹⁰

In practical terms, these obstacles will prevent justice from being achieved for all, or even a substantial proportion of, the wrongs done in Congo's conflict. Fundamentally, the scale of the atrocities and the number of victims are too great. Beyond this, the intervening time and chaos have obliterated crucial details and evidence and have permanently separated perpetrators from their victims and from the scenes of their crimes. Where perpetrators can be found, some are shielded from arrest or prosecution by political and military leaders.⁹¹ On an institutional level, the national civilian courts were decimated by the war and barely exist at all outside urban areas,⁹² and neither the international nor the national justice systems have the capacity to take on more than a few cases.⁹³ Finally, neither the international nor the national justice

⁸⁶ Robinson & Walt, *supra* note 81; Vivienne Walt & Andrew Purvis, *Starving in a Land of Plenty*, TIME INT'L, Apr. 3, 2006, at 20.

⁸⁷ Executive Summary, *What Justice Is There for Vulnerable Groups in Eastern DRC?*, SOS JUSTICE (Global Rights, Washington, D.C.), Aug. 2005, at 6–8 [hereinafter SOS JUSTICE], available at http://www.globalrights.org/site/DocServer/SOS_ExecutiveSummary_ENG_FIN.pdf; Interview with Anonymous G in Kinshasa, Dem. Rep. Congo (June 27, 2006) [hereinafter G Interview] (notes and contact information on file with author).

⁸⁸ SOS JUSTICE, *supra* note 87, at 6–8; see *supra* notes 21–28 and accompanying text (concerning international system).

⁸⁹ Paule Bouvier & Pierre Englebert, *Congo's Implausible Democracy*, FOREIGN POL'Y, July 2006, http://www.foreignpolicy.com/story/cms.php?story_id=3535.

⁹⁰ *Id.*

⁹¹ MONUC HUMAN RIGHTS DIV., U.N., THE HUMAN RIGHTS SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO (DRC) DURING THE PERIOD OF JANUARY TO JUNE 2006, at 11–12 (2006) [hereinafter JUNE 2006 MONUC REPORT], available at http://www.monuc.org/downloads/HRD_6_month_2006_report.pdf; MONUC HUMAN RIGHTS DIV., U.N., THE HUMAN RIGHTS SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO (DRC) DURING THE PERIOD OF JUNE TO DECEMBER 2006, at 21–22 (2007) [hereinafter DEC. 2006 MONUC REPORT], available at http://www.monuc.org/downloads/HRR_6Month_Eng.pdf; G Interview, *supra* note 87; Interview with Marc LaRoche, Program Dir., Global Rights, in Kinshasa, Dem. Rep. Congo (July 5, 2006) [hereinafter LaRoche Interview] (notes on file with author).

⁹² SOS JUSTICE, *supra* note 87, at 6–8.

⁹³ See *id.*; Marlise Simons, *Congo Warlord's Case Is First for International Criminal Court*, N.Y. TIMES, Nov. 10, 2006, at A9.

systems have the confidence of the Congolese people.⁹⁴ It is in this context that Congolese prosecutors brought the three cases described below.

B. *An Illustration: The Rome Statute in Three Domestic Cases*

In this Section, I discuss three atrocity trials held in domestic Congolese courts. In the first two cases, the courts used the Rome Statute directly in lieu of national legal standards. In each instance, by applying the Rome Statute, the national court substantially improved upon the standards that would have been applied under national law by bringing the rules used in these trials into better accord with widely recognized substantive and due process standards. In the third case, in which domestic law was applied, there was at least one fundamental due process violation that could have been prevented by resort to the provisions of the Rome Statute.

The use of the Rome Statute in these cases is not the only way in which international law and international actors affected these and other cases in the Congo. It is, however, the most obvious and tangible way. As such, these examples offer the opportunity to begin this discussion of the interaction between national and international actors with a discrete, readily identifiable set of issues, focusing solely on the laws applied in each case and on the effect those laws had on the judgments.

1. The Cases

In each of the three cases discussed here, armed militia deliberately targeted a civilian town in eastern Congo for attack and widespread theft, rape, and/or killings.⁹⁵ All of the attacks took place between 2003 and 2005, well after peace had been declared and also after

⁹⁴ Interview with Anonymous F in Kinshasa, Dem. Rep. Congo (June 27, 2006) [hereinafter F Interview] (notes and contact information on file with author); Global Rights Meeting, in Kinshasa, Dem. Rep. Congo (June 26, 2006); see also GLOBAL RIGHTS, LA JUSTICE PROTÈGE VOS DROITS: QU'EN DIT LE PROGRAMME DE VOTRE CANDIDAT? 1 (2006), available at http://www.globalrights.org/site/DocServer/DRC_Political_Parties_Guide.pdf.

⁹⁵ See Ngoy case, *supra* note 11, at 7–11; Massaba case, *supra* note 11, at 6; Katamisi case, *supra* note 11, at 6. The choice of cases discussed here was determined by relevance and availability. I obtained these three judgments during a research trip to Kinshasa in June and July 2006. This is not easy to do: the judgments are not published, nor is information necessarily made publicly available about them in the course of the trial. I found out about the cases described here through a series of personal contacts and interviews with members of the UN, NGOs, and others in Kinshasa, and I obtained copies of them through personal contacts as well.

the DRC ratified the Rome Statute in 2002.⁹⁶ In one of the cases, the defendants were soldiers enlisted in the DRC army;⁹⁷ in the others, they were members of nongovernmental militias.⁹⁸

In many respects, these cases are entirely typical of the crimes occurring in Congo. Such attacks have long been and continue to be commonplace. In June 2006, MONUC reported that “[t]he routine use of physical violence against civilians, including summary executions, beatings and rape, committed by FARDC soldiers . . . is reported wherever the army is deployed”⁹⁹ and that killings, rapes, and abductions of civilians by armed militias likewise “continue unabated” in the contested regions of the country.¹⁰⁰

The sense in which these cases are extraordinary is that someone is being tried at all. MONUC’s human rights reports recount a litany of failed efforts to secure prosecution of suspects for such crimes, punctuated by these occasional successes. In case after case, prosecutors refuse to open investigations or military commanders decline to execute arrest warrants, so that suspects remain at large. Where arrests are made, trials are delayed or suspended. MONUC attributed this recalcitrance “mainly to undue external interference, but also to the lack of will, resources and capacity.”¹⁰¹ It contends that “the increase of open interference in judicial matters by political and military actors . . . is the result of a worrying superciliousness on the part of these actors, who know that they can openly disregard the law in absolute impunity.”¹⁰² Similarly, news reports describe “rampant political interference.”¹⁰³ Observers allege that recent acquittals and overturned convictions are products of this political pressure.

Each of these trials was heard by a military court, not a civilian one.¹⁰⁴ Under the justice system actually at work in the DRC now, these

⁹⁶ See Ngoy case, *supra* note 11, at 8; Massaba case, *supra* note 11, at 4; Katamisi case, *supra* note 11, at 6.

⁹⁷ See Massaba case, *supra* note 11, at 1.

⁹⁸ See Ngoy case, *supra* note 11, at 7; Katamisi case, *supra* note 11, at 5.

⁹⁹ JUNE 2006 MONUC REPORT, *supra* note 91, at 2; *see also* DEC. 2006 MONUC REPORT, *supra* note 91, at 13–17, 19–20.

¹⁰⁰ JUNE 2006 MONUC REPORT, *supra* note 91, at 10; *see also* DEC. 2006 MONUC REPORT, *supra* note 91, at 17–20.

¹⁰¹ JUNE 2006 MONUC REPORT, *supra* note 91, at 12.

¹⁰² *See id.* at 11–12; *see also* DEC. 2006 MONUC REPORT, *supra* note 91, at 17–20; G Interview, *supra* note 87.

¹⁰³ Lisa Clifford, *Military Court Trials Worry Activists*, INST. FOR WAR & PEACE REPORTING, Sept. 25, 2007, http://www.iwpr.net/?p=acr&s=f&o=338941&apc_state=henfacr338943.

¹⁰⁴ See Ngoy case, *supra* note 11, at 1; Massaba case, *supra* note 11, at 1; Katamisi case, *supra* note 11, at 1.

military courts are currently functioning as national courts for many purposes, and thus I treat them as such for the purpose of assessing international-national interactions. In a formal sense, these courts have certain crucial characteristics that permit this treatment, including: (1) the codification of the relevant crimes and procedural rules as national law;¹⁰⁵ (2) the courts' status as a permanent system of military justice, rather than as special military tribunals;¹⁰⁶ and (3) the exclusivity and comprehensiveness of the military courts' jurisdiction over these crimes: that is, the military courts have exclusive jurisdiction over war crimes, crimes against humanity, and genocide and over both civilians and members of the military who commit these crimes.¹⁰⁷

In addition to these formal elements, the military courts are also the functioning national system in actuality. The civilian courts are not operating at all in vast parts of the country.¹⁰⁸ Moreover, crimes against humanity and war crimes are commonplace in the parts of the country still in conflict and arguably constitute the predominant problem of criminal law there.¹⁰⁹ Additionally, many acts of sexual violence were not incorporated into the civilian criminal code until 2006 and thus were recognized solely in the context of these international crimes under the jurisdiction of the military courts.¹¹⁰ Finally, the military courts are seen by many as being more trustworthy and effective than the civilian courts, where the civilian courts are operating at all.¹¹¹

Thus, in this context, for the purpose of examining the interactions between international and domestic actors and international and national law, I treat the military courts as the domestic system, because they are both formally and functionally performing as such. In so doing, however, I do not advocate for such equivalence in other contexts,

¹⁰⁵ CODE JUDICIAIRE MILITAIRE, art. 76, Loi No. 023/2002 of Nov. 18, 2002, Journal Officiel, Numéro Spécial [Official Journal, Special Issue], Mar. 20, 2003 (Dem. Rep. Congo) (granting jurisdiction to military courts over all infractions of the Code Pénal Militaire); CODE PÉNAL MILITAIRE, arts. 164–66, 173–75, Loi No. 024/2002 of Nov. 18, 2002, Journal Officiel, Numéro Spécial [Official Journal, Special Issue], Mar. 20, 2003 (Dem. Rep. Congo) (defining crimes of genocide, crimes against humanity, and war crimes).

¹⁰⁶ CODE JUDICIAIRE MILITAIRE, *supra* note 105, arts. 1–2.

¹⁰⁷ *Id.* art. 76 (granting jurisdiction to military courts over all infractions of the Code Pénal Militaire); CODE PÉNAL MILITAIRE, *supra* note 105, arts. 164–66, 173–75 (defining crimes of genocide, crimes against humanity, and war crimes). This has, unsurprisingly, been the subject of criticism. See JUNE 2006 MONUC REPORT, *supra* note 91, at 2, 12.

¹⁰⁸ SOS JUSTICE, *supra* note 87, at 8.

¹⁰⁹ See *id.* at 9.

¹¹⁰ CODE PÉNAL, arts. 167–74, Loi No. 06/018 of Jul. 20, 2006, Journal Officiel, Numéro Spécial [Official Journal, Special Issue], Aug. 1, 2006 (Dem. Rep. Congo).

¹¹¹ Clifford, *supra* note 103 (quoting Harriet Solloway, Director of MONUC's Rule of Law Unit); F Interview, *supra* note 94.

nor do I endorse the use of military courts for these purposes rather than civilian ones. Indeed, as will become clear later, even in this context the use of military courts raises questions concerning the channeling of international resources.¹¹²

a. *The Massaba Case*

Blaise Bongli Massaba was a captain in the DRC army.¹¹³ He and the soldiers in his command were deployed in Ituri, one of the eastern provinces of the DRC. Intense fighting and atrocities took place in Ituri throughout the two wars, and many nongovernmental armed militias have continued to operate in Ituri since then. Attacks on civilians are commonplace and brutal. Massaba and his troops were sent to patrol and secure an assigned area with the purpose of suppressing the militia activity there.¹¹⁴

On October 12, 2005, Massaba and his troops arrested five boys, mostly students. Massaba and his cohort then went to a town in their patrol area, Tchekele, and stole a motorcycle, a radio, a motorized pump, and solar panels, among other things. Massaba forced the boys to carry the stolen goods to his command post and then ordered his troops to kill them on the pretext that they were militia members.¹¹⁵

Massaba was prosecuted in an Ituri military court for the war crimes of murder and pillage. The court chose to apply the Rome Statute instead of national law on war crimes and convicted Massaba of both charges. It sentenced him to life imprisonment and ordered him to pay \$300,000 in damages to the families of the murdered boys.¹¹⁶

¹¹² Of course, military courts cannot be treated as commensurate with civilian courts in other respects, for example, for purposes of examining the details of trial procedure or adjudication, which might well differ as between the two. But I am concerned here with the interaction between international and domestic actors. Because the military courts are the sole venue for atrocity trials in the DRC, they are also the sole venue for transnational interactions concerning those trials. See CODE JUDICIAIRE MILITAIRE, *supra* note 105, art. 76. In contrast, the proposed implementing legislation for the Rome Statute would give jurisdiction to the civilian courts, amending the ordinary criminal code to include these crimes. See COMMISSION PERMANENTE DE RÉFORME DU DROIT CONGOLAIS, AVANT PROJET DE LOI PORTANT MISE EN OEUVRE DU STATUT DE LA COUR PÉNALE INTERNATIONALE 16 (2003) [hereinafter AVANT PROJET DE LOI].

¹¹³ Massaba case, *supra* note 11, at 1.

¹¹⁴ *Id.* at 4–6.

¹¹⁵ *Id.* at 5–6. There is a discrepancy in the judgment as to whether five or six boys were kidnapped and killed. See *id.*

¹¹⁶ *Id.* at 6–7, 18–19.

b. *The Ngoy Case*

The defendants in this case were members of the MLC nongovernmental militia.¹¹⁷ They had made their defensive headquarters near the town of Songo Mboyo for about five years, and they had grown accustomed to living off of the local population during that time. The DRC has been working to integrate militias into its regular army, and shortly before this incident took place, the local commander announced that these units of the MLC were to be integrated into the Congolese army. Consequently, the soldiers would be moved to a new location, far from the compliant population of Songo Mboyo. They would also receive a pay raise that would increase their pay by five times. The commander did not pay the soldiers promptly, however, and instead held their money after collecting it from the army's agent. On December 21 and 22, 2003, frustrated that they had not received the money owed to them, the militia members rebelled against their commander. They attacked him and then went to Songo Mboyo, stole a large amount of personal and commercial property, and raped thirty-one women.¹¹⁸

Lieutenant Eliwo Ngoy and eleven co-defendants were prosecuted in a Mbandaka military court for crimes against humanity for the sexual assaults, as well as for various crimes relating to their military insubordination under the Congolese military penal code.¹¹⁹ Like the Ituri court, the Mbandaka court chose to apply the Rome Statute instead of national law for the crimes against humanity charges.¹²⁰ The court convicted seven of the defendants of crimes against humanity under the Rome Statute and sentenced them to life imprisonment.¹²¹ The court also ordered the convicted defendants to pay damages of \$5,000 to sur-

¹¹⁷ Ngoy case, *supra* note 11, at 7.

¹¹⁸ *Id.* at 8–11.

¹¹⁹ *Id.* at 1, 12. The other military crimes included military conspiracy, inciting the taking of arms against a civilian population, insulting a superior, usurping command, mishandling of arms, misuse of war munitions, and pillage. *Id.* at 4. It is not clear why pillage was charged only as a military crime in this case, rather than as a war crime under the Rome Statute as in the Massaba case. *See id.* at 12; Massaba case, *supra* note 11, at 10, 18.

¹²⁰ Ngoy case, *supra* note 11, at 12.

¹²¹ *Id.* at 4, 26. Five of the seven defendants who were convicted of crimes against humanity were also convicted of pillage under the Congolese military penal code and sentenced to twenty year terms of imprisonment. Some defendants were acquitted and others convicted and sentenced to terms of imprisonment on the other national charges. *Id.* at 37–38.

living rape victims and \$10,000 to the families of deceased rape victims.¹²²

c. *The Katamisi Case*

Kalonga Katamisi, Sdt. Alimasi, and their unidentified accomplices were members of the Mayi-Mayi militia. In 2004, the defendants kidnapped and raped ten women from the town of Kamanga. Katamisi held one of the kidnapped women captive as his “wife” for three months.¹²³

In contrast to the Massaba and Ngoy cases, charges were brought against these defendants only under the Congolese Military Penal Code rather than under the Rome Statute. The Kindu military court that heard these cases did not even consider applying international law. Only Katamisi was present at the trial; the others were still at large and were tried in absentia. Indeed, remarkable as it sounds, except for Alimasi, the other defendants were not only absent, but unidentified. In spite of this, not only Katamisi but also Alimasi and the unidentified accomplices were all convicted of crimes against humanity under the Congolese Military Penal Code, sentenced to death, and ordered to pay \$20,000 in damages to three of the rape victims who brought claims in a related action.¹²⁴

2. Effects of the Rome Statute

As is evident from these cases, there are two overlapping legal frameworks for prosecuting crimes against humanity, war crimes, and genocide in the DRC: an international framework and a national one. In the Massaba and Ngoy cases, the courts chose international law for these crimes, while in the Katamisi case, the court applied solely national law. Even before delving into the cases in any detail, it should be obvious from the summaries above that the court using national law in the Katamisi case chose a starkly different punishment—the death penalty—and permitted a serious due process violation by allowing defendants to be tried not only in absentia but without being identified. Would the use of international law have made a difference in this case? As described below, I believe so. Of course, there is a limit to what can be gleaned about a case from the judgment alone. My conclusions are

¹²² *Id.* at 38–40.

¹²³ Katamisi case, *supra* note 11, at 5, 6.

¹²⁴ *Id.* at 1–2, 5, 8–9.

of necessity limited to these aspects of the cases, and I am unable to comment on aspects of the trial procedure or other matters that were not discussed in the written judgments. Nonetheless, when we examine information provided in the Ngoy and Massaba judgments, the use of international law seems to have made some positive difference.

First, a brief summary of the competing legal frameworks: on the international level, the Rome Statute defines the crimes of genocide, crimes against humanity, and war crimes for cases before the International Criminal Court.¹²⁵ By ratifying the treaty, states parties do not adopt those definitions but rather, agree to cooperate with the court. They also create a nexus whereby the court might choose to exercise its jurisdiction.¹²⁶ The DRC ratified the Rome Statute in March 2002, but has not yet passed implementing legislation.¹²⁷ On the national level, the DRC's military penal code contains its own definitions of genocide, crimes against humanity, and war crimes, which overlap to some extent with the Rome Statute's definitions but also differ in significant ways.¹²⁸

There are three primary areas in which the effects of the Rome Statute can be seen in the Ngoy and Massaba cases: in the adoption of international definitions of crimes and punishments, in the use of international due process standards, and in the creation of protections

¹²⁵ Rome Statute, *supra* note 1, arts. 5–8.

¹²⁶ *Id.* art. 86.

¹²⁷ Décret-loi No. 00/3/2000 of Mar. 30, 2002 (Dem. Rep. Congo); Olympia Bekou & Sangeeta Shah, *Realising the Potential of the International Criminal Court: The African Experience*, 6 HUM. RTS. L. REV. 499, 502 (2006); E-mail from Anonymous G to Elena Baylis [author] (Feb. 19, 2008) [hereinafter Feb. 19 E-mail] (on file with author).

¹²⁸ See CODE PÉNAL MILITAIRE, *supra* note 105, arts. 164–66, 173–75. Although the DRC also has an amnesty law for crimes committed during the period of hostilities, it is not applicable here because it is limited to crimes committed between August 1996 and July 2003 and because it does not apply to genocide, war crimes, or crimes against humanity. MONUC HUMAN RIGHTS DIV., U.N., THE HUMAN RIGHTS SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO (DRC) DURING THE PERIOD OF APRIL TO DECEMBER 2005, at 11 (2006) [hereinafter DEC. 2005 MONUC REPORT], available at http://www.monuc.org/downloads/MONUC_human_rights_2005_en.pdf. Curiously, the alternative definitions in DRC national law post-date the DRC's ratification of the Rome Statute: they originated in September 2002 legislation amending the military penal code. See CODE PÉNAL MILITAIRE, *supra* note 105, arts. 164–66, 173–75. The reasons for this development are mysterious. Since then, the DRC has floated successive drafts of legislation that would implement the Rome Statute's definitions of crimes and many of its other substantive provisions, so it does not appear that the military penal code legislation was intended either to implement or to supplant the Rome Statute. Bekou & Shah, *supra* note 127, at 502, 509–11; Interview with Anonymous J in Kinshasa, Dem. Rep. Congo (June 29, 2006) [hereinafter J Interview] (notes and contact information on file with author). The best explanation for why this occurred, strange as it seems, appears to be that the contradictory provisions were simply overlooked.

for victims and witnesses. The presence of these developments in the Massaba and Ngoy cases and their absence in the Katamisi case (in which domestic law was used) suggest avenues for international law to play a constructive role in domestic atrocity trials.

a. *International Definitions*

In both the Massaba and Ngoy cases, the courts convicted the defendants of crimes under the Rome Statute, adopting its definitions of crimes, as well as its rules of procedure and evidence.¹²⁹ ICC observers have suggested that the Rome Statute might be a vehicle for developing the substance of international criminal law and have particularly noted the Rome Statute's progressive rules on sex crimes.¹³⁰ The Ngoy case fulfills these expectations. Under national law, the definition of the underlying act of rape for purposes of a charge of crimes against humanity was apparently quite narrow, including only certain acts committed against women.¹³¹ In contrast, the Rome Statute's definition is broader, encompassing various forms of sexual assault against both genders.¹³² The Ngoy court applied the Rome Statute's definition to draw in some assaults that would otherwise have been excluded.¹³³

Also, the courts in the Massaba and Ngoy cases adopted not only the definitions of crimes but also other aspects of the Rome Statute in lieu of national law.¹³⁴ This had a substantial effect on sentencing, for Congolese law provides for the death penalty for crimes against humanity, but under the Rome Statute defendants cannot be sentenced to death.¹³⁵ Accordingly, in the Massaba and Ngoy cases the death penalty was not on the table; in the Katamisi case, in contrast, the defendants were sentenced to death.¹³⁶ In this respect, as in the area of sex crimes, the adoption of the Rome Statute advanced the growing

¹²⁹ Ngoy case, *supra* note 11, at 26–38; Massaba case, *supra* note 11, at 11–12.

¹³⁰ *E.g.*, William W. Burke-White, *The International Criminal Court and the Future of Legal Accountability*, 10 ILSA J. INT'L & COMP. L. 195, 200–01 (2003).

¹³¹ It is not clear from the judgment exactly which acts are included in the national definition of rape. *See* Ngoy case, *supra* note 11, at 27, 32.

¹³² *See* Rome Statute, *supra* note 1, art. 7(1)(g).

¹³³ Ngoy case, *supra* note 11, at 26–28.

¹³⁴ *See id.* at 4, 12, 38; Massaba case, *supra* note 11, at 11–12.

¹³⁵ CODE PÉNAL MILITAIRE, *supra* note 105, art. 169; Rome Statute, *supra* note 1, art. 77.

¹³⁶ Ngoy case, *supra* note 11, at 12, 38; Massaba case, *supra* note 11, at 12, 18; Katamisi case, *supra* note 11, at 9.

international consensus on a substantive issue: the abolition of the death penalty even for the most serious of crimes.¹³⁷

However, the Congolese courts' adoption of the Rome Statute's sentencing provisions also raises another fundamental justice issue: disparate sentencing. This problem is familiar from the ad hoc international tribunals. In Rwanda, until 2007, defendants tried in national courts could be sentenced to death, but defendants tried in the international tribunals could not.¹³⁸ This disparity was particularly acute because the defendants in the international tribunals tended to be among the most serious perpetrators.¹³⁹ Here also, the difference in sentences among these cases is due not to a difference in the severity of the crimes but, rather, to the application of international rather than national law.¹⁴⁰

In the same vein, ICC supporters also hoped that the existence of the Rome Statute would promote common universal definitions of the crimes it addresses.¹⁴¹ Here, the courts' use of the Rome Statute promotes development of common, universal definitions of these crimes in one sense but not in another. The use of the Rome Statute's definitions in the Ngoy and Massaba cases does of course extend the use of these definitions into national law for the first time, thereby creating commonalities between international and national law where none existed before. However, the use of the Rome Statute's definitions is not universal among domestic courts, as evidenced by the Katamisi case. Accordingly, this increased convergence between international and national law comes at the cost of increased divergence within the law applied domestically, as well as the risk of local uncertainty concerning the applicable law.

¹³⁷ See, e.g., Amnesty International, Abolitionist and Retentionist Countries, <http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries> (last visited Nov. 4, 2008); European Union Human Rights Policy, Abolition of the Death Penalty, http://ec.europa.eu/external_relations/human_rights/adp/index.htm (last visited Nov. 4, 2008).

¹³⁸ See Rome Statute, *supra* note 1, art. 77; William A. Schabas, *Sentencing by International Tribunals: A Human Rights Approach*, 7 DUKE J. COMP. & INT'L L. 461, 479 (1997); *U.N. Welcomes Death Penalty Ban*, N.Y. TIMES, July 28, 2007, at A6. The former Yugoslavia's criminal code also provided for the death penalty, but it has since been abolished in the splinter states. See Schabas, *supra*, at 478–79; Amnesty International, *supra* note 137.

¹³⁹ Schabas, *supra* note 138, at 507–08; Robert D. Sloane, *Sentencing for the "Crime of Crimes": The Evolving "Common Law" of Sentencing of the International Criminal Tribunal for Rwanda*, 5 J. INT'L CRIM. JUST. 713, 719–20 (2007).

¹⁴⁰ Compare Ngoy case, *supra* note 11, at 12, 38 (applying international law and sentencing the defendant to imprisonment), with Katamisi case, *supra* note 11, at 8–9 (applying national law and sentencing the defendant to death).

¹⁴¹ Burke-White, *supra* note 130, at 204.

b. *Due Process Standards*

One of the primary critiques of domestic courts, as discussed above, is that they fail to maintain acceptable due process standards. The judgments do not discuss in detail the procedures that were followed in these cases, so it is impossible to provide a complete assessment of this issue. Where the issue does arise in the Massaba judgment, the court's use of the Rome Statute standards appears to have brought this trial and conviction more in accord with due process standards than it would have been under national law.¹⁴² In contrast, in the Katamisi judgment, the court's description of its procedures raises fundamental due process questions that could have been resolved by resort to the procedures endorsed by the Rome Statute.¹⁴³

Massaba was accused of war crimes for his role in pillaging and ordering his troops to kidnap and kill schoolboys.¹⁴⁴ There was, however, a gap in the national law on war crimes: the law did not state the applicable penalty for war crimes.¹⁴⁵ Because DRC law requires a punishment to be stated in advance for each crime, as do basic principles of fairness to the accused (i.e., *nulla poena sine lege*), conviction and punishment of the defendants under the national war crimes provisions would have placed the court in violation of both national and international due process mandates.¹⁴⁶ Faced with this "glaring omission" and persuaded that the intent of the legislature in drafting legislation prohibiting war crimes was surely not to leave such crimes unpunished, the court looked to the Rome Statute to fill this gap in the national law and avoid the due process problem.¹⁴⁷

In the Katamisi case, where national law was used, the court not only tried Sdt. Alamisi *in absentia* for crimes against humanity for his role in raping ten women, it also tried and convicted various unnamed

¹⁴² See Massaba case, *supra* note 11, at 11–12.

¹⁴³ See Katamisi case, *supra* note 11, at 1–2.

¹⁴⁴ Massaba case, *supra* note 11, at 5–7.

¹⁴⁵ *Id.* at 11.

¹⁴⁶ CODE PÉNAL MILITAIRE, *supra* note 105, art 2; Massaba case, *supra* note 11, at 11; see Rome Statute, *supra* note 1, arts. 23–24. *But see* Schabas, *supra* note 138, at 475–76 (arguing that this is "a mechanical and ultimately exaggerated application of the *nulla poena* principle" due to the effective notice provided by the history of international criminal trials and sentencing at and since Nuremburg).

¹⁴⁷ Massaba case, *supra* note 11, at 11 (describing "une lacune criante"). However, as discussed above, the court did not merely adopt the Rome Statute's penalties as a gap-filling measure, but rather applied the Rome Statute and its rules of procedure and evidence to the case as a whole. *Id.* at 12–17.

codefendants.¹⁴⁸ Trials in absentia raise questions of due process even when the identities of the defendants are known and they are simply not present at the trial. To try and convict unknown, unnamed defendants violates any conceivable notion of the right to a fair trial and defense. The court does not discuss its decision to try the unnamed defendants in absentia in the judgment, so it is not clear whether trials in absentia, of known or unknown defendants, are permissible under national law or are merely a vagary of this court's procedure in this case. Regardless, the Rome Statute does not permit trials in absentia, and so the use of the international standard in this case would have precluded such a gross due process violation.¹⁴⁹

c. *Protections for Victims*

The Rome Statute offers extensive protections for victims and witnesses, including a Victims and Witnesses Unit tasked with undertaking protective measures and security arrangements.¹⁵⁰ The Statute calls for particular attention to victim protection in cases of sexual assault, such as use of in camera proceedings or alternative ways of presenting evidence as appropriate.¹⁵¹

In both the Massaba and Ngoy cases, the judgments refer to the protections the Rome Statute offers for victims and witnesses as an advantage of the Statute over national law.¹⁵² In particular, the Ngoy court followed the Rome Statute's procedures in holding in camera sessions to take testimony from rape victims.¹⁵³ Furthermore, the court's attitude toward the victims' testimony is strikingly sympathetic: the judgment asserts that the effect of trauma and shame on the victims' testimony must be taken into account and should not be permitted to undermine their veracity.¹⁵⁴ The tendentious arguments put forward by the Ngoy defendants seem to indicate that they expected a more skeptical approach to the victims' testimony from the court.¹⁵⁵ In contrast, in the

¹⁴⁸ Katamisi case, *supra* note 11, at 1–2, 8–9.

¹⁴⁹ Rome Statute, *supra* note 1, art. 63.

¹⁵⁰ *Id.* art. 43(6).

¹⁵¹ *Id.* art. 68(2).

¹⁵² See Ngoy case, *supra* note 11, at 12; Massaba case, *supra* note 11, at 12.

¹⁵³ See Ngoy case, *supra* note 11, at 3; JUNE 2006 MONUC REPORT, *supra* note 91, at 11; G Interview, *supra* note 87.

¹⁵⁴ See Ngoy case, *supra* note 11, at 27–28.

¹⁵⁵ See *id.* at 29–30. In fact, some defendants took their efforts to discredit the victims to the point of absurdity, arguing that a victim's testimony that she had been raped by two of them in succession could not be true because, according to her account, the lower ranked soldier had raped her first. *Id.* In reality, the defendants argued, in such a situation

Katamisi judgment, where national law was used, no mention is made of any protections available for the rape victims, and Congolese law apparently does not provide for in camera hearings or other measures.¹⁵⁶

3. Conclusions Concerning Effects

At least in these limited senses, therefore—focusing solely on these three cases and on the use of the Rome Statute—the introduction of international law seems to have shown both noticeable and positive effects.¹⁵⁷ Although analyzing case law to understand the legal standards set forth may seem like the most ordinary mode of analysis imaginable, in this context it is actually rather startling that the opportunity to do so arises. For, as I outline below, in Section C of this Part, the importation of the Rome Statute into this context, like the other aspects of international influence upon post-conflict justice in the Congo, was neither a simple process nor a foregone conclusion.¹⁵⁸

These cases are, however, merely an illustration of one kind of interaction between international and domestic legal systems. Thus, my focus in this Section on the use of the Rome Statute in these cases also stands in temporarily for a whole range of other effects that are less marked and thus more difficult to enumerate and dissect. Accordingly, having grounded my analysis in this relatively tangible issue, in the Sections that follow, I expand out from this example to consider

the higher ranked soldier would never have deferred to his subordinate but would have pulled rank to rape the woman first—betraying a rather self-incriminating certainty of the protocol of rape. *See id.* As one would expect, the court rejected this argument with indignation. *See id.*

¹⁵⁶ *See* JUNE 2006 MONUC REPORT, *supra* note 91, at 11. *See generally* Katamisi case, *supra* note 11.

¹⁵⁷ *See* JUNE 2006 MONUC REPORT, *supra* note 91, at 11 (identifying similar effects).

¹⁵⁸ Indeed, from the few subsequent judgments I have been able to obtain, there appears to be an ongoing disparity within the DRC between the military courts in Ituri (where there has been a great deal of international involvement in post-conflict justice and where the courts appear to apply the Rome Statute as a matter of course in appropriate cases) and those in other regions (where there has been far less involvement and where the courts may or may not do so in any given case). *Compare* Auditeur Militaire v. Mulombo, No. RP 101/2006, RMP No 545/PEN/2006, slip op. at 40–41, Tribunal Militaire de Garnison [Military Garrison Court] Ituri, Feb. 19, 2007 (Dem. Rep. Congo) [hereinafter Mulombo case] (using the Rome Statute), *with* Auditeur Militaire Supérieur v. Ilunga, Arrêt R.P. no. 010/2006, slip op. at 3, 15, Cour Militaire [Military Court] Katanga, June 28, 2007 (Dem. Rep. Congo) [hereinafter Ilunga case] (failing to make clear whether the court is applying international or national law), *with* Auditeur Militaire Supérieur v. Ekembe, Arrêt R.P. no. 011/2006, R.M.P. no. 0086/06/MW, slip op. at 2–3, Cour Militaire [Military Court] Katanga, April 25, 2007 (Dem. Rep. Congo) [hereinafter Ekembe case] (applying national law).

the work of international and national actors in the Congo on atrocity trials and post-conflict justice generally.

C. *Mechanisms of Influence*

Four major theories of international law—transnational legal process, transgovernmentalism, legal pluralism, and policy-oriented jurisprudence—provide frameworks for analyzing interactions between international and national institutions. Although these four theories vary substantially in their particulars and in their normative claims, they share certain commonalities that can be taken as fundamental. They reject formalist and positivist frameworks of international law and instead call upon us to look at a broader set of actions and actors for lawmaking behavior. They also press us to consider that the production of law may not be a straight line endeavor from legislation to enforcement but, rather, may develop over time in a more dynamic and decentralized fashion. In so doing, these theories urge us to a relatively thick description of the process of interaction between international and national participants as a means of understanding the normative function of this process. These insights are fundamental to the analysis in this Section.¹⁵⁹

Here, in the simplest sense, a national court system has voluntarily adopted an international standard and deployed that standard in particular cases brought before it. By what process did this happen? What were the conduits of influence that proved to be effective in this situation? The answers to these questions complicate this simple summary statement considerably.

The DRC is exactly the sort of state that commentators expected would adamantly resist participating in the Rome Statute treaty regime, precisely because it is rife with the kinds of atrocities that the Rome Statute is intended to prevent and punish.¹⁶⁰ Contrary to all expectations, the DRC was not only one of the early states to ratify the ICC's Rome Statute, but it also self-referred the situation within its

¹⁵⁹ See 1 HAROLD D. LASSWELL & MYRES S. MCDUGAL, JURISPRUDENCE FOR A FREE SOCIETY 3–32 (1992) (policy-oriented jurisprudence); Berman, *supra* note 18, at 1159–64, 1168 (legal pluralism); Koh, *supra* note 16, at 184 (transnational legal process); Reisman et al., *supra* note 17, at 577–80 (policy-oriented jurisprudence); Anne-Marie Slaughter, *The Real New World Order*, 76 FOREIGN AFF. 183, 185 (1997) (transgovernmentalism).

¹⁶⁰ See, e.g., Goldsmith, *supra* note 2, at 92; Ratner, *supra* note 55, at 449, 452 (acknowledging the DRC as an exceptional ratification, but predicting that it would not turn over defendants to the ICC).

borders to the ICC for investigation and cooperated in turning over the ICC's first defendant to the court.¹⁶¹

Now, again contrary to expectations, the DRC has become an early adopter of the Rome Statute domestically as well. Here, as in the past, the Congolese courts' unanticipated, voluntary adoption of the Rome Statute as the rule of decision in some domestic cases requires us to rethink our assumptions about how international law is drawn into domestic contexts. As with the DRC's ratification and self-referral, the forces that influenced the courts to undertake these trials and to apply the Rome Statute have taken a different course than commentators predicted.

Observers expected the risk of prosecution to serve as a direct incentive to states to investigate and prosecute perpetrators in order to avoid having the ICC assert its jurisdiction.¹⁶² Although the existence of the ICC and its investigations in the Congo seem to have sparked greater awareness of and interest in war crimes prosecutions in general, the Congolese courts do not seem to be responding directly to the possibility that the ICC would indict these defendants in undertaking prosecutions themselves.

Additionally, although those promoting national implementation of the Rome Statute have pressed for legislatures to pass implementing legislation as the mechanism by which the Rome Statute will have national effect,¹⁶³ in the DRC, this development comes directly from the courts. The military courts have adopted the Statute without the benefit of implementing legislation—which is still in draft form—and in lieu of competing national law also defining these crimes.

Furthermore, one of the most fundamental conduits for the development of international law—the use of case law, commentaries, and other sources developing legal rules and analysis from the relevant treaties—appears to have been virtually irrelevant. Neither of the courts applying the Rome Statute makes extensive use of these sources in its analysis.

¹⁶¹ See ICC April 2004 Press Release, *supra* note 60; Press Release, MONUC, Congolese National Arrested for War Crimes in First Transfer to UN-Backed Court (Mar. 18, 2006), available at <http://www.monuc.org/news.aspx?newsID=10350>; Coal. for the ICC, States Parties to the Rome Statute of the ICC (July 18, 2008), available at http://www.iccnw.org/documents/RatificationsbyUNGroupp_18_July_08.pdf; ICC, Democratic Republic of the Congo (African States), <http://www.icc-cpi.int/asp/statesparties/country&id=5.html> (last visited Sept. 27, 2008).

¹⁶² See Rome Statute, *supra* note 1, art. 17 (requiring the prosecutor to defer to genuine state investigations and prosecutions).

¹⁶³ See Bekou & Shah, *supra* note 127, at 505–07.

Finally, rather than being compelled by the legislature or the ICC to apply the Statute, these courts seem to have been influenced by the involvement of MONUC in investigating and pressing for prosecution of these crimes, as well as by the work of NGOs and others. In particular, the dynamics of these investigations and prosecutions and the pattern of use of the Rome Statute and international law in court judgments suggest the influence of transnational networks. These networks of international, foreign, national, and local actors not only advocate for trials in general and for these trials in particular, they also actively deliver information to the national courts that are trying cases.

In this Section, I provide a fairly detailed account of the roles of four different players in the DRC domestic trials: the DRC legislature, the jurisprudence of international courts, the International Criminal Court, and networks of international organizations, NGOs, embassies and others. What emerges is that the incorporation of the Rome Statute in the cases described above is not an isolated importation of international law by the domestic system. Rather, this development is embedded in multiple, overlapping international-national interactions aimed at the more far-reaching goal of promoting post-conflict justice by rebuilding the national justice system.

1. Legislature

Perhaps the most typical, and certainly the most straightforward way by which the standards enumerated in the Rome Statute might come to be deployed by a national court would be for the national legislature to ratify the Statute and then to pass implementing legislation that the courts would then apply as national law.¹⁶⁴ This did not happen in the Congo. Instead, after the DRC ratified the Rome Statute, it did two contradictory things: it began developing and publicly floating implementing legislation that is to this day still in draft form,¹⁶⁵ and it amended the national law on the same subjects to include provisions, including definitions of the relevant crimes, that are

¹⁶⁴ Even in monist states, implementing legislation is required for treaties that are considered non-self-executing. Monist states such as Belgium have enacted implementing legislation concerning the relevant provisions of the Rome Statute. *See* 10 février 1999 Loi relative à la répression des violations graves de droit international humanitaire, M.B. 23 mars 1999, p. 9286 (Belg.).

¹⁶⁵ AVANT PROJET DE LOI, *supra* note 112, at 2; Bekou & Shah, *supra* note 127, at 509–11.

not the same as those in the Rome Statute.¹⁶⁶ In practice, this has created a condition of legal pluralism in the DRC, in which jurists must choose whether to apply the provisions in the Code Pénal Militaire or those in the Rome Statute, with some choosing the one and some choosing the other.¹⁶⁷ The choice of the Rome Statute is not clearly correct when analyzed in the context of the choices made by other states parties in implementing the Statute. Nonetheless, as discussed below, it does have one important and, in my view, positive consequence: it tends to promote greater implementation of the treaty in situations like the Congo's in which it can be put to effective use.

One might reasonably ask whether the dual approach to this question in the DRC is true pluralism or mere error. After all, states typically have rules defining which of various legal enactments shall take precedence in the event that they conflict. Here, the answer is not entirely clear. The DRC, like many civil law countries, is monist, and its constitution provides that treaties take precedence over ordinary laws.¹⁶⁸ It would seem to be easy enough, then, to conclude that the Rome Statute's provisions are directly applicable within the DRC and must take precedence over the subsequently enacted Code de Justice Militaire. The courts adopting the Rome Statute here cite to this constitutional provision in support of their decisions.¹⁶⁹

In so doing, however, the Congolese courts stand at odds with the other states parties to the Statute, as well as the conclusions of scholars

¹⁶⁶ Compare, for example, the provisions on crimes against humanity of the CODE DE JUSTICE MILITAIRE, *supra* note 105, arts. 165–72, with those of the Rome Statute, *supra* note 1, art. 7.

¹⁶⁷ Compare Massaba case, *supra* note 11, at 10–12, with Katamisi case, *supra* note 11, at 8. At least those who are aware of the pluralism must choose. The decision in the Katamisi case gives no indication whether the judge considered applying the Rome Statute. See Katamisi case, *supra* note 11, at 8. In light of the practical difficulties of disseminating legal information discussed below, it is certainly possible that some judges are not aware of the relevance of the provisions of the Rome Statute. See *infra* note 186 and accompanying text.

¹⁶⁸ CONSTITUTION DE LA RÉPUBLIQUE DÉMOCRATIQUE DU CONGO art. 215.

¹⁶⁹ Ngoy case, *supra* note 11, at 12; Massaba case, *supra* note 11, at 11–12. The DRC Constitution does not contain a last in time rule; thus, treaties appear to trump even subsequent domestic legislation. See CONSTITUTION DE LA RÉPUBLIQUE DÉMOCRATIQUE DU CONGO art. 215; cf. Note, *Conflicts Between Treaties and Subsequently Enacted Laws in Belgium: Etat Belge v. S.A. "Fromagerie Franco-Suisse Le Ski,"* 72 MICH. L. REV. 118, 126–27 (1973) (stating that Belgian law accords treaties “having direct effect within the domestic legal order” precedence over subsequently enacted legislation but applies a last in time rule to other treaties). The prevailing opinion in the domestic legal community seems to be that it is self-evident that the Rome Statute's provisions should trump the subsequent domestic codes. See, e.g., Interview with Alpha Fall, Senior Assoc., Int'l Ctr. for Transitional Justice, in Kinshasa, Dem. Rep. Congo (June 28, 2006) [hereinafter Fall Interview] (notes on file with author).

who have considered the subject. States parties and commentators alike have uniformly understood the Rome Statute to be non-self-executing, at least with regard to its definitions of crimes and related provisions.¹⁷⁰ Indeed, by ratifying the Rome Statute, states parties do not expressly take on the obligation to adopt and enforce its norms, but only to cooperate with the ICC.¹⁷¹ As noted in a scholarly discussion of Belgium's rule on non-self-executing criminal treaties, this is particularly important in the criminal law context in light of the *nullem crimen, nullem poena sine lege* principle.¹⁷² As such, one would expect the DRC to follow the practice followed by Belgium and other monist countries concerning non-self-executing treaties and to find the Rome Statute unenforceable domestically absent implementing legislation.

Furthermore, if the treaty is self-executing and trumps subsequent domestic legislation, then it is difficult to imagine what the DRC legislature could accomplish by proposing implementing legislation that includes provisions concerning the definitions of crimes and related issues. If the Rome Statute is self-executing, then to the extent that this legislation duplicates those provisions, it is redundant, and to the extent that it diverges from them, it is ineffective.¹⁷³

In light of these countervailing considerations, it may seem that the Congolese courts have no support for their position. It is true that the Congolese courts' approach does appear to put them in a worldwide minority of one. Nonetheless, if we take the constitutional provision at face value and presume that the DRC is simply at the extreme among monist countries in treating all international treaties as self-executing, then the courts' decisions were correct as a matter of domestic constitutional law.¹⁷⁴ Furthermore, as a matter of international

¹⁷⁰ See, e.g., CRIMINAL LAW SECTION, COMMONWEALTH EXPERT GROUP, REPORT OF THE COMMONWEALTH EXPERT GROUP ON IMPLEMENTING LEGISLATION FOR THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT ¶ 3 (2004), available at http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/%7BF3BC7D68-4922-4B35-A14E-ED26AEC86F5%7D_FINAL%20REPORT-%20london%20ICC.pdf; Marco Roscini, *Great Expectations: The Implementation of the Rome Statute in Italy*, 5 J. INT'L CRIM. JUSTICE 493, 494 (2007); Turner, *supra* note 2, at 8.

¹⁷¹ Rome Statute, *supra* note 1, art. 86.

¹⁷² Damien Vandermeersch, *Droit Belge*, in JURIDICTIONS NATIONALES ET CRIMES INTERNATIONAUX 69, 70 (Antonio Cassese & Mirielle Delmas-Marty eds., 2002); see also Roscini, *supra* note 170, at 494.

¹⁷³ Of course, implementing legislation would serve the purpose of providing procedures for carrying out the state's cooperation obligations. However, the draft legislation also defines the crimes of genocide, war crimes, and crimes against humanity. AVANT PROJET DE LOI, *supra* note 112, at 16–24.

¹⁷⁴ See CONSTITUTION DE LA RÉPUBLIQUE DÉMOCRATIQUE DU CONGO art. 215; Ngoy case, *supra* note 11, at 12; Massaba case, *supra* note 11, at 11.

law, it is hardly inappropriate for a state party's courts to voluntarily deploy the Statute, even if they are not required to do so. At a minimum, domestic use of the Rome Statute should promote its object and purpose of providing redress for atrocities. Also, because the courts in question applied not only the Rome Statute itself, but also the ICC's Rules of Procedure and Evidence (thus providing considerable specificity) and because they have applied the Statute only to acts over which the ICC itself would have jurisdiction if the domestic courts did not prosecute (thus avoiding retrospective application of new criminal rules and penalties), the *nullem crimen, nullem poena sine lege* concerns mentioned above are substantially mitigated here.¹⁷⁵

In the end, irrespective of the correctness of their decisions as a matter of international or national law, the DRC courts have in fact treated the Rome Statute as self-executing and applied it as the rule of decision in these cases. The effect has been to leapfrog the legislature's dilly-dallying over its implementing legislation and to internalize the international rule without modifications.

These are no small matters when considered in the context of the theory and realities of importing international law into domestic contexts. By applying the Rome Statute directly without waiting for implementing legislation, the Congolese courts have demonstrated the possibility of extending the ICC's range of influence to states that have ratified but not implemented the treaty. This is particularly significant for African states: a 2006 study found that although forty-two of the fifty African states had either signed or ratified the treaty, only South Africa had passed implementing legislation.¹⁷⁶ In some states, of course, this delay may be the result of substantive concerns; however, particularly in transitional states like the DRC, where government institutions are functioning only sporadically, it may simply reflect the legislature's failure to act effectively.¹⁷⁷

2. Jurisprudence

Another familiar mechanism through which international law is transmitted is through the authoritative or persuasive interpretation of provisions of international law in cases and commentaries. Accordingly, one of the expectations for international courts has been that they

¹⁷⁵ Ngoy case, *supra* note 11, at 26–28; Massaba case, *supra* note 11, at 12; see Vandermeersch, *supra* note 172, at 70.

¹⁷⁶ Bekou & Shah, *supra* note 127, at 501.

¹⁷⁷ *Id.* at 501–05.

would develop influential rules and standards through their case law.¹⁷⁸ Here, however, the Massaba and Ngoy courts relied primarily on the text of the Rome Statute itself, analyzing it directly rather than considering international case law or commentaries. The Massaba court did not refer at all to prior rulings by the ad hoc international tribunals on the issues raised, nor did it consider any of the numerous articles and books commenting on the ad hoc tribunals and the International Criminal Court, nor the *travaux préparatoires* of the Rome Statute. Apart from the Rome Statute itself, it makes use only of some general international law treatises predating the Statute.¹⁷⁹ The Ngoy court also engaged primarily in direct analysis.¹⁸⁰ Unlike the Massaba court judgment, the Ngoy judgment referred to some other sources, including a Congolese treatise concerning the Rome Statute and a single case from the ad hoc International Criminal Tribunal for Rwanda.¹⁸¹

The materials considered by the courts in their deliberations may well have been determined by what is available, not by what might be most useful or relevant.¹⁸² It is perhaps not a coincidence that MONUC provided support for the Ngoy trial; such support has included briefings on relevant legal issues and provision of international legal materials.¹⁸³ This conclusion is also supported by a pattern in a few subsequent judgments of repeated citation of certain international cases in the Ituri courts, where MONUC and the EU have invested enormous resources.¹⁸⁴ In contrast, the courts in Katanga and other regions without such international support do not typically cite international cases, if they use international law at all.¹⁸⁵

Indeed, without such assistance, it is difficult to obtain case law and other current international and foreign legal resources within the

¹⁷⁸ See Turner, *supra* note 2, at 16.

¹⁷⁹ Massaba case, *supra* note 11, at 9–10, 12–16.

¹⁸⁰ See Ngoy case, *supra* note 11, at 26–27.

¹⁸¹ Ngoy case, *supra* note 11, at 34. The Ngoy court cites the Akayesu case only once for the definition of a widespread or systematic attack but does no further analysis and makes no other references to this case or any other international jurisprudence, leaving this citation as a curious one-off. See *id.*

¹⁸² See Massaba case, *supra* note 11, at 13 (citing PIETRO VERRI, *DICTIONARY OF THE INTERNATIONAL LAW OF ARMED CONFLICT* (1988)).

¹⁸³ JUNE 2006 MONUC REPORT, *supra* note 91, at 18; F Interview, *supra* note 94; G Interview, *supra* note 87; E-mail from Anonymous G to Elena Baylis [author] (Feb. 18, 2008) [hereinafter Feb. 18 E-mail] (on file with author).

¹⁸⁴ See, e.g., Auditeur Militaire v. Kahwa, No. RP 039/2006, RMP 227/PEN/2006, slip op. at 26–27, Tribunal Militaire de Garnison [Military Garrison Court] Ituri, Aug. 2, 2006 (Dem. Rep. Congo) [hereinafter Kahwa case] (containing citations to international cases).

¹⁸⁵ See generally Ilunga case, *supra* note 158 (lacking citations to international cases).

DRC.¹⁸⁶ Cases, laws, treatises, and other legal materials are not often published domestically or imported from abroad. Legal research can resemble detective work, requiring the researcher to hunt down leads on where copies of judgments or laws might be found. Even in Kinshasa, where Internet service is widely available, it is unreliable and slow, and there is a dearth of legal materials in print as well. In a study sponsored by the United Nations Development Programme (“UNDP”), the judges of the DRC Supreme Court said that the difficulty of obtaining copies of laws and judgments posed a significant problem for them—all the more so for trial judges in isolated Ituri and Mbandaka.¹⁸⁷

It would be easy to lightly dismiss this as a pragmatic question of implementation, but to do so would be a mistake. This problem brings into focus one of the crucial factors determining how international courts can influence domestic trials: the conduits available for them to do so. Simply put, for the ICC to influence other tribunals through its jurisprudence, that jurisprudence must be made available to these other courts. Because many post-conflict states have similar resource and infrastructure problems to those described here, it is not sufficient solely to publish opinions in print or on the Internet.¹⁸⁸ These mechanisms are simply not effective in states where print and Internet media are not readily accessible. Rather, to ensure that any such materials are available to courts in the DRC and similarly situated countries, it is necessary to obtain them outside the state in question and provide them directly to the involved judges and attorneys, as the networks described below have done.¹⁸⁹

¹⁸⁶ During my field research in Kinshasa, I found it difficult to obtain copies even of Congolese laws, much less foreign legal materials. When I went to the office in Kinshasa that prints and sells the DRC laws and codes to obtain the laws cited in this Article, the personnel there were able to provide only one: the ratification of the Rome Statute. The others I had to obtain through foreign sources. For discussion of my research methods generally, see *supra* note 79.

¹⁸⁷ Interview with Fred Robarts, Gestionnaire du Projet Renforcement des Capacités de Règlement des Contentieux Electoraux, UNDP, in Kinshasa, Dem. Rep. Congo (July 5, 2006) [hereinafter Robarts Interview].

¹⁸⁸ In my experience, for example, Ethiopia, Kosovo, and Sierra Leone each suffer from similar problems at varying levels. See Widner, *supra* note 13, at 74, for additional information.

¹⁸⁹ This problem extends to all manner of logistics and can have a real effect on the course of justice and legal reform. For example, when Global Rights was advocating legislation against sexual violence, it hit a roadblock: there was no printer ink available at the legislature to print the proposed legislation for the parliamentarians. Global Rights supplied a print cartridge, and the law was eventually passed. LaRoche Interview, *supra* note 91.

3. International Criminal Court

In their visions of how the International Criminal Court might promote greater justice for atrocities, both William Burke-White and Jenia Turner call for the ICC itself to be involved in domestic trials to some extent.¹⁹⁰ This would be a major shift in direction for the Court. The ICC has not thus far played a direct role in the national trials in the Congo, nor does it seem to have interacted with domestic institutions or systems in any significant way. Accordingly, the ICC's influence has been limited to setting some of the foundational but ultimately background political and legal circumstances against which these trials have taken place.

Here, it is important to distinguish between the International Criminal Court as an institution and participation in the Rome Statute treaty regime. Of course, the DRC's ratification of the Rome Statute laid the legal groundwork for the Congolese courts to apply the Statute directly in these cases. Its participation in the treaty regime was thus a prerequisite (albeit an insufficient one) for the direct application of the Statute in domestic law. The substance of the legal rules provided by the Rome Statute is, of course, at the heart of the effects on the Massaba and Ngoy judgments described above. As a treaty, therefore, the Rome Statute had an enormous effect upon these cases.

However, the ICC as an institution has not had the impact within the DRC that supporters anticipated, either in kind or in degree. In particular, it seems to have had only a general awareness-raising effect and perhaps some political effect within the country. It does not seem to have had any direct influence upon military prosecutors' decisions to bring particular charges against particular defendants or upon the Congolese courts' decision to make use of the Rome Statute in some of those cases.

The ICC has made an effort to publicize its work in the DRC, and certainly the Kinshasa international and domestic legal communities, at least, are well aware of the ICC's prosecutions. It is worth noting that the results of this awareness-raising have not been entirely positive in nature, as public dissatisfaction with the ICC efforts seemed to be high, from what I could gather as a firsthand observer. This is due not only to the slowness with which the prosecutions have developed but also the selectivity in defendants and in the charges against them, which are perceived to be the result of political interference.¹⁹¹ None-

¹⁹⁰ See Burke-White, *supra* note 2, at 56–58; Turner, *supra* note 2, at 30–35.

¹⁹¹ Madidi Interview, *supra* note 56.

theless, it can be said that the existence of the ICC, the process of ratifying the Rome Statute and drafting implementing legislation, and the investigations and cases the ICC is now pursuing all seem to have raised public consciousness of the issue of prosecuting international crimes in the DRC.¹⁹²

William Burke-White has argued that this awareness has had fairly wide-ranging effects on a political level. To some extent this may be true. In other respects, however, increased consciousness of the ICC and the crimes it prosecutes has had no apparent effect: for example, awareness of the ICC does not seem to have deterred the atrocities that rage on even now.¹⁹³ If all that the ICC has accomplished is to ratchet down the level of political opposition to holding atrocity trials by several notches, enough to enable trials at least of some defendants whose prosecution does not pose any threat to or hold any interest for those in power, this is a significant contribution. It is not, however, the sort of central role that supporters have sought for the court.

The primary role that the ICC was expected to play in post-conflict states parties was to spur domestic prosecution of known perpetrators to avoid the perceived loss of face and sovereignty costs of having the ICC pursue those prosecutions internationally.¹⁹⁴ Contrary to predictions, however, the threat of ICC prosecution does not appear to have played any direct role in spurring these or other domestic prosecutions in the DRC. In particular, the military prosecutors do not appear to have brought domestic cases in order to shield the defendants from international prosecution under the Rome Statute's complementarity provisions. These defendants are all low level perpetrators like many thousands of others, and thus are not of interest to the ICC.¹⁹⁵ There is also no evidence that Congolese authorities have made any effort to make use of the complementarity provisions to shield more senior suspects like Lubanga, who are of concern to the ICC.

¹⁹² At a minimum, everyone with whom I spoke was aware of the ICC and the Lubanga case. See, e.g., Fall Interview, *supra* note 169.

¹⁹³ See Burke-White, *Complementarity*, *supra* note 62, at 587; Jeffrey Gettleman, *Rape Epidemic Raises Trauma of Congo War*, N.Y. TIMES, Oct. 7, 2007, at A1.

¹⁹⁴ See Burke-White, *supra* note 2, at 69.

¹⁹⁵ See Ngoy case, *supra* note 11, at 1; Massaba case, *supra* note 11, at 1, 6. Indeed, one criticism of the domestic prosecutions has been that they have only involved low level perpetrators rather than more senior suspects who have also been identified but have not been arrested. As many suspects have easily evaded arrest or been cleared of charges under suspicious circumstances, the commonly held belief is that only those low enough in the local hierarchy to be unable to protect themselves will be tried. See MONUC, Monthly Human Rights Assessment: April 2007 ¶¶ 66–75 (May 17, 2007), <http://www.monuc.org/News.aspx?newsID=14592> [hereinafter MONUC April 2007 Assessment].

Nor has the ICC as an institution involved itself in promoting or supporting domestic cases in the DRC. Instead, the ICC has been involved in its own investigations in the Congo and in outreach activities intended to publicize its work, but not in supporting or participating in domestic efforts at achieving justice.¹⁹⁶ The ICC's reports on its activities describe investigations for the Lubanga case and for additional cases to be heard in the ICC itself. They also describe outreach aimed at informing the Congolese population about the Lubanga proceedings and educating it about the court and its procedures generally. Some of this outreach has been directed at the Congolese legal community, but it has been targeted at informing this audience about the ICC rather than at providing training on the relevant law, assistance with domestic cases, or capacity-building of domestic institutions.¹⁹⁷

Instead of playing a central role in domestic efforts at post-conflict justice, the ICC's contributions are dwarfed by those of others working actively to build up the domestic legal system and support domestic cases within the Congo. Unlike the other institutions and actors whose work is described below, the ICC does not seem to have had any direct influence either on the decisions to bring these particular cases or on the domestic courts' decision to make use of international law in them.

Unlike Burke-White and Turner, I am not convinced that this is something to be decried. To the contrary, I am skeptical that a vast reallocation of the ICC's resources from its own investigations and trials to support for national trials and interaction with national or hybrid tribunals is either possible or wise. Of course, both the ICC and national courts would likely benefit from some interchange. It would be a positive step, for example, for the ICC to take steps to channel its future jurisprudence to domestic judges working on similar cases. But it may well be best for the ICC to focus its energies on what its institutional structure and mandate suggest that it should do: investigating and trying cases and producing judgments and legal opinions.¹⁹⁸ It can thereby serve the useful if unglamorous purposes

¹⁹⁶ See 2007 ICC Report, *supra* note 74, at 4–7.

¹⁹⁷ See *id.* at 6–7; see also *Outreach: Engaging Communities*, NEWSLETTER (ICC), Nov. 2006, at 5, available at http://www.icc-cpi.int/library/about/newsletter/files/ICC-NL6-200511_En.pdf. This description is based on a complete review of the ICC's newsletters and reports to the Assembly of States Parties as of November 1, 2007, which are too numerous to cite here. The cited documents are examples of those surveyed. In addition, the ICC's Public Information Officer in Kinshasa confirmed that the ICC's activities in the DRC had been limited to its own investigations and public outreach and education. Madidi Interview, *supra* note 56.

¹⁹⁸ See generally Rome Statute, *supra* note 1.

of serving as a backstop against the risk of total impunity for all atrocities and providing reputational and political incentives for domestic actors to get out of the way of at least some national atrocity trials. It is true that this will limit the ICC's institutional role in post-conflict settings like the DRC, but that is not, in my view, inappropriate.

For limiting the ICC's institutional role in post-conflict states is not synonymous with limiting the international community's investment and involvement in those states. Courts do not have an exclusive claim on expertise in the activities and systems that are necessary to bring justice for atrocities, nor are court personnel or bureaucracies necessarily best suited to convey such expertise. Indeed, as discussed below, not only are court-to-court relationships not the only international-national interactions that can promote the cause of justice in post-conflict settings like the DRC, but other liaisons may in fact be better at doing so. Due to the structural, bureaucratic, and other institutional limits on the kinds of activities the ICC can hope to take on, the goals of post-conflict justice may best be served if the ICC focuses on the more limited role that is its core function and relies on other international actors to support national courts.

4. Networks of International Organizations, NGOs, and Others

Instead of the International Criminal Court, the legislature, or the jurisprudence of international courts, what seems to have played the most influential role in the development of these cases and the use of the Rome Statute within them is formal and informal networking by international and domestic actors. Some of this activity has been directly related to the trials in question, and some has indirectly shaped the domestic legal environment. The situation here demonstrates several of the themes common to theories of transnational legal interactions such as transnational legal process, global governance, policy-oriented jurisprudence, and legal pluralism: (1) that the actors who influence the legal process will be not only those directly involved in trials, but also other institutions and individuals, at both international and domestic levels, governmental and nongovernmental; (2) that they will interact not only within the formal legal process but also informally, through institutions, and through networks; and (3) that their involvement will be iterative as well as singular.¹⁹⁹

¹⁹⁹ LASSWELL & MCDUGAL, *supra* note 159, at 141–60 (policy-oriented jurisprudence); Berman, *supra* note 18, 1164–68 (global legal pluralism); Koh, *supra* note 16, at

A central player in these networks has been MONUC's Human Rights Division ("HRD"), which has been intimately involved in the investigation and prosecution of international crimes in the DRC, including, among others, the Ngoy case.²⁰⁰ In language reminiscent of the hyperbole of ICC supporters, MONUC's website asserts that its HRD "is to put an end to impunity and to ensure that those responsible for serious violations of human rights and international humanitarian law are brought to justice."²⁰¹

Although these goals are undoubtedly too lofty, there is no doubt that MONUC has played a substantial role both in moving these cases to trial and in promoting the use of international law within them. In 2002, the HRD organized a Special Investigations Unit that investigates massive human rights violations.²⁰² This Unit does not simply conduct the general fact-finding, monitoring, and reporting of human rights violations in which the HRD has long been engaged (as well, for that matter, as NGOs like Human Rights Watch).²⁰³ Instead, drawing from the experience of personnel in other post-conflict zones, it engages in "professional data gathering and analysis"²⁰⁴ with the aim of producing evidence that can be used in criminal trials.²⁰⁵ Upon deciding to investigate an incident, the Special Investigations Unit puts together multidisciplinary teams of six to ten people from various MONUC units.²⁰⁶ This team travels to the affected area, conducts a physical investigation, and interviews victims and witnesses, as well as perpetrators when possible.²⁰⁷

For example, in the initial investigation that launched the Special Investigations Unit, the HRD carried out an inquiry into an attack called *Effacer le Tableau* ("erasing the board") that took place in the Ituri

184 (transnational legal process); Reisman et al., *supra* note 17, at 578–80 (policy-oriented jurisprudence); Slaughter, *supra* note 159, at 195–97 (transgovernmentalism).

²⁰⁰ JUNE 2006 MONUC REPORT, *supra* note 91, at 18.

²⁰¹ MONUC, Human Rights: Mandate and Activities, <http://www.monuc.org/news.aspx?newsID=761&menuOpened=Activities> (last visited Sept. 27, 2008).

²⁰² MONUC, Human Rights: Special Investigations Unit, <http://www.monuc.org/news.aspx?newsID=769> (last visited Sept. 27, 2008); *see also* Roberto Ricci, *Human Rights Challenges in the DRC: A View from MONUC's Human Rights Section*, in CHALLENGES OF PEACE IMPLEMENTATION: THE UN MISSION IN THE DEMOCRATIC REPUBLIC OF THE CONGO 97, 99 (Mark Malan & João Gomes Porto eds., 2004).

²⁰³ *See* Ricci, *supra* note 202, at 99.

²⁰⁴ Office of the High Comm'r for Human Rights, HR Component of the UN Peace Mission in Democratic Republic of the Congo, <http://www.unhchr.ch/html/menu2/5/rdc.htm> (last visited Sept. 27, 2008).

²⁰⁵ Ricci, *supra* note 202, at 99; Telephone Interview with Anonymous R (Feb. 14, 2008) [hereinafter R Interview] (contact information and notes on file with author).

²⁰⁶ R Interview, *supra* note 205.

²⁰⁷ *Id.*

town of Mambasa and nearby areas. The Mouvement de Libération du Congo (“MLC”) militia went from house to house systematically, raping women and stealing property from each one, as well as engaging in acts of cannibalism. The investigators spent about two-and-a-half months total over the course of two visits investigating this attack and interviewing victims, witnesses, and perpetrators. At that time, there was no domestic justice system whatsoever in the region, so the HRD preserved the evidence for future use and produced several widely publicized reports. These served as the catalyst for the Security Council’s authorization of additional peacekeepers and an expansion of the UN mandate in Congo—as well as for prosecutions in the court system later on.²⁰⁸

The HRD’s Justice Support Unit picks up at the end of the Special Investigation Unit’s investigations. It lobbies for the arrest and prosecution of suspects and provides “advice and technical assistance to magistrates and other legal personnel involved in bringing these cases to trial,” as well as “[f]acilitation and support to the prosecution investigation.”²⁰⁹ Legal Officers have met with prosecutors and judges, discussed relevant legal issues, and provided them with legal materials, including copies of international treaties. Part of this activity has been advocacy for use of the Rome Statute.²¹⁰

For example, in the Mambasa situation, the HRD opened a field office nearby, and other MONUC officers followed up on the initial investigation. When UN peacekeeping forces arrived and began to stabilize the region, the HRD started pushing for trials. The European Union paid for a prosecutor to come to Ituri from Kinshasa, financing his salary and bringing him in from outside the region in an effort to ensure his impartiality and honesty. MONUC investigators facilitated the work of prosecutors by sharing factual information, meeting jointly with witnesses whom they had already interviewed in their investigation, and providing security for victims and witnesses. For a long while, they worked with the prosecutors on a daily basis.²¹¹

As the Mambasa cases progressed, other needs developed and additional partnerships were created to meet them. For example, both

²⁰⁸ *Id.*; see also *Discussion Notes, Part Two, in CHALLENGES OF PEACE IMPLEMENTATION*, *supra* note 202, at 123, 130–31.

²⁰⁹ MONUC, Human Rights: Justice Support Unit, <http://www.monuc.org/news.aspx?newsID=767> (last visited Sept. 27, 2008); see also DEC. 2005 MONUC REPORT, *supra* note 128, at 15; G Interview, *supra* note 87.

²¹⁰ See JUNE 2006 MONUC REPORT, *supra* note 91, at 11; F Interview, *supra* note 94; G Interview, *supra* note 87; Feb. 18 E-mail, *supra* note 183.

²¹¹ R Interview, *supra* note 205. Information-sharing is, however, limited on a case by case basis for the protection of victims and witnesses. *Id.*

the defendants and the victims needed lawyers, and so the NGO Avocats sans Frontières (“ASF”) found, coordinated, and paid local attorneys to represent both sides. Another UN agency began providing witness protection. As the cases moved toward trial, everything had to be rebuilt from the ground up. The EU repaired the courtroom, while an NGO repaired the prisons. The judges were paid by the EU but lived inside the MONUC military camp for their protection. All this time, MONUC and others were pressing for arrests and then for prosecutions.²¹²

Notably absent in all of this is any participation by the International Criminal Court. Indeed, although MONUC investigators made a point of getting victims’ and witnesses’ permission to share their statements with the ICC and although they did eventually share some of this information pursuant to a Memorandum of Understanding between MONUC and the ICC, this was a one way street. The ICC did not provide any resources for the investigations or prosecutions nor did it play any other role in the process whatsoever.²¹³

Also notable is that much of this activity has been driven, not by institutional directives or policy, but by individual initiative.²¹⁴ For example, MONUC’s investigations and interactions with the local judiciary are within the scope of MONUC’s mandate and were ultimately endorsed by the Secretary General.²¹⁵ These initiatives, however, were instigated, not top-down by the Office of the High Commissioner for Human Rights or the Security Council, but on the ground by officers in the HRD.²¹⁶ Crucial developments such as the creation of the Special Investigations Unit were catalyzed by the experience of individual MONUC officers in other UN administrations in other post-conflict settings, where similar investigative techniques had been used.²¹⁷ MONUC continued to be actively involved while I was in Kinshasa. Special investigations were ongoing, and human rights officers continued to provide legal support to the trials and to follow the outcomes.²¹⁸

²¹² *Id.*

²¹³ *Id.* In its peacekeeping capacity, MONUC has also agreed to offer support for arrests pursuant to ICC arrest warrants. 2007 ICC Report, *supra* note 74, at 8.

²¹⁴ See R Interview, *supra* note 205.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ F Interview, *supra* note 94; G Interview, *supra* note 87; R Interview, *supra* note 205; E-mail exchange with Anonymous A (Oct. 24–29, 2007) (e-mails on file with author); see also Office of the High Comm’r for Human Rights, *supra* note 204.

Despite the impressive scope of these efforts, however, it is also important to note that they have been consistently dwarfed by the events in question. For example, MONUC's investigations were initially limited solely to the region of Ituri, although this is only one of the active conflict zones, and even later its involvement in other areas of the country was relatively limited. It had no hope of, for example, deploying teams to investigate reports of mass graves because it lacked the necessary personnel and resources.²¹⁹ Nor has MONUC often seen the results it would like even in those areas where it has had resources to deploy. For example, the result of all the effort described in the Mombasa cases above was, in the end, disappointing: although prosecutors had originally expressed willingness to prosecute all identified suspects, in the end only a few people were arrested, and even they escaped from prison.²²⁰ Courts in Ituri, where MONUC and others have invested substantial resources, have continued to prosecute atrocities under the Rome Statute. But even there MONUC has been disappointed to see some key convictions for international crimes overturned on appeal.²²¹

As other investigations and prosecutions have proceeded, the network of NGOs, international organizations, and government and local actors has continued to evolve and expand. The most direct role in the trials has continued to be played by ASF, which has worked with defense attorneys for the defendants in some of these prosecutions.²²² ASF has also continued to work with MONUC on prioritizing trials and providing other assistance for victims and defendants.²²³ The international NGO Global Rights has been organizing a trial monitoring program for these trials as well as others in military and civilian courts.²²⁴ In addition to the activities described above, MONUC's Human Rights Division has provided financial and personnel support for domestic investigations on at least one occasion.²²⁵

The efforts of these networks, however, are not limited to these particular trials. Instead, the networks promote post-conflict justice through broader efforts at redeveloping the legal system, by pushing legislative reform, conducting studies of the current system, and developing capacity-building and gap-filling programs. On the legislative

²¹⁹ *Discussion Notes, Part Two, supra* note 208, at 123, 125, 129.

²²⁰ R interview, *supra* note 205.

²²¹ *E.g.*, Kahwa case, *supra* note 184, at 4.

²²² J Interview, *supra* note 128.

²²³ F Interview, *supra* note 94.

²²⁴ LaRoche Interview, *supra* note 91.

²²⁵ DEC. 2005 MONUC REPORT, *supra* note 128, at 15.

front, for example, Global Rights and the U.S. Agency for International Development (“USAID”) promoted legislation reforming the laws against sexual violence to cover a broader range of sexual attacks, which have been endemic in the conflict. This legislation was passed while I was in Kinshasa in June 2006.²²⁶ Global Rights, with support from USAID, also produced a pioneering study in August 2005 on the problem of violence and impunity in eastern Congo; this study has been widely used as the basis for reform efforts as it is the only comprehensive empirical information available on the courts in that region.²²⁷ The Restoration of the Justice System of Eastern Congo (“RE-JUSCO”) is a major program to address the gaps identified by Global Rights in that study, and USAID and the aid branches of other foreign embassies have been the central partners in this initiative.²²⁸ The NGO RCN Justice & Démocratie (“RCN”) has developed outreach and training programs on post-conflict legal matters, such as the problem of internally displaced persons returning to their land to find that it has been redistributed (legally) by local leaders in their absence.²²⁹ RCN’s programs are also funded primarily by embassies.²³⁰ Similarly, the U.K. Department for International Development (“DFID”), the British equivalent to USAID, funded an ASF program to develop “mobile courts” to travel to rural areas and hear cases. These courts fill some of the gaps created by the dearth of courts in most of the country.²³¹

²²⁶ See CODE PÉNAL, *supra* note 110, arts. 167–74; GLOBAL RIGHTS, UNE LOI SUR LA RÉPRESSION DES VIOLENCES SEXUELLES: DE QUOI S’AGIT-IL? 2 (2006) [hereinafter *UNE LOI*], available at http://www.globalrights.org/site/DocServer/DRC_SexViolencePamphFIN_Eversion.pdf; Interview with Deko Moleka-Bekangba, Program Officer, USAID, in Kinshasa, Dem. Rep. Congo (June 20, 2006) (notes on file with author); see also LaRoche Interview, *supra* note 91 (describing other legal reform projects). See generally GLOBAL RIGHTS, UNE NOUVELLE LÉGISLATION SUR L’INDÉPENDANCE DU POUVOIR JUDICIAIRE: CHEMIN OBLIGÉ POUR L’INSTAURATION DE L’ÉTAT DE DROIT EN RDC (2006), available at http://gr.convio.net/site/DocServer/DRC_Advocacy_Judicial_Guide.pdf (discussing proposed legislation on judicial independence).

²²⁷ See generally *Quelle justice pour les populations vulnérables à l’Est de la RDC?*, SOS JUSTICE (Global Rights, Washington, D.C.), Aug. 2005, available at http://www.globalrights.org/site/PageServer?pagename=www_afr_sosjustice. Global Rights has also instigated a study of traditional justice systems as a first step toward developing programs aimed at these systems. LaRoche Interview, *supra* note 91.

²²⁸ Interview with Pierre Kanika, Ministry of Justice, in Kinshasa, Dem. Rep. Congo, (June 27, 2006) (notes on file with author).

²²⁹ Interview with Aurore Decarnieres & Delphin Bulambo, RCN Justice & Démocratie, in Kinshasa, Dem. Rep. Congo (June 28, 2006) [hereinafter *Decarnieres & Bulambo Interview*] (notes on file with author) (describing other projects).

²³⁰ *Id.*

²³¹ Interview with Oliver Blake, Governance Advisor, Dept. for Int’l Dev., in Kinshasa, Dem. Rep. Congo (June 23, 2006) (notes on file with author) (describing other projects).

Likewise, the HRD's efforts also extend beyond the atrocity trials to other legal reform projects. In response to the interrelated problems of arbitrary arrests and long periods of preventative detention, for example, officers visited more than thirty prisons, produced a report, offered some technical assistance, and urged the lead prosecutor to circulate a memo to all prosecutors instructing them to follow new procedures that would comply with human rights norms. The HRD has also been involved in developing recommendations for reform legislation and in other work on transitional justice issues.²³²

Thus, a vast network of national and international actors is pushing a transitional justice agenda for reform and reconstruction of the judicial system. Atrocity trials are one part of this agenda. MONUC, NGOs, local attorneys and government officials, and the aid branches of foreign embassies have played a variety of roles in these trials and in promoting post-conflict justice more generally. Frequently, they engage in joint action: embassies finance projects that are then carried out by international and national NGOs, which often manage the projects through local partners.

5. Conclusions Concerning Mechanisms

Three relevant conclusions can be drawn from these patterns of activity. On the ground, there is not a sharp division between post-conflict justice and legal reform. Rather, the deployment of the Rome Statute within these cases is embedded in a wide range of justice-related activities. Furthermore, these reform programs are not the work of individual actors in isolation. Instead, embassies, international organizations, and NGOs are forming shifting and overlapping partnerships to address different aspects of post-conflict justice. Finally, the exception to these practices of partnership and broad legal reform is the ICC. It has pursued its own investigations and publicized its own activities rather than joining with other organizations to support domestic efforts at reform and justice.

It is striking that the most obvious and traditional mechanisms by which legal rules are transmitted have proved to be the most feeble in moving the Rome Statute from the international realm to its place in the Massaba, Ngoy, and other atrocity cases. Certainly the DRC legislature instigated the process by bringing the country into the Rome Statute treaty regime, and the ICC set positive background conditions for

²³² F Interview, *supra* note 94.

domestic incorporation with its investigations and prosecutions. Nonetheless, the Statute and its norms would have languished as mere formal rules but for the decisions of domestic judges, facilitated by a network of embassy donors, NGOs, local attorneys, and MONUC.

D. *Crucial Features: Functional Hybrids and Domestic Control*

In the previous Section, I relied on the commonalities between the theories of transnational legal process, transgovernmentalism, legal pluralism, and policy-oriented jurisprudence to ground a relatively thick description of the processes by which networks of international and national actors have promoted post-conflict justice in the Congo. In this Section, I turn to the differences between these theories in an effort to understand the features of these transnational networks that have been crucial to the international-law-incorporating results.

I consider first the contribution that theories of transnational networks, transnational judicial dialogue, and transnational legal process make to our descriptive understanding of the post-conflict justice networks in the DRC. These theories are descriptively useful at varying levels, but they do not help us to identify the crucial characteristics of these networks that make them effective as law-conveying tools. For this purpose, I turn to theories of legal pluralism and policy-oriented jurisprudence, which offer the concepts of hybridity and authority.

Ultimately, I conclude that certain distinctive characteristics of these networks have contributed to the development of what I call “functional hybrids”: hybrid international-national processes that build from the strengths of their international and national components. Furthermore, the fact that control over atrocity trials remains in domestic hands, while controversial for the reasons discussed in Part I on international courts, nonetheless promotes domestic institution-building and the long-term goals of post-conflict justice.

I. Transnational Networks, Dialogues, and Processes

a. *Transnational Network Theory*

Much of the seminal work on transnational networks has concerned transgovernmental networks of national government officials and their foreign counterparts, often in the context of economic regula-

tion.²³³ Recently, scholars have begun to suggest that the sorts of trans-governmental networks that have strengthened domestic capabilities and promoted transnational norm convergence in regulatory and economic contexts might also be useful in the spheres of justice and human rights.²³⁴

At the same time, scholars concerned with international criminal law and international human rights law have identified looser transnational networks operating in these arenas. These networks are not strictly transgovernmental in nature, nor do they consist of domestic officials and their horizontally matched foreign counterparts. Instead, they have wide-ranging members, from state actors to NGOs, international organizations, and domestic attorneys and associations. Rather than being characterized by the development of formal associations and cooperation, these networks interact in a looser, ad hoc fashion. The coalitions promoting the importation of international criminal law norms and the pursuit of domestic trials for violation of those norms in the DRC seem to be another example of such a network.

For example, Margaret McGuinness's description of the role of transnational advocacy networks and what she calls "norm portals" in importing international human rights norms into the U.S. legal system presents some relevant parallels.²³⁵ She describes an ad hoc network of foreign governments, domestic attorneys, and international organizations coalescing around a common substantive issue (abolition of the death penalty); as she explains it, this network was catalyzed by, and pursued its broader policy goals through, individual death penalty cases in the United States.²³⁶ Like the networks at work in the Congo, this network comprises a diverse group of actors brought together by their interest in a particular substantive issue rather than by membership in common associations or by relationships as horizontal counterparts.

Further, McGuinness describes a process of transnational norm transfer that is characterized by a combination of formal and informal

²³³ See, e.g., Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1, 11–12 (2002); Anne-Marie Slaughter, *Global Government Networks, Global Information Agencies, and Disaggregated Democracy*, 24 MICH. J. INT'L L. 1041, 1045 (2003); Slaughter, *supra* note 159, 195–97.

²³⁴ 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, 336 (2006); cf. Hari M. Osofsky & Janet Koven Levit, *The Scale of Networks? Local Climate Change Coalitions*, 8 CHI. J. INT'L L. 409, 414 (2008) (transnational environmental networks).

²³⁵ See Margaret E. McGuinness, *Medellin, Norm Portals, and the Horizontal Integration of International Human Rights*, 82 NOTRE DAME L. REV. 755, 760 (2006).

²³⁶ *Id.* at 808–24.

mechanisms, and in which the primary point of entry into the domestic legal system is a formal, domestic legal mechanism.²³⁷ Similarly, in the Congo, the formal mechanism of ratifying the ICC treaty, together with the state's cooperation with the ICC in the Lubanga investigation, the voluntary work of MONUC investigatory and legal teams, the work of domestic attorneys on individual atrocity cases, and the indirect efforts of NGOs and foreign embassies on justice and impunity generally, all coalesced to enable the adoption of international standards in certain atrocity cases.²³⁸ Here, as in the U.S. cases that McGuinness considers, the immediate mechanism by which this was possible was a treaty that could be invoked in the context of domestic litigation and that provided a legal basis for courts to adopt the international norms in question over competing domestic norms.²³⁹

In addition to her work on the ICC, Jenia Turner has also described nascent international criminal law networks.²⁴⁰ She focuses primarily on transgovernmental networks of investigatory, prosecutorial, and judicial national government counterparts. But while looser transnational networks are not her primary focus, she also describes and advocates the development of networks with vital roles for nongovernmental entities and actors, such as NGOs and the ICC.²⁴¹ Turner is particularly concerned with the potential for joint action networks: networks that “engage [transnational] participants daily in face-to-face joint activities—investigation, adjudication, prosecution—for a sustained period of time.”²⁴² She conceives of hybrid courts as the institutionalization of such a network.²⁴³

Although the networks that Turner describes and advocates are considerably more formal and structured than those at work in the Congo, they share certain important characteristics. In particular, Turner points to the substantial roles played by NGOs and the ICC in facilitating existing transgovernmental international criminal law networks. She also emphasizes the importance of engaging these nongovernmental actors in states where domestic institutions are weak.²⁴⁴ These characteristics are of course particularly salient in places like the

²³⁷ *Id.* at 832–33.

²³⁸ *See supra* notes 164–232 and accompanying text.

²³⁹ *See* McGuinness, *supra* note 235, at 837–39; *see also supra* notes 164–232 and accompanying text.

²⁴⁰ Turner, *supra* note 34, at 986.

²⁴¹ *Id.* at 1000–17.

²⁴² *Id.* at 1017.

²⁴³ *Id.* at 1018.

²⁴⁴ *Id.* at 1000–06.

Congo, where rebuilding domestic institutions is a primary goal of the operating networks.

The networks supporting the Congolese military trials are looser than the joint action networks that Turner identifies. They also seem to have been functioning to some degree consecutively rather than concurrently and with overlapping rather than co-extensive responsibilities.²⁴⁵ Nonetheless, these networks involve members of different organizations in the same general task, relying on close interactions between individuals rather than on impersonal bureaucratic mechanisms for their functioning. Accordingly, they present some opportunities for mutual education and support.

There is another important characteristic of the networks in the Congo that is not mentioned by either Turner or McGuinness in their descriptions of transnational networks: the rapid transfer of personnel and thus of information and skills from one post-conflict setting to another.²⁴⁶ Here, the phenomenon that I call “tribunal-hopping”²⁴⁷ comes into play: UN officers and other UN employees on short-term contracts are moving rapidly from tribunal to tribunal (e.g., from the ICTY, to the ICTR, to the Special Court for Sierra Leone) and from UN administration to UN administration (e.g., from Kosovo to the DRC). With each “hop,” they bring along their experiences of the norms and processes at work in each tribunal and administration and thereby spread this knowledge from one distant location to another.²⁴⁸ A similar phenome-

²⁴⁵ For example, MONUC seems to take the lead in the investigative phase, with some interaction with government investigators, but in the trial phase its role diminishes to a supportive one. At that stage, ASF seems to be the leading nongovernmental actor as it provides assistance to defense attorneys. F Interview, *supra* note 94; G Interview, *supra* note 87; J Interview, *supra* note 128.

²⁴⁶ See generally McGuinness, *supra* note 235; Turner, *supra* note 34.

²⁴⁷ I describe and analyze this phenomenon in greater detail in a forthcoming symposium article. See Elena Baylis, *Tribunal-Hopping with the Post-Conflict Justice Junkies*, 10 OR. REV. INT'L L. 361 (2008).

²⁴⁸ See *id.* I observed this phenomenon while in Kosovo in 2004 and 2005, in Sierra Leone in 2005, and in the DRC in 2006. My observations about the rapid turnover at these missions and the short duration of appointments are confirmed by the UN's recruitment policies and practices and by a UN audit indicating high staff turnover in special peacekeeping missions and financial and career advancement incentives for quick movement between special peacekeeping posts. See The Secretary-General, *Follow-up Audit of the Policies and Procedures of the Department of Peacekeeping Operations for Recruiting International Civilian Staff for Field Missions*, ¶ 11, delivered to the General Assembly, U.N. Doc. A/59/152 (July 15, 2004); The Secretary-General, *Report of the Office of Internal Oversight Services on the Audit of the Policies and Procedures of the Department of Peacekeeping Operations for Recruiting International Civilian Staff for Field Missions*, ¶ 2, at 45–46, delivered to the General Assembly, U.N. Doc. A/56/202 (July 20, 2002). Official sources indicate initial contracts of six months; one unofficial estimate was of movement roughly every one and a half to three years, depending on the opportunities available

non occurs in other foreign service institutions, including USAID, DFID, and their counterparts, as well as in NGOs.²⁴⁹ As a consequence, the “lessons learned” of one post-conflict setting move quickly to the next, and people within the networks maintain personal contacts from one post to the next, facilitating the networks’ effective functioning.²⁵⁰ Of course, not all the consequences of this rapid movement of personnel are positive: it is difficult to acquire sufficient local knowledge to operate effectively during the short durations of these postings.

The transnational networks that Turner and McGuinness have studied are of course not identical to those at work in the Congo; in particular, they do not seem to share this crucial characteristic of rapid movement of personnel. Nonetheless, their descriptions of transnational networks driven by individual interactions and harnessed to achieve a particular goal capture certain core characteristics of the coalitions promoting post-conflict justice in the Congo.

b. *Transnational Judicial Dialogue*

Transnational judicial dialogue, as the name suggests, describes national and international judges engaging in a dialogue concerning legal norms that is more mutual and interactive than the paradigm of national courts simply importing international law in the cases before them.²⁵¹ Thus, national judges are said to take part in a “much more diverse and messy process of judicial interaction across, above and below borders, exchanging ideas and cooperating in cases involving national as much as international law” through direct and indirect interchanges.²⁵²

In this respect, the Congolese courts’ interface with international law resembles the traditional model. As discussed above, the Congolese courts are almost absolutely isolated from their international and for-

elsewhere. See, e.g., UN Peace Operations Recruitment Centre, Information Sheet, <https://jobs.un.org/Galaxy/Release3/VacancyFM/RecruitmentInfo.html> (last visited Sept. 27, 2008); see also R Interview, *supra* note 205.

²⁴⁹ U.S. foreign service officers, for example, are assigned to one- to two-year posts in conflict and post-conflict settings, with a maximum three-year stay. E-mail from Tracy Naber, Foreign Svc. Officer, U.S. State Dept. to Elena Baylis [author] (Mar. 6, 2008) (on file with author).

²⁵⁰ Baylis, *supra* note 247.

²⁵¹ Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT’L L. 1103, 1104 (2000); Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. 487, 490 (2005).

²⁵² Slaughter, *supra* note 251, at 1104.

eign colleagues by the dearth of conduits of information.²⁵³ With rare exceptions,²⁵⁴ the Congolese courts do not cite foreign or international judgments, much less have more robust contacts with their counterparts abroad.²⁵⁵ Similarly, international and foreign judges have no way to access the Congolese judgments I discuss here: the opinions are unpublished and undistributed, and I myself obtained them only through personal contacts with people in Kinshasa.

Transnational judicial dialogue, therefore, does not offer a useful model for understanding the interactions in the Congo, at least not yet. It is best suited to understanding judicial interactions in highly developed countries, where judges have ready access to their counterparts abroad. Accordingly, it has typically been applied to such contexts.²⁵⁶

This raises an important forward-looking question: whether crafting a connection to existing transnational judicial dialogues should be a goal of legal reform and post-conflict justice efforts. If dialogue between national judicial actors in different countries does in fact shape international law, then the Congolese courts and judges are the worse for not having contact with it. As a consequence, they cannot benefit from the norms produced by that dialogue, and their experience and views do not play a role in crafting the concerned international legal rules. Melissa Waters, a proponent of transnational judicial dialogue, argues that “a relative handful of courts in a handful of (mostly rich Western) countries have an outsized influence over the dialogue taking place—and over the content of the norms emerging from that dialogue.”²⁵⁷ In effect, these “repeat players . . . actively export their own countries’ norms to weaker courts, who then internalize these foreign norms into their own domestic legal systems.”²⁵⁸

This is a particularly troubling dynamic in the context of post-conflict justice and atrocity trials, as the states that are cut off from this dialogue, like the Congo, are by and large the states in which atrocities occur and thus are the states with the most immediate interest in the

²⁵³ See *supra* notes 186–187 and accompanying text.

²⁵⁴ It is notable that, among the judgments that I have reviewed, all of these exceptions have been from the Ituri courts, where MONUC and other participants in the transnational networks described here have directly promoted the use of international law in atrocity trials. See, e.g., Mulombo case, *supra* note 158, at 40–41; Kahwa case, *supra* note 184, at 26–27. However, I have been able to acquire only a handful of recent judgments, which may not be representative of the remainder.

²⁵⁵ See *supra* notes 186–187 and accompanying text.

²⁵⁶ Waters, *supra* note 39, at 464.

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 464–65.

development of the relevant international criminal law norms. Although there are few atrocity trials in the “rich Western” countries to which Waters refers, there are some, whether concerning internal matters or under universal jurisdiction.²⁵⁹ Furthermore, the international and hybrid tribunals have a large number of jurists from such states and far fewer, if any, from post-conflict states.²⁶⁰ Even granting that the incapacity of national tribunals in post-conflict states complicates these questions, surely it does not make sense for an area of law that is directed at a particular set of states with a particular set of extreme and unique experiences of violence to be shaped almost exclusively by a totally different set of states that for the most part lack any recent experience of the violence with which the law is concerned. Similarly, for internationalists in the ICC and elsewhere, a lack of judicial dialogue with post-conflict states is both a missed opportunity to influence national courts and also to benefit from their views as part of what Anne-Marie Slaughter calls “collective judicial deliberation” on the critical problems of developing legal responses to mass atrocities.²⁶¹

c. Transnational Legal Process

Transnational legal process theory also provides a description of transnational interactions that could be applied to the mechanisms at work in the Congo; however, its analysis is not completely apt. As conceived by Harold Koh, “Transnational legal process theory describes the theory and practice of how public and private actors . . . interact in a variety of public and private, domestic and international fora to make, interpret, enforce, and ultimately, internalize rules of transnational law.”²⁶²

In identifying factors that affect a state’s incorporation of international law, transnational legal process draws our attention to processes, actors, and venues similar to those discussed by transnational network theorists.²⁶³ Koh describes transnational issue networks of

²⁵⁹ See *id.* at 464.

²⁶⁰ See, e.g., Press Release, Coalition for the International Criminal Court, First Eighteen Judges Elected to the International Criminal Court (Feb. 7, 2003), available at http://www.iccnw.org/documents/0207200318_judges_final.pdf; ICTY Key Figures (Oct. 17, 2003), <http://www.un.org/icty/glance/keyfig-e.htm>.

²⁶¹ Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99, 119 (1994).

²⁶² Koh, *supra* note 16, at 183–84.

²⁶³ See Harold Hongju Koh, Professor of Law, Yale University, Address at the 1998 Frankel Lecture: Bringing International Law Home (Apr. 8, 1998), in 35 Hous. L. Rev. 623, 647–52 (1998); *supra* notes 233–250 and accompanying text.

transnational norm entrepreneurs and governmental norm sponsors who seek law-declaring fora where norms can be introduced²⁶⁴—a succinct description of the process by which the Rome Statute was introduced into military courts in the Congo. Koh’s more detailed descriptions of these actors and activities also resonate. His networks are composed of international and domestic actors, state and nonstate actors. Legal norms move dynamically from international to domestic settings, public to private fora, and back again.²⁶⁵

In another sense, however, transnational legal process is a less satisfactory description. Koh’s theory focuses primarily on the incentives for incorporating international law at the state level, pointing to the “frictions and contradictions” that arise when states fail to comply with international law yet want to gain the benefits of participating in international systems.²⁶⁶ Certainly such benefits were a strong incentive for the DRC’s initial decisions to participate in the Rome Statute treaty system and to refer its situation to the ICC.²⁶⁷ Perhaps at some point in the future the DRC will experience some international friction for its failure, for example, to pass implementing legislation for the Statute or to hold more extensive trials, and maybe then this friction will be passed down through the system from the affected politicians to the court system and eventually to individual trial judges. But this concept does not seem to capture the current dynamic, which is bottom-up,²⁶⁸ small scale, and driven by individual interchanges rather than state or even institutional ones. That is, it is particular UN officers in a particular division of MONUC (among others) interacting with individual courts and judicial officers who have brought about this effect, not a relatively distant and intangible state-level incentive. The use of international law and pursuit of atrocity trials is not spreading mechanistically, bureaucratically, or institutionally, but personally and individually, through one-to-one contacts.²⁶⁹

Koh’s normative claims for transnational legal process also do not provide a good normative explanation of the processes at work in the Congo. That is primarily because the theory is intended to answer a very particular question, “why nations obey” international law, which is

²⁶⁴ Koh, *supra* note 263, at 647–52.

²⁶⁵ Koh, *supra* note 16, at 184.

²⁶⁶ *Id.* at 203.

²⁶⁷ *See id.*

²⁶⁸ *See* Janet Koven Levit, *A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments*, 30 *YALE J. INT’L L.* 125, 128–29 (2005).

²⁶⁹ For a fuller discussion of these issues, see Baylis, *supra* note 247.

not the most useful line of inquiry here.²⁷⁰ Transnational legal process responds to a longstanding debate in the literature about whether obligations imposed by international law are truly legal and whether the law itself exerts any compliance pull in the international arena.²⁷¹ In answering these questions, Koh conceives of the purpose and function of transnational legal process as a process of “internalization of” or “compliance with” international law.²⁷²

I am less sanguine about the notion that compliance with international law is or should be the goal of the transnational legal interactions in the Congo. In my view, the fundamental problem of impunity in the Congo is not a lack of international law in particular but a lack of any law whatsoever. Individuals operate with no fear whatsoever of legal consequences for their actions, and MONUC’s human rights reports describe a pattern of vigilantism born of this total failure of legal order.²⁷³ There are any number of approaches—international, national, and local, legal and quasi-legal—that would represent improvements on the present situation. Importation of international law is only one. I am in favor of anything that can hope to offer some redress for the suffering in the Congo, and if importing international law helps to promote this end, then I am in favor of international law. But I would equally be in favor of other measures that might reach the same ends.²⁷⁴ What international law has going for it in this instance is in some part the existence of those norm entrepreneurs and issue networks (to use the terminology that Koh has adopted) who are willing to put resources into its enforcement. If local or other legal systems had the same resources, they might be just as effective, but because they do not, international law has more hope of being successful in filling the great legal gaps that characterize the justice system in the Congo. This does not mean that compliance with international law is an end in itself, but rather, that international law might be a means to make progress toward the reinstatement of post-conflict legal order.²⁷⁵

Furthermore, Koh’s analysis seems to presume the inevitable final triumph of international law. The cases he describes are narratives of

²⁷⁰ Koh, *supra* note 16, at 183.

²⁷¹ *See id.* at 192–93.

²⁷² *Id.* at 199.

²⁷³ *See* MONUC April 2007 Assessment, *supra* note 195, ¶ 67.

²⁷⁴ *See infra* notes 278–297 and accompanying text; *see also* DRUMBL, *supra* note 19, at 194–205.

²⁷⁵ I do not mean, here or elsewhere, to suggest that the use of international law might in itself re-establish legal order. The process of instituting legal order after a conflict is extraordinarily complex. *See generally* STROMSETH ET AL., *supra* note 20.

marches toward international compliance marked by setbacks and about-faces but nonetheless eventually arriving at their goal.²⁷⁶ In contrast, it cannot be overemphasized how unusual these trials are in the Congo. Far from being indicative of a growing trend toward prosecution of those responsible for these misdeeds, the trend seems to be, if anything, moving in the other direction since these trials took place.²⁷⁷ I am, therefore, skeptical about placing this situation in the context of Koh's progressive narrative of increasing compliance with international law as an eventual, inevitable good. Indeed, to the contrary, these trials are interesting and important precisely because they are so exceptional—because amidst the legal and social chaos in the Congo, these trials happened, and they happened better because of international law than they would have without it.

d. *Conclusions*

Transnational network theory and, to a lesser extent, transnational legal process offer useful categories for conceptualizing the constituent elements, interrelationships, and processes that make up transnational legal interactions like those in the Congo. In turn, the interchanges between international and domestic actors in the DRC confirm these theories' on-the-ground accuracy and usefulness to some extent. These theories, however, do not offer a means of identifying the crucial features of these interchanges that have produced an international-law-incorporating result, nor do they provide answers for the normative questions of the purpose and consequences of incorporating international law in this post-conflict setting.

2. Hybridity and Authority

Two other theories, legal pluralism and policy-oriented jurisprudence offer some insight into the questions of significance and of ultimate goals. Having rejected the notion that the trajectory in this situation is toward compliance or obedience to international law, which paradigm (if any) does describe the dynamic at work, and what should be the aim of these interactions?

²⁷⁶ See Koh, *supra* note 16, at 194–99.

²⁷⁷ Clifford, *supra* note 103.

a. *Legal Pluralism*

Legal pluralism theory draws our attention to the multiplicity of legal regimes, norms, and actors that are in play in any given situation and describes the complex and dynamic interchanges between these overlapping and contesting legal systems.²⁷⁸ As described above, the overlapping international and national definitions of atrocity crimes in effect in the Congo have created a situation of legal pluralism. Of course, should all the Congolese military courts adopt the Rome Statute, this situation would abate, as the Congolese national law would in effect have been superseded by international law. But if we look beyond the rules themselves to the systems of legal enforcement that are in place, there is far more pluralism at work than just this.

For example, there are at least three systems of investigating atrocities for purposes of criminal prosecution: the ICC's, MONUC's and the Congo's. The ICC prosecutor and Congolese prosecutors make formally authoritative (though not always implemented) decisions about whom to prosecute, while the HRD makes unauthoritative but powerful recommendations.²⁷⁹ In addition, NGOs have conducted their own investigations. While not intended to produce evidence for criminal trials, these investigations add compelling accounts to the depictions of the atrocities and the corresponding calls for justice.²⁸⁰ Because it is so difficult logistically to acquire information about what is happening in eastern Congo, and because there are no widely trusted sources of public information in the Congolese media or government, these investigations and accounts are relied upon to construct credible descriptions of the problem and to legitimize proposed legal and extralegal responses.²⁸¹

For while in one sense these trials are isolated legal processes in a field of impunity, in another sense they are one of many nascent legal reform initiatives aimed at redressing atrocities and other conflict-related harms through legal processes. Some of these initiatives compete with the present atrocity trials: for example, some NGOs have called for jurisdiction over war crimes and crimes against humanity to

²⁷⁸ DRUMBL, *supra* note 19, at 186 (advocating "cosmopolitan pluralism"); Berman, *supra* note 18, at 1164–68.

²⁷⁹ While not backed by formal power of authority, the MONUC peacekeeping forces and other conduits of influence available to the UN back these recommendations with the power of threatened intervention, of one sort or another. *See* United Nations Peacekeeping Operations, Background Note: 31 July 2008, <http://www.un.org/Depts/dpko/dpko/bnote010101.pdf>.

²⁸⁰ *E.g.*, SOS JUSTICE, *supra* note 87, at 6–8.

²⁸¹ *See supra* notes 227–228 and accompanying text.

be transferred from military to civilian courts, apparently out of skepticism about the capabilities of military courts.²⁸² UN peacekeepers (some of whom were accused in 2005 of sexual attacks upon the population they were supposed to protect) are subject to neither the military nor the civilian regimes within the Congo. They can be prosecuted solely in their home countries, if they are prosecuted at all.²⁸³ Other initiatives supplement the military trials: as discussed above, Global Rights and USAID promoted a law against sexual violence that imposes criminal liability for a broader range of sexual offenses than were previously recognized under Congolese criminal law. This law, passed in June 2006, extends the reach of the civilian courts to overlap with the military courts' jurisdiction over some sex crimes.²⁸⁴ The NGO RCN's work with local *chefs coutumiers* in eastern Congo to develop local legal processes for resolving land disputes arising from the return of internally displaced persons, also mentioned above, is another example of a supplementary initiative.²⁸⁵

I could go on recounting pluralities for pages, but this should suffice to prove the point. But does recognizing these pluralities offer us any additional understanding of the dynamics of the interactions in the Congo? Importantly, in addition to its acknowledgment of (and indeed, at times its relish of) the complexity of legal interactions, legal pluralism legitimizes hybridity as an end state rather than merely tolerating it as a necessary if irritating transition point to another goal.²⁸⁶ So whereas Koh's transnational legal process presumes the ultimate aim to be compliance with international law and sees the continued existence of discrepancies between national law and practice and international legal norms as a problem to be solved, legal pluralism takes a different tack.²⁸⁷ It suggests that the overlap of legal regimes and the hurly-burly this creates are inevitable in view of the overlapping claims of interest and overlapping communities that underlie the contesting legal systems.²⁸⁸ Far better then, legal pluralism would suggest, to develop hybrid institutions and processes that provide opportunities for multiple

²⁸² Clifford, *supra* note 103.

²⁸³ Susannah Price, *DR Congo Sex Abuse Claims Upheld*, BBC NEWS, Jan. 8, 2005, <http://news.bbc.co.uk/2/hi/africa/4156819.stm>.

²⁸⁴ UNE LOI, *supra* note 226, at 2.

²⁸⁵ Decarnieres & Bulambo Interview, *supra* note 229.

²⁸⁶ Berman, *supra* note 18, at 1236.

²⁸⁷ See Koh, *supra* note 16, at 194–99.

²⁸⁸ See Berman, *supra* note 18, at 1235–37.

voices to be heard in multiple contexts, in order to genuinely accommodate those multiple interests and communities.²⁸⁹

In some sense, of course, this is exactly what the Congolese courts have done. They are domestic courts directly applying international law, and thus have transformed the criminal trials they oversee into a hybrid domestic-international legal process.²⁹⁰ Similarly, by deploying international investigators and legal officers into the domestic arena to investigate crimes and then injecting their reports and legal and factual findings into the domestic legal context, MONUC also is engaging in a hybrid domestic-international process. Harkening back, therefore, to the discussion of hybrid courts above, other kinds of hybrid institutions and processes are developing in the DRC, driven not top-down by legal theorists and academics, but bottom-up by UN Human Rights Officers and Congolese judges on the ground in order to solve the real world legal problems they face.

Legal pluralism has been accused of being a purely descriptive theory lacking normative content, on the one hand,²⁹¹ and on the other, of having a foolishly consistent normative commitment to plurality regardless of the comparative value of the positions at stake. Thus, although legal pluralism does seem to offer a description of the situation on the ground, it must be asked whether it offers a normative perspective as well. As Paul Berman notes, “Describing mechanisms for managing hybridity does not tell us how best to actually manage hybridity in particular cases.”²⁹² Perhaps these Congolese hybrid processes are merely a MacGyveristic²⁹³ response to the exigencies of the situation: courts coping with the gaps in a national code and an international administration coping with the limited resources of a country in conflict. If so, perhaps by accepting and even celebrating this hybridity, legal pluralism stops us short, and encourages us to accept a rubber band

²⁸⁹ *Id.* at 1237; *see also* DRUMBL, *supra* note 19, at 182–87.

²⁹⁰ I am presuming here that the Congolese courts’ implementation of the Rome Statute will differ in some regards from the ICC’s implementation of the Statute, and that those differences will, at least in part, reflect domestic preferences and norms.

²⁹¹ Reisman et al., *supra* note 17, at 581–82.

²⁹² Berman, *supra* note 18, at 1196–97 (emphasis omitted).

²⁹³ “MacGyver” was a TV show that aired from 1985 to 1992. *See* MacGyver: Summary, <http://www.tv.com/macyver/show/706/summary.html> (last visited Sept. 27, 2008). The main character was a secret agent who was known for getting himself out of hopelessly sticky situations by quickly putting together a gadget out of whatever ordinary materials were immediately available. *Id.* Such inventions have become known as “MacGyverisms.” *See* Urban Dictionary: MacGyverism, <http://www.urbandictionary.com/define.php?term=MacGyverism> (last visited Sept. 27, 2008).

and duct tape solution rather than working for something more principled and enduring.

Whatever else may be said of these mechanisms, the fact that they have arisen because they meet the exigencies of the situation tells us, at a minimum, that they can function in the post-conflict context. Contrast these hybrid mechanisms with the hybrid courts discussed earlier. Hybrid courts rely for their success on foreign judges who typically arrive without expertise in the crucial areas of international criminal law and judicial management of trials and are therefore ill-positioned to carry this burden. In contrast, these hybrid processes rely on networks of UN and foreign service officers whose careers are focused on international law and human rights, who have been repeatedly immersed in conflict and post-conflict settings, and who have access to the technical support, information, and resources that the UN has at its disposal. At least from the international side, the skills and experience of the actors in this hybrid system are far better aligned with the needs in the situation.

Another normative good that this plurality may provide is the space for a multiplicity of legal and extra-legal mechanisms to address atrocities. Although I believe that criminal trials in national tribunals offer the international community an opportunity to fulfill its commitment to post-conflict justice in the long term, I am at the same time deeply skeptical that these trials will consistently achieve justice, in a procedural or substantive sense, on a case by case basis in the short term. As described above, there are too many obstacles to their immediate success.²⁹⁴ This is precisely why international support would be useful to them and why long-term reform of the national judicial system should be one of the fundamental goals of post-conflict justice. But it also means that we cannot look to national trials to necessarily fulfill some of the other goals of post-conflict justice, like reconciliation, accountability, and so on.²⁹⁵ By not attempting to resolve the messy plurality and hybridity of systems functioning in the DRC now, we will allow

²⁹⁴ See *supra* notes 79–94 and accompanying text.

²⁹⁵ There are also other reasons not to look to them to fulfill these goals, including prominently, the limits upon the capacity of criminal trials to do so. I do think, however, that these trials can successfully serve an expressive function of conveying the state's intent to restore order. For these and other reasons, in my view, it would be useful to more narrowly construe the goals of such trials to focus upon accurate determination of guilt for individual perpetrators and victims (notwithstanding the fact that I anticipate frequent failure in this regard) and upon contributing to the reintroduction of order and to social confidence in that order. It is also worth noting that, in my experience, post-conflict societies do not seem to look to the judicial system to accomplish such grandiose goals as does the international community.

for at least the possibility of success through other means—a possibility that would be foreclosed if international legal standards deployed in the criminal justice system were to acquire a monopoly on redressing atrocities.²⁹⁶ Thus, recognizing the imperfections of the criminal legal process, we should also have an eye to whether these hybrids tend to catalyze (or at least to leave space for) other forms of redress or, instead, to “squeeze out local approaches to justice, most notably those that eschew the methods and modalities dominant internationally.”²⁹⁷

In the end, then, legal pluralism suggests that rather than looking to increased compliance with international law as the aim of transnational interactions, we should accept hybridity, in which neither international nor national norms prevail entirely, as a possible good end point. As such, it clears the way for us to look for what I will call “functional hybrids”: hybrid mechanisms that function effectively to resolve problems on the ground by building from the comparative strengths of the national and international frameworks.

b. *Policy-Oriented Jurisprudence*

Like legal pluralism, policy-oriented jurisprudence takes pluralistic communities as a given.²⁹⁸ But while policy-oriented jurisprudence also identifies a multiplicity of social forces operating on law, it does not sweep all legal and quasi-legal processes, institutions, and actors under the aegis of law, as legal pluralism does.²⁹⁹ Instead, it defines law more narrowly “as authoritative decision, combining elements of authority and control.”³⁰⁰ “Authority” in this context refers to the legitimate exercise of power as defined by the expectations of the relevant community, and “control” to actual power to make and enforce decisions in practice; both are determined empirically.³⁰¹ Thus, while a complete application of the policy-oriented jurisprudence methodology to this study would be an article in itself, its emphasis on authoritative decision-making as the *sine qua non* of law directs us to one of the most dif-

²⁹⁶ See DRUMBL, *supra* note 19, at 182–87; *see also* Berman, *supra* note 18, at 1197.

²⁹⁷ DRUMBL, *supra* note 19, at 13.

²⁹⁸ LASSWELL & MCDUGAL, *supra* note 159, at 26.

²⁹⁹ Berman, *supra* note 18, at 1177–78.

³⁰⁰ LASSWELL & MCDUGAL, *supra* note 159, at 26; Reisman et al., *supra* note 17, at 579–80. However, policy-oriented jurisprudence does not focus solely on formal institutions; rather, a range of activities by a range of groups may be considered, so long as they possess this crucial characteristic of authoritative decision. LASSWELL & MCDUGAL, *supra* note 159, at 403.

³⁰¹ See LASSWELL & MCDUGAL, *supra* note 159, at 26; Reisman et al., *supra* note 17, at 579–80.

difficult aspects of this situation: effective control over the legal decision-making process is contested both overtly and covertly, both between the legal and political institutions of the national system and between the international and national systems.

In particular, this distinction between authority and control draws our attention to an important but as yet unexplored aspect of the interactions described above: the disparate allocation of authority and control amongst the actors. Again, contrast this hybrid structure with the hybrid courts in place elsewhere, focusing for the moment on the processing of individual cases. On the one hand, the relationships between foreign and national judges in hybrid courts are peer-to-peer, and all are equally authoritative decisionmakers. Nonetheless, the foreign judges typically have actual control over the courts' decisions. In both Kosovo and Sierra Leone, the hybrid panels of judges consist of a majority of foreign judges and a minority of domestic judges, so that the foreign judges can consistently determine the results in every case.³⁰² In the context of the Congolese national trials, in contrast, the foreign participants may control the processes of investigating, gathering evidence, developing dossiers and reports, conducting legal research, and preparing legal briefs, but control of the legal decision itself belongs to the domestic judges, who have the sole authority to try cases and issue judgments. Any further efforts by MONUC officers or others to control the outcome would violate the commitment to the rule of law that (at least in part) motivates their participation in this process. Their legitimate role is thus limited to persuasion; they do not have control.

This lack of control, it should be added, appears to be a matter of no small frustration to the involved MONUC officers, at least when the prosecutions and/or convictions they seek are not forthcoming from the courts. MONUC's reports seethe at "unjustifiable delays" in "potentially landmark cases,"³⁰³ at the "important Ituri warlords" who "con-

³⁰² BASKIN, *supra* note 27, at 20–22 (describing Kosovo); Special Court of Sierra Leone, *supra* note 51. However, this is not the case in the new hybrid court in Cambodia, where Cambodian judges dominate the trial and appellate panels. Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Camodian Law of Crimes Committed During the Period of Democratic Kampuchea art. 3(2), June 6, 2003, *available at* <http://www.cambodia.gov.kh/krt/pdfs/Agreement%20between%20UN%20and%20RGC.pdf>. But although Cambodian judges constitute the majority on each panel, the rules for decisionmaking contain a supermajority requirement, such that at least one international judge must be in agreement with the decision. *Id.* art. 4(1).

³⁰³ JUNE 2006 MONUC REPORT, *supra* note 91, at 11.

tinue to enjoy impunity for their crimes,”³⁰⁴ and at the overall “reluctance of the judicial authorities to progress in their investigations.”³⁰⁵ They list case after case in which evidence of a perpetrator’s wrongdoing has been provided to prosecutors and yet no action has been taken.³⁰⁶ In one case, for example, “[m]ilitary prosecutors . . . are refusing to bring [the defendant] to trial on the basis of the available evidence,”³⁰⁷ and in another, “despite several substantiated complaints for serious crimes filed before military judicial authorities, no judicial action was taken against [the defendant], or any of the men under his command.”³⁰⁸

In this sense, MONUC’s reports echo a widely held belief that control over such cases is not in fact in the hands of the judges after all, but rather, is exerted in many instances by political actors.³⁰⁹ MONUC itself attributes the courts’ “reluctance” to move these cases forward “mainly to undue external influence, but also to the lack of will, resources, and capacity.”³¹⁰ It is not clear from these reports whether political forces always determine outcomes or solely prevent convictions. That is, one possibility is that political interference is used only to prevent undesired trials from occurring, so that cases that go to trial and yield convictions are simply cases of political disinterest in which judges and prosecutors did in fact exercise independent control. On the other hand, it is also possible that political actors are actively at work in directing prosecutions and convictions irrespective of the guilt of the accused. As discussed in the Conclusion of this Article, in determining where to draw the line in offering international support to national trials and institutions, this distinction could be important.

Thus, MONUC might reasonably protest that the distinction I draw here between the allocation of authority and control in hybrid courts versus the hybrid processes in the Congo is only superficially correct. Arguably, while in a superficial sense authority and control are better integrated in this hybrid process than in hybrid courts, in reality there is merely a different disjuncture between the two, for turning authority over to domestic legal actors in fact means turning control over to political actors. Accordingly, it is perhaps unsurprising that the idea

³⁰⁴ *Id.* at 12.

³⁰⁵ *Id.*

³⁰⁶ *See id.* at 11–12.

³⁰⁷ *Id.* at 11.

³⁰⁸ JUNE 2006 MONUC REPORT, *supra* note 91, at 12.

³⁰⁹ *E.g.*, SOS JUSTICE, *supra* note 87, at 6–8.

³¹⁰ JUNE 2006 MONUC REPORT, *supra* note 91, at 12.

of asserting international control by establishing hybrid panels of international and national judges to hear such cases is mentioned repeatedly in MONUC's reports, though it has thus far come to nothing.³¹¹ Would such a move be successful? The reader is by now well aware of my skepticism concerning the availability of appropriately experienced and skilled foreign jurists who would be willing to travel to Kinshasa, much less to the more distant locations where these trials have been held, deep in Congo's conflict zones.

But more than this, I am concerned that there is a trade-off between international involvement and domestic development on several levels. This trade-off is brought into focus by the control-authority distinction raised here. In a practical sense, financing hybrid panels tends to direct resources toward foreign elements of the project rather than toward domestic institutions. This diverts resources away from the long-term goal of developing domestic institutions. It is also costly. For example, the expense associated with importing and supporting foreign judges and their staffs is exorbitant as compared to that of providing consistent, reasonable salaries for national judges so that it is at least conceivable for them to live on their salaries without taking bribes.³¹²

Of course, in the Congolese context there is an additional complication: the use of military courts rather than civilian courts as venues for atrocity trials inevitably means that investment in atrocity trials is to some extent investment in the military justice system, rather than the civilian one. This introduces a fresh divergence of resources from the intended end of rebuilding a comprehensive system of national courts to investment in the military courts, with their narrower mandate. This is not entirely true, however, as evidenced by MONUC's training of police and ASF's work with defense attorneys, for example.

The most important thing to note about this particular dilemma is that it will not necessarily exist elsewhere. It just so happens that in the Congo the military courts have jurisdiction over these crimes, but in

³¹¹ DEC. 2005 MONUC REPORT, *supra* note 128, at 15; *Discussion Notes, Part Two, supra* note 208, at 128.

³¹² See TOM PERRIELO & MARIEKE WIERDA, INT'L CTR. FOR TRANSITIONAL JUSTICE, THE SPECIAL COURT OF SIERRA LEONE UNDER SCRUTINY 30 (2006), available at <http://www.ictj.org/static/Prosecutions/Sierra.study.pdf>; *Sierra Leone: Special Court Needs \$30 Million to See War Crimes Trials Through*, IRINNEWS.ORG, May 25, 2005, <http://www.globalsecurity.org/military/library/news/2005/05/mil-050525-irin03.htm>; Robarts Interview, *supra* note 187; J Interview, *supra* note 128. However, international financing and support of domestic reforms can also introduce problematic dynamics, as the sudden introduction of vast sums of money can distort the incentives and interests of the domestic actors. See Ricci, *supra* note 202, at 101.

other states this is not necessarily the case. Accordingly, we should not allow this peculiarity of the Congolese example to distract us from the more general rule that investment in the domestic system is investment in civilian courts. Where it does exist, of course, this presents an argument against extending substantial international resources into the domestic system, at least so long as the international community's goal is to support the civilian justice system, rather than the military one.

Furthermore, in the exigencies of the Congolese context, developing the military justice system is arguably an appropriate expenditure of international resources and energies. The conflict in Eastern Congo is ongoing, and the atrocities being committed there seem to be, if anything, escalating in severity.³¹³ Establishing order and adherence to the rules of war that protect civilians is thus essential. The military justice system is an appropriate way of controlling and sanctioning members of the Congolese army operating in those regions.³¹⁴

Even more fundamental than this concern about investment of resources is another issue: international efforts to assert control over war crimes trials undermine public perceptions of domestic authority over the judicial system and thus undercut development and reform efforts. At the most general level, the more control is exerted over these processes by international actors in order to reach the right result³¹⁵ in individual cases, the less control is held by domestic actors, and hence the less responsibility, the less accountability, and the less incentive to commit their "will, resources, and capacity"³¹⁶ to a process they do not control. Consider the possibilities. If domestic actors control the judicial process, international actors can promote domestic accountability for those processes by, as they are now doing, observing and critiquing the domestic process and by calling for and supporting efforts at reform. If international actors take control of the judicial aspects of this process, what then? As in Kosovo, domestic actors may step back and ask to be relieved entirely of their duties (i.e., may seek to abdicate their authority).³¹⁷ Certainly they will feel no sense of responsi-

³¹³ See *supra* notes 79–112 and accompanying text.

³¹⁴ It is also worth noting that this situation may not continue to exist in the Congo, as the long-proposed implementing legislation for the ICC, if ever passed by the legislature, would transfer jurisdiction over these crimes to the civilian courts.

³¹⁵ By this, I mean the "right result" in both a procedural and substantive sense, that is, that the guilty are convicted and the innocent exonerated through a fair and transparent process. This is, of course, an entirely admirable goal.

³¹⁶ JUNE 2006 MONUC REPORT, *supra* note 91, at 12.

³¹⁷ See BASKIN, *supra* note 27, at 21. Baskin writes:

bility for the results in these cases nor for the system as a whole, nor will they be able to build public confidence in the authority of judicial institutions that are openly controlled by outsiders. It is an essential tenet of good governance that accountability can be promoted only where lines of responsibility are clear. Hybrid panels simultaneously blur responsibility and shift it to the involved international actors, allowing domestic actors to shrug off claims for accountability.

This is not to suggest that Congolese courts (or indeed, most post-conflict judicial systems) are already authoritative in the sense of having public confidence and a public expectation that they will genuinely and appropriately exercise control over legal disputes. To the contrary, as suggested above, in Congo and in many post-conflict states, authority in this sense does not exist, and control is frequently exerted, illicitly but openly, by political and other influential actors. But this fact does not necessarily mean that control should be shifted to the international level. Rather, this is exactly why one of the purposes of post-conflict justice should be to reinstate (or even to instate) the authority of the judiciary. A necessary though insufficient precondition for doing so is for the domestic judiciary to openly and obviously exercise control over the cases before it.³¹⁸

Thus, the question we need to consider is the ultimate goal of these trials: are we focused upon the success of each immediate trial or the development and reconstruction of the judicial system? If we look to immediate outcomes, there is a tension between these two goals, for it is true, as proponents of international trials have suggested, that national courts often do not have the capacity to handle atrocity trials post-conflict. In many cases, however, including the Congolese situation, the fundamental problem that this statement identifies is not the incapacity to handle atrocity trials as such but the complete breakdown of the national court system. If we look instead to the question of investment of resources, the two goals are aligned: so long as the atrocity trials are left within the domestic system, the international community's investment in promoting just outcomes in those trials will also promote

Kosovars propose that [the hybrid panels] be composed entirely of international judges instead of a minority of one Kosovar on a three-judge panel. This would reflect the existing international control of the process of assigning sensitive cases and it would free Kosovar judges from being political hostages to rulings imposed by international jurists.

Id.

³¹⁸ LASSWELL & MCDUGAL, *supra* note 159, at 400 ("authority + control = law").

the redevelopment of the national system. In this sense, a conflict will be created unnecessarily if the international community acts to disengage control over the immediate trials from local actors, thereby also isolating the valuable financial and human resources that it pours into atrocity trials from the domestic system.

Thus, it seems particularly significant that the international community's support of atrocity trials in the Congo, including its promotion of use of the Rome Statute, is not isolated from efforts to rebuild the judiciary. Instead, the two are complementary and mutually reinforcing, with the need for prosecutions spurring rebuilding of infrastructure and other basic elements of a functioning justice system. This has not, of course, yielded either instant or consistent results. It does, however, allow atrocity trials to function as part of an engine of reform and reconstruction.

3. Conclusions Concerning Crucial Features

The transnational networks that exist in the Congo seem to serve functions and operate in some ways like the transnational networks that others have observed in the contexts of human rights law and international criminal law. However, the post-conflict justice networks in the Congo have certain crucial characteristics that differ from these other transnational networks, like the quick movement of personnel. They also differ in important ways from alternative approaches to international-national interactions, such as international and hybrid courts. Unlike international courts that seize control or peer-to-peer hybrid courts that blur lines of authority and control, in the Congo we see hybrid legal processes that leave authority and control in domestic hands, with the international community providing resources and support. This quality may contribute to the eventual effectiveness of the hybrid processes in rebuilding a functioning national judiciary.

Furthermore, the institutional structure of the international organizations that typically send people to conflict and post-conflict zones ensures that some members of these transnational networks will be particularly well placed to bring information and skills quickly from one such zone to another. These individuals also tend to be specialists in post-conflict reconstruction and justice issues and to be relatively junior as compared to the judges who are typically recruited for hybrid courts. As such, the individuals that comprise these networks contribute to what I call a "functional hybrid" process that builds upon the strong points of its international and national aspects, for they are well suited to take on the sort of supportive and facilitative role that transnational

networks have played in the Congo. The importance of these individual players and their individual experiences is magnified in a post-conflict setting where national institutions and bureaucracies have typically been destroyed, where national institutions like legislatures may not be functioning well, and where more traditional conduits of legal information, like jurisprudence, may not reach their intended audience on their own.

CONCLUSION

The transnational networks supporting atrocity trials in the Democratic Republic of the Congo offer a realistic model for the involvement of the international community in post-conflict justice. Rather than seeking to assert control over atrocity trials and ensure that they reach the right results by holding them at the international level or by establishing special hybrid courts dominated by foreign judges, the international community may more profitably invest its resources in supporting and facilitating trials controlled by domestic judges in domestic courts. Rather than looking solely to international courts and jurists to convey international norms, transnational networks made up of members of the institutions on the ground in post-conflict settings—the UN, NGOs, foreign embassies, and the local legal community—can do so also, and often more effectively. These networks of frequently moving experts in post-conflict justice settings can quickly convey legal rules and skills from one post-conflict setting to another.

The Congolese experience suggests two fruitful approaches to international influence in post-conflict countries: (1) expanding the use of transnational networks rather than reliance on conventional mechanisms of influence such as publication of judicial decisions; and (2) the use of carefully designed hybrid mechanisms and institutions, relying on junior personnel and support activities rather than senior personnel and primary control of institutions. It also suggests some aspects of international law that networks might promote. Supporting direct use by courts of the Rome Statute and other international legal rules, if appropriate under the relevant constitutional system, may assist courts in bypassing nonfunctioning legislatures. Transferring relevant foreign and international jurisprudence into the domestic system and relevant domestic jurisprudence into the international system could advance post-conflict states' participation in and benefit from transnational judicial dialogue concerning matters of post-conflict justice.

There is no doubt that national courts in conflict and post-conflict states like the DRC are often deeply flawed institutions and

that due process violations are a commonplace occurrence in these venues. It is no wonder that many commentators have urged a retreat to the international level as the best means of assuring that minimum due process standards are met.³¹⁹ This Article suggests some reasons that it is worth reconsidering national courts as a venue for war crimes trials. Among other reasons, in reality international and national courts will be competing for cases only rarely, so that making a direct comparison between the two as if there were actually a choice of venues is inapposite in most cases. Furthermore, there is not a necessary connection between the focal point of a set of interests (local, national, or international) and the venue in which those interests can best be served; international interests may best be served in national venues or vice-versa. Fundamentally, I argue for context-specific approaches and contend that it is worth using transnational networks to attempt to influence Congolese courts, rather than simply dismissing them for their admittedly grave flaws.

Here, I would like to return to what I consider the most robust argument in favor of national courts as venues, contending that we should shift our focus from the results of the immediate trials to more long-term and holistic effects. From this perspective, national courts' systemic weaknesses do not necessarily present an adequate reason for rejecting them as venues for post-conflict justice. To the contrary, often, though not always, the international community should invest its resources into corrupt, nonfunctioning, and otherwise problematic national systems. The international community has too long focused on holding high profile individual trials that comply with rigorous due process standards, on the laudable but unproven theory that these trials will promote post-conflict goals such as justice for victims, retribution, reconciliation, and deterrence. As Jane Stromseth and Mark Drumbl have argued, the notion that procedurally pristine trials will ensure public confidence in the impartiality of the proceedings and the legitimacy of the results has not been borne out by the response to the ICTY and the ICTR in the former Yugoslavia and Rwanda, respectively.³²⁰ The expectation that such trials will achieve the loftier goals of post-conflict justice, while appealing intellectually, is at best context-dependent. It is telling that the trend since seeing the negligible national and local impact of the ICTY and ICTR's trials has been more

³¹⁹ *E.g.*, Heller, *supra* note 19, at 279; *see also* DRUMBL, *supra* note 19, at 189–91 (suggesting criteria for “qualified deference” to national tribunals).

³²⁰ DRUMBL, *supra* note 19, at 72, 130–31; Stromseth, *supra* note 3, at 258–80.

and more toward looking to their legacy effect on the corresponding national systems. In my view, this trend is a good one.

Indeed, I propose that we should turn the current valuation of post-conflict justice goals on its head and should look mainly to long-term effects on the capabilities of national justice systems in assessing how to invest international resources in post-conflict justice. In this, I echo and build upon Jane Stromseth's call to bridge the gap between "transitional justice" and "rule of law reform" scholarship and "explore systematically how accountability processes might, concretely, contribute to forward-looking rule of law reforms."³²¹

I do not pretend that the type of investment I propose is necessarily going to be effective in any given situation. Certainly, there are good reasons to fear investing in systems as troubled as the Congo's, such as the potential for abuse of the legal system to oppress political opponents or minority ethnic groups or to take personal revenge for private grievances. Although the cases discussed in this Article seemed to benefit from the introduction of international law, more recent cases have reportedly been undermined by political interference.³²² There is also reason to heed the warnings of the long literature on legal transplants and to be nervous about the effects of international influence upon national legal reform.

Nor is international support for and investment in atrocity trials remotely sufficient to rebuild a national justice system.³²³ Rather, it is one possible point of entry for international resources in a complex and fraught process. I would argue, however, that it is a particularly useful point of entry in certain respects. Fundamentally, atrocity trials offer a useful focal point for international attention. They are dramatic, of limited duration, and have a definitive conclusion. They require specific inputs: attorneys, judges, courtrooms, police, witnesses, physical evidence, relevant laws, and so on. This provides opportunities for investment in particular programs (training, building, proposing legislation, etc.) with particular end products that international donors and the involved domestic and international actors can claim as successes of their projects. Atrocity trials also provide identifiable short-term results in what is an extremely long-term and uncertain process.

A functioning judicial system represents post-conflict justice's potentially most valuable and lasting legacy. As I have argued in other

³²¹ Stromseth, *supra* note 3, at 256.

³²² Clifford, *supra* note 103; Feb. 19 E-mail, *supra* note 127.

³²³ See generally STROMSETH ET AL., *supra* note 20.

post-conflict contexts, a focus on a few high level criminal trials ignores the numerous and wide-ranging legal problems that arise in post-conflict contexts and require some means of resolution.³²⁴ Furthermore, legal systems operate to some extent as a means of conflict prevention as well as dispute resolution. Self-reinforcing problems of violence, self-help, and vigilantism often develop even in otherwise stable countries in the absence of an effective judiciary.³²⁵ It is not so much that reform of the judiciary is always an achievable goal, especially in the short term, but that it is a necessary goal for the eventual stabilization and peaceful functioning of post-conflict societies. It is therefore worth pursuing even if it is not immediately attainable.

Under what circumstances does investing in troubled national systems makes sense? I have a few thoughts drawn from the Congolese context. When the failed legal system is contributing to continued post-conflict disorder, investing in the national system is crucial. In the Congo, there is widespread impunity for crimes of all sorts, including the atrocities of which the defendants in the cases highlighted in this Article were convicted. Violence is rampant, and there are no legal consequences. Under these circumstances, re-establishing legal order is critical. Also, it is important to note that those tried in the domestic cases discussed here were the immediate perpetrators. If not arrested and tried, the accused would presumably still be active soliders or militia members in the conflict ongoing in eastern Congo. Thus, these trials do not concern solely justice for past crimes but deterrence in the most direct sense: preventing additional crimes by these very perpetrators as well as the vigilantism that arises in the absence of any hope of justice.

On the other hand, investing in national systems would not be appropriate when the level of political interference in trials means that not only are the influential and powerful protected from prosecution, but the legal system is consistently deployed by the powerful against the innocent to serve their purposes, without hope of recourse. This is deliberately a very high threshold. All legal systems are susceptible of illicit influence, and post-conflict legal systems are often deeply susceptible of it. To require a non-corrupt system would be to go back to square

³²⁴ Baylis, *supra* note 28, at 3–4.

³²⁵ Elena A. Baylis, *Beyond Rights: Legal Process and Ethnic Conflicts*, 25 MICH. J. INT'L L. 529, 540–41, 550 (2004); Widner, *supra* note 13, at 70.

one. Nevertheless, some “self-limitation on capriciousness”³²⁶ is necessary lest the international community find itself in support of a legal vendetta.

These represent the extreme ends of the possible range of pros and cons of investing in national systems—on the one hand, the risk of total disorder if there is no legal system in place, and on the other, the risk of the legal system serving as merely a tool of oppression. There are of course far more nuanced assessments to be done of the factors that indicate potential for the success of such investments and also of the kinds of involvement that might be most fruitful.

But regardless of whether the international community *should* promote national trials and invest in national courts, the fact is that it *is* happening. National trials are taking place, and transnational networks are conveying international law and international legal practice to national courts. Amongst the information being transferred are the judgments of international courts. Thus, the anxiety of supporters of international criminal courts over their failed domestic role is perhaps overblown. International criminal courts have undoubtedly been more important thus far for the international community than for the national and sub-national communities directly affected by atrocities. By their institutional structure and design, international courts and even hybrid courts are probably not the best mechanisms for conveying international law to chaotic post-conflict settings. But they probably shouldn't try to be. Rather than trying to develop a model of the ideal court—one that can hold procedurally pristine trials in The Hague that are deeply meaningful to rape survivors in Ituri—we should model and build from the messy, incomplete, but nonetheless very real justice mechanisms that are actually functioning in post-conflict settings.

³²⁶ LASSWELL & McDUGAL, *supra* note 159, at 409 (“[S]elf-limitation’ on capriciousness is to be taken as the minimum degree of order that begins to cover the nakedness of control with a cloak of authority.”).

