March 9, 2008

Reassessing the Role of International Criminal Law: Rebuilding National Courts Through Transnational Networks

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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.

TABLE OF CONTENTS

I. THE ROLES OF INTERNATIONAL, NATIONAL AND HYBRID COURTS .... 7
   A. International Courts as a Substitute for National Courts .......... 8
   B. Hybrid courts ........................................................................ 14
   C. The ICC and Interactions with Other Courts ......................... 17

II. TRANSNATIONAL INTERACTION IN THE DRC ......................... 23
   A. Post-conflict Congo ............................................................... 23
   B. An Illustration: The Rome Statute in Three Domestic Cases..... 25
      1. The Cases ........................................................................ 26
      2. Effects of the Rome Statute .............................................. 29
      3. Conclusions Concerning Effects ...................................... 34
   C. Mechanisms of Influence ..................................................... 34
      1. Legislature ..................................................................... 36
      2. Jurisprudence ................................................................. 39
      3. International Criminal Court .......................................... 41
      4. Networks of International Organizations, NGOs and Others 44

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University of Pittsburgh School of Law; J.D., Yale Law School; B.A., University of
Oregon. This article has benefited from presentations at the Junior International Law
Scholars Conference at Yale Law School, the Law and Society Annual Meeting at
Humboldt University in Berlin, and a faculty workshop at the University of Pittsburgh
Law School. Thanks to Paul Berman, Mark Janis, Chimène Keitner, Hari Osofsky, Jaya
Ramji-Nogales, Jenia Iontcheva Turner, and David Zaring for their comments, advice and
encouragement; to Lisl Brunner, Malin Delling, Kate Drabecki, and Foreign and
International Law Librarian Linda Tashbook for their research; and to the University of
Pittsburgh’s School of Law, Center for International Legal Education, University Center
for International Studies, and Central Research Development Fund for grants supporting
my field research in the Democratic Republic of Congo.
A crisis has arisen amongst supporters of international criminal courts. It has become evident that early claims that international courts would end impunity for atrocities were overblown. Worse, it is difficult to claim that the courts operating thus far have had much positive effect at all within the concerned post-conflict states. As the ad hoc tribunals for Rwanda and the former Yugoslavia work toward completion of their mandates, it is no secret that there has been little public enthusiasm for their work within either Rwanda or the states comprising the former Yugoslavia.\(^1\) Certainly it would be unfair to say that the ad hoc international criminal tribunals have made no contributions whatsoever. Some have pointed to the body of jurisprudence that they have produced developing core concepts of international law, which undoubtedly constitutes a useful advancement of the field.\(^2\) However, there is no escaping the fact that this development, like other measures of success, has garnered more positive attention from members of the international legal community than from members of the domestic communities where the atrocities occurred.

Supporters have scrambled to salvage some other productive role for these courts whose trials have turned out to have disappointingly little on-the-ground impact. Increasingly, these efforts have taken the form of redefining the focus of attention from international trials themselves to international courts’ influence upon national trials and domestic legal systems. Within the UN, discussion of the completion strategies for the ad hoc tribunals turns again and again to “legacy” and “outreach,” although it is also well known that the ad hoc tribunals have had limited impact on domestic systems and are unlikely to do much more at this late date.\(^3\) Hybrid tribunals with mixed panels of foreign and domestic judges have been introduced in Kosovo, Sierra Leone and elsewhere, but despite their hype, the results have been similarly “mixed.”\(^4\) Now, even before the International Criminal Court (“ICC”) has held its first trial, some academics are conceding that the ICC cannot hope to play its

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\(^2\) Stromseth, supra note 1, at 268.

\(^3\) Id. at 269-79; Turner, Nationalizing, supra note 1, at 28-29; Press Release, General Assembly, Presidents of Tribunals for Rwanda, Former Yugoslavia Address General Assembly, U.N. Doc. GA/10636 (Oct. 15, 2007); see also part I.A, infra.

\(^4\) Stromseth, supra note 1, at 281; see also part I.B, infra.
desired transformative role through its own trials and are proposing that it should refocus its energies on interactions with hybrid and national tribunals.\(^5\)

While this crisis represents a fundamental challenge to the *raison d’être* of international criminal tribunals, it is but the latest turn in the longstanding debate over the role of international law and the appropriate balance between international and national courts in addressing atrocities. Within this debate, some scholars have criticized international courts as such,\(^6\) while others have wholeheartedly supported them.\(^7\) The turn toward hybrid and interactive models represents an attempt to develop an alternative model for international courts to wield their influence. But 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 as such, and in particular, whether and how to preserve a central role for these international courts in which the international community has invested so much hope.

I suggest here that we should return to this core issue 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 supporters. Instead of relying solely on international courts, I suggest that we should look to national courts as the primary venues for atrocity trials and to transnational networks as the best mechanism for the international community and international criminal law to play a constructive role.\(^8\)

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 Congo (“DRC” or “Congo”). The atrocities that have taken place in the DRC are at the heart of the

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\(^8\) For an administrative account of the differences between court-centered approaches to international governance and network approaches, see David Zaring, *Choice of Policymaking Form in International Law*, 45 Colum. J. Trans. L. (forthcoming 2008).
controversy over the effectiveness of international courts. The International Criminal Court will soon embark on its first trial, prosecuting a Congolese militia leader for war crimes for using child soldiers, and this trial stands in the public eye as the first test of the ICC’s long-debated effectiveness. 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. 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. However, this development cannot be credited to the ICC itself, which has limited its activities in the Congo to pursuing and promoting its own investigations and has had little if any institutional 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, and others who have worked avidly in support of these national trials, 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

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international law, in which transnational networks bring about a decisive transformation of national law. Domestic authorities, not international ones, were and remain predominant here, and what has taken place in the Congo 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 briefly reviews the recent development of this issue, focusing on the international community’s development first of international courts and then of hybrid courts, followed by a new shift in emphasis from international trials 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. This Part focuses first on the judgments in three exemplary atrocity trials. These judgments show a number of tangible effects of the national courts’ decision to use the Rome Statute, and by and large these effects seem to be positive ones. 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. Rather than entering these cases through traditional mechanisms such as legislative implementation or consideration of international jurisprudence, or even through the direct involvement of the ICC, 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, transnational legal process, policy-oriented jurisprudence and legal pluralism, focus our attention on critical aspects of these networks that enabled them to convey international law effectively in a chaotic post-conflict context. Particularly important are what I call the networks’ “functional hybrid” character, strategically incorporating elements of the international and the national, and 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, in light of the deficiencies of the national judicial system, do I really intend to suggest that the international community should nonetheless 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 a word, yes. 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, unnegotiable 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 on the international level insofar as possible and to discourage and criticize national trials that do not meet international standards. I suggest here that the ordinary failings of national tribunals do not in themselves present a sufficient reason for international withdrawal. To the contrary, the ultimate successful functioning of national legal systems should be

regarded as the most important goal of post-conflict justice, 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 a belief in their grave importance, as well as a sense of deep 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 the Congo and in many other post-conflict settings. 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 the low-ranking soldiers and militia members who carried out the atrocities and have no such pull. International trials, while 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 while 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 must be, not justice absolute, ideal and untarnished, but 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, I do not mean to suggest 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
turned first to hybrid courts and now to interactions between the International Criminal Court and either hybrid or national courts. In my view, these developments track in a positive direction, moving from a view of international and national courts as competing alternatives to the development of institutions that allow for greater interaction between international and national actors, and from the expectation that the responsibility for trials could be or should be shifted to the international arena to an expectation that national courts must shoulder the primary burden of holding such trials. However, in the end I propose that we should take this progression a step further, recognizing that the international community can and does act through institutions other than courts, and 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 40 years after Nuremberg there had been no more international tribunals. 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 indeed 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.

However, as international courts have begun to function, it has

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16 There is also a vigorous debate about the role of local justice mechanisms vis-à-vis national and international trials. E.g., Lars Waldorf, Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice, 79 Temp. L. Rev. 1 (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 (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 is likely to be quite limited due to the mechanisms by which it is spread and the relative isolation of local institutions. Furthermore, the relative 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.

quickly become evident that their apparent edge on national courts is not nearly so great as it originally seemed. 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. However, for purposes of this brief background discussion, I will focus on the functionalist and normative arguments raised in favor of international and national courts.

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. In contrast, 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, but 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. 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.

It does seem to often be true that a post-conflict state’s own judicial system is 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 Congo, and political interference and inadequate legal


19 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. E.g., 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. 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 will not address universal jurisdiction cases here.


21 DRUMBL, ATROCITY, supra note 15, at 129-34; Alvarez, Crimes, supra note 20, at 395-403; Stromseth, supra note 1, at 268-69.
training in Rwanda). 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 Rwanda’s lawyers and judges disappeared into the genocide). 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, and crucially, less likely to be shared by domestic observers. This, more than 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.” Furthermore, when international institutions are viewed by national communities as taking one side in a dispute, as is the case in the former Yugoslavia, decisions by international judges in international courts like the ICTY are not likely to be viewed as impartial by those communities, whatever international observers may think. Indeed, 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

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24 Alvarez, Crimes, supra note 20, at 410.

25 Baskin, supra note 22, at 12 & 21.
intensity of defendants’ participation in the atrocities. While international tribunals may be overinclusive in this sense, they are inevitably underinclusive in another: 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. 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.

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 clearcut 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.

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 such 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.

A contrasting view gives greater emphasis to the immediate harm done 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 community.

As with the functionalist line of argument, I regard much of the normative debate as over-generalized and insufficiently connected to post-conflict states’ on-the-ground realities. In cases of war crimes,
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[March

genocide and crimes against humanity, the victims, however numerous, are those who have suffered the immediate and direct harm. The destabilization and insecurity that such widespread and serious crimes cause is also felt most directly and immediately on a local level, by the concerned communities. In this, I stand with those who advocate the primacy of local interests. However, I also recognize that an international interest often arises in cases of war crimes, crimes against humanity, and genocide. I do not consider the international community’s collective sense of horror to be an appropriate basis for its claimed interest (surely its horror is not more compelling than that of the immediate victims), but rather, focus on two alternative reasons: often the scale of the crime renders it a threat to international security and stability, and often domestic authorities are unwilling or unable to prosecute, leaving the international community as the only source of recourse. Note, however, that we should assess the actual extent of the international interest in any given case; in some instances, the international community may have very weak independent interests and may thus appropriately participate in the judicial response to atrocities, if at all, by serving local interests.32

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, incapacity, or some other reason, for example. Similarly, international interests may better be served in national courts if the judgments of international tribunals will not reach domestic audiences. Thus, not only the relative strength of international, local and national interests varies from situation to situation, but also the capacity of international, local, and national institutions to fulfill those interests.33

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 will be 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.34 Thus, as with pragmatic arguments about institutional function, generalizations about international, national and local interests are not likely to tell us much about how those interests

32 Mark Drumbl discusses a similar set of concerns in the introduction to his study of sentencing and punishment in international and national tribunals. DRUMBL, ATROCITY, supra note 15, at 6.
33 A multi-country empirical study of victims’ attitudes revealed divided and non-exclusive support for international, domestic, and hybrid solutions. See Id. at 42.
34 See Dickinson, supra note 22, at 301; Waldorf, supra note 15, at 74-82.
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. Why then has a reliance on these universalized characteristics lingered so long in this debate? This goes to 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. However, the idea that international and national courts are competing for trials is incorrect 99% of the time. 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, or even millions of perpetrators who could be tried in any given situation, and no possibility that any international tribunal will try more than a few of 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. Furthermore, 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. While the question of deference to

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national tribunals is crucial for any case that the ICC is actually considering pursuing, these cases are few and far between. However, in light of the relative costs of trials in international courts and national tribunals, hidden within this debate is a different choice with a different set of consequences. 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. From a resource allocation perspective, then, if we presume a zero sum game, there is a genuine choice to be made between the small number of cases that could be heard internationally and the larger number of cases that could be heard nationally for the same commitment of resources. 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. In my view, then, the question we ask in making this decision should be, not just 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, but rather: where and to what end do we want to invest our financial, human, and other resources – in developing international institutions or in rebuilding domestic ones?

Thus, I contend that a focus on dichotomies between international and national institutions represents a distraction from more important questions. It has tended to misdirect the conversation away from fruitful pragmatic and realistic inquiry into 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 between national courts and deter inquiry into the strengths and weaknesses of particular systems and of the significance of those strengths and weaknesses in their particular settings. 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

37 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 Ahdieh, *Dialectical Regulation*, 38 CONN. L. REV. 863 (2006); Paul Schiff Berman, *Dialectical Regulation, Territoriality and Pluralism*, 38 CONN. L. REV. 929 (2006).
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. 

Laura Dickinson has identified legitimacy, capacity-building and norm penetration as three issues that hybrid courts address better than either international or national courts do alone, due to this interaction between international and domestic actors. Similarly, William Burke-White has promoted hybrid courts as combining the greater legitimacy of international courts with the local advantages and reduced expense of domestic courts, and Jenia Turner has praised hybrid courts for their relative efficiency, their incorporation of both domestic and international law, and their greater capacity to engage local populations and coordinate with local institutions.

There are certainly more critical assessments of the success of hybrid tribunals in achieving these goals in reality. 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. While their international colleagues may perceive international judges as impartial, their domestic counterparts may disagree. Nonetheless, while the debate over international versus domestic courts seemed to assume that both international and national courts are what they are, with a given, known set of positives and negatives, hybrid courts offer a venue, albeit an imperfect one for interaction and mutual influence.

However, although I wholeheartedly approve of this fundamental shift in conceptualizing international-national court relations, I do think that hybrid courts have thus far failed to fulfill their promise. Amongst all the possible critiques of hybrid courts, 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

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39 Dickinson, supra note 22, at 300.
41 Turner, Nationalizing, supra note 1, at 37-39.
42 See Nouwen, supra note 38, at 214.
43 Baskin, supra note 22, at 35.
will rub shoulders with their local counterparts on a day-to-day basis, sharing crucial knowledge and experience.

Thus, expertise is no small part of foreign judges’ purported “value added” to the proceedings, but 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 also have extensive trial experience, much less knowledge of the correct “family” of law (civil or common, depending on the circumstances). 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. Furthermore, unless a judge with all these qualifications also happens to have the relevant language skills, the level of interaction amongst the foreign and domestic judges will be sharply limited by the need for constant translation.

Consequently, the foreign judges on these tribunals frequently do not have the necessary experience and knowledge to fulfill the important role that hybrid courts demand of them. In Sierra Leone, while 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 with international criminal law, and of the five foreign judges serving in the court’s trial chambers, at least two (possibly more) appear to have no experience whatsoever presiding over a trial court. UNMIK (the UN Mission in Kosovo) also struggled to recruit international judges to Kosovo to serve on hybrid panels there, and national judges complained bitterly about foreign judges’ lack of experience and lack of interaction on the bench. At least one evaluation of UNMIK’s importation of international judges asserted that the actual level of interaction between international and national judges in Kosovo has been quite low.

Nonetheless, 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, while hybrid institutions create settings for interactions between international and national actors, it is important to consider carefully the factors affecting the success of that interchange. Hybrid courts demand of their international participants immersion into difficult living conditions in foreign states, management of complex trials in contentious political and social settings, and effective communication with foreign counterparts. It is certainly understandable in hindsight that mid- and late-career

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44 Id. at 23; Cesare P R Romano, The Judges and Prosecutors of Internationalized Criminal Courts and Tribunals, in INTERNATIONALIZED CRIMINAL COURTS 235, 251 (Romano et al ed., 2004).
45 Baskin, supra note 22, at 23; Romano, supra note 44.
46 Chambers, Special Court of Sierra Leone, http://www.sc-sl.org/chambers.html.
47 Whether correct or not, these complaints indicate a dearth of positive relations and good feelings amongst the international and domestic jurists serving together in Kosovo.
48 Id. at 35.
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. However, 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.

C. The ICC and Interactions with Other Courts

Efforts to reconstitute the role of international courts have now turned to the International Criminal Court and its relationship with other tribunals. 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 ICC effectiveness in trying perpetrators and a continued reliance on national courts. Among others, the identified weaknesses included: (1) the complementarity regime, which would enable states to shield their citizens from prosecution by a sufficient show of investigation and/or prosecution; (2) limited capacity and resources, which would prevent the ICC from pursuing many cases and could hamper effective prosecution in those it did choose to pursue; and (3) lack of a police force or other mechanisms for enforcing ICC orders, which would compel the court to rely entirely on state cooperation for enforcement. Many also assumed that states that were experiencing or likely to see violations of the ICC crimes would likely 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.

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 the kinds of difficulties with domestic perceptions of legitimacy and fairness 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.\textsuperscript{51} In the face of an array of complex, chaotic situations, 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.

However, while the ICC will be hard pressed to fulfill expectations for its role as a trial court, it has not been entirely without effect in national settings thus far. For one thing, contrary to expectations, states have voluntarily participated in the Rome Statute treaty regime, including a number of states with ongoing conflicts involving crimes of the sort the ICC might investigate and prosecute.\textsuperscript{52} 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 proven false by Uganda, the DRC, and the Central African Republic, all of which have self-referred situations to the ICC.\textsuperscript{53}

Here, the underlying mistake driving the assumption that states whose citizens might face prosecution would not cooperate may have been to think of states as monolithic entities with a single interest (maintaining maximum sovereignty), whereas each state is made up of different factions and individual actors with competing interests. Some of these find it useful to draw in international actors to pressure others, to increase their own relative strength, or to create international ties.\textsuperscript{54} In the DRC, there is a sense that President Kabila’s relatively clean-handed

\textsuperscript{51} Interview with Paul Madidi, Public Information and Outreach Officer, International Criminal Court, 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. International Criminal Court, Case Information Sheet, The Prosecutor vs. Germain Katanga, http://www.icc-cpi.int/library/cases/DRC-18-10-07_En.pdf; Press Release, International Criminal Court, Third Detainee for the International Criminal Court: Mathieu Ngudjolo Chui (7 Feb. 2008), http://www.icc-cpi.int/pressrelease_details&id=329&l=en.html

\textsuperscript{52} For example, in addition to the DRC, Afghanistan, Central African Republic, Chad, and Uganda are parties. The States Parties to the Rome Statute, International Criminal Court Assembly of States Parties, http://www.icc-cpi.int/asp/statesparties.html.


government benefited from the threat that ICC prosecutions posed to his political opponents. 55

This voluntary cooperation with the ICC raised hopes 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. 56 After all, national institutions are not all cut from one cloth, and states are not monolithic entities when it comes to national prosecutions either. Those 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, a few scholars have been trying to shift the focus of the debate on the effectiveness of international courts from their immediate capacity to hold trials to their effect on the operations of other tribunals. Initially, hybrid courts seemed to present the most appealing venue for such interactions. But recently, some of these authors have returned to the possibility of trials in national courts and to examining alternative mechanisms for ICC involvement in such courts. 57

In addition to considering the role of hybrid courts as such, Jenia Turner, William Burke-White, and Laura Dickinson have all argued that hybrid courts offer an institutional space for positive interaction between the ICC and domestic legal systems. 58 Dickinson has offered the most restrained view, proposing some joint efforts between the ICC and the hybrid courts that she proposes should handle lower level cases in lieu of national courts. Such joint action would, in her view, enhance the ICC’s local legitimacy by grounding ICC prosecutions more in local norms and practices, while the hybrid court will channel international norms into the local courts. 59 Of course, past experience suggests that hybrid tribunals of the sort that Dickinson proposes may well continue to suffer from the problems of underqualified jurists and of limited interactions between international and national judges.

55 This was my impression during my visit to the DRC and is confirmed by William Burke-White’s earlier research. Burke-White, Complementarity, supra note 54, at 565-66.

56 However, some fear that this cooperation marks abrogation of domestic responsibility to prosecute and use of the ICC for the political purpose of undercutting political opponents. Antonio Cassese, Comment, Is the ICC Still Having Teething Problems, 1 INT’L CRIM. JUST. 434, 436 (2006); Paola Gaeta, Is the Practice of ‘Self-Referrals’ a Sound Start for the ICC?, 2 INT’L CRIM. JUST. 949, 950-51 (2004); see also Arsanjani & Reisman, supra note 50, at 387.

57 Turner, Nationalizing, supra note 1.

58 Burke-White, Community, supra note 40; William W. Burke-White, The International Criminal Court and the Future of Legal Accountability, 10 ILSA J. INT’L & COMP. L. 195 (2003) [hereinafter Burke-White, Future]; Dickinson, supra note 22; Turner, Nationalizing, supra note 1. Burke-White does not describe the type of interaction he proposes in any detail. Also, in framing this discussion, it is worth noting that it is undecided whether hybrid courts should be considered domestic courts to which the ICC must defer for purposes of complementarity. Dickinson, supra note 22, at 309.

59 Dickinson, supra note 22, at 308-09.
At the other extreme, Turner has suggested that the ICC reorganize itself as a “traveling court,” participating in local trials with local lawyers and judges using an institutional format of specially created hybrid courts.\textsuperscript{60} Whereas Dickinson sees interaction with hybrid courts as supplementary to the ICC’s main role holding its own trials, Turner contends that the limitations on ICC action and its lack of local involvement or legitimacy mean that it should devote its primary attention to participating in multiple hybrid venues.\textsuperscript{61} Here, again, the problem of qualified judges remains, though in a slightly different guise: while the ICC may be better able to recruit highly qualified judges to its offices in the Hague, it may prove difficult to persuade ICC judges to leave the comforts of the Hague to participate in hybrid courts in the rural reaches of the Congo.\textsuperscript{62}

Apart from these lingering pragmatic concerns about these models, there are two crucial aspects of this discussion, for our purposes. First, rather than treating international and national courts as static, separate alternatives, these authors promote dynamic interaction between international and national actors. Accordingly, they 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, 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.\textsuperscript{63}

Next, the authors’ preference for hybrid courts as the venue for interaction to some extent reflects a continued skepticism about national courts, primarily on functional grounds. Dickinson points to the risks of domestic courts discussed above, such as bias, violations of due process norms, and lack of capacity.\textsuperscript{64} Burke-White has described national courts in the locale of the atrocities as being likely to become trial venues by virtue of their ubiquity and proximity, but he has similarly expressed skepticism about their fairness and the quality of the trials, as well as their ability to persuade the international community that they are fair and unbiased.\textsuperscript{65}

However, Turner is less skeptical about national courts, and Burke-White has expressed a more favorable assessment of national courts in

\textsuperscript{60} Id. at 35-36.
\textsuperscript{61} Turner, Nationalizing, supra note 1, at 17, 22-23.
\textsuperscript{62} Indeed, if participation in hybrid tribunals were to become a required role of ICC jurists, the ICC might find it more difficult to recruit personnel generally.
\textsuperscript{63} Burke-White, Community, supra note 40, at 62-63.
\textsuperscript{64} Dickinson, supra note 22, at 301-02.
\textsuperscript{65} Burke-White, Community, supra note 40., at 13-16. Burke-White treats military tribunals separately from national courts and is skeptical of whether they will provide sufficient due process protections. However, he appears to be referring to ad hoc military tribunals, rather than to a permanent court system like that functioning in the DRC. Id. at 21-23.
his latest work. 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.

Turner suggests that where national institutions are willing to prosecute, but find themselves unable to do so, the ICC “should not take cases to The Hague, but instead work with the government to enforce international criminal law locally.” Moving beyond the hybrid court model, she suggests that ICC officials could play a cooperative role providing logistical support and expertise to local officials, investigators, prosecutors and judges, and notes the success of the ECJ and ECHR in working with national courts to promote their ends. She also emphasizes other potential avenues of influence for the ICC, such as providing a model for domestic implementing legislation and related rules at the state level and, importantly, transnational networks.

Similarly, Burke-White has proposed a system of “proactive complementarity” in which the ICC would “encourage and perhaps even assist” with prosecutions in national courts. His proposal is broader than Turner’s in that he endorses ICC involvement in situations in which a state is unwilling to prosecute, in addition to those in which it is unable to do so. However, in another sense his approach is narrower, in that he considers but ultimately rejects intensive ICC involvement in support for or assistance with national trials and in the end endorses an essentially hortatory role far heavier on encouragement than assistance. Like Turner, he recognizes the importance of networks in this endeavor.

This turn toward renewed consideration of national courts and toward a focus on the interactions between national courts and their international counterparts is in my view a positive one. First and foremost, this shift represents a more realistic assessment of the prospects for development of post-conflict justice. National courts are and will continue to be in the front lines when it comes to trying defendants for atrocities within their jurisdictions. Hybrid and international courts are too few, too slow, and, contrary to popular opinion, the foreign judges imported by hybrid courts often do not provide a good conduit for transfer of international norms.

67 Turner, Nationalizing, supra note 1, at 33.
68 Id. at 30-35.
69 Id. at 50-51.
70 Turner, Transnational, supra note 30.
71 Burke-White, Proactive, supra note 5, at 56.
72 Id. at 87-91.
73 Id. at 95-96.
However, I am skeptical 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, particularly in the immediate future. This skepticism is based in part on the ICC’s own resource constraints and on the fact that it is currently fully engaged in its own process of institution-building to develop its capacity to prepare for and hold trials. But more than this, while Turner and Burke-White’s arguments that such a major shift in direction lies within the ICC’s mandate may be intellectually appealing, after the long, hard-fought negotiations that finally led to agreement on this mandate, 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.”

Nor am I convinced, as will become evident below, that the ICC should reorient itself in this way, even if it could, for in my view there are better mechanisms for influencing national courts than another court. Nonetheless, while I am not in accord with their prescriptions for retooling the ICC and their emphasis on a central role for that institution as opposed to other international actors, 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 while 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 solely on the hybrid court context. The recent trials in military courts in the Democratic Republic of Congo 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 the 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.

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75 Burke-White, Proactive, supra note 5, at 76.
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 atrocities. While there are no precise figures for the number of people who have died since armed conflict began in eastern Congo in 1996, 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. This conflict, dubbed “Africa’s World War,” is the deadliest since World War II.

The first war in Congo began as a foreign-supported rebel movement to overthrow longtime President Mobutu Sese Seko in 1996. After that

76 A note on research methodology: I visited the Democratic Republic of Congo 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 Democratic Republic of Congo government, of foreign governments, international organizations, and local non-governmental 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 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 techniques 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 either 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.


rebellion succeeded, eastern Congo resurfaced into a second war in 1998, characterized by an explosion of militia warfare 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, MONUC (Mission des Nations Unies en République Démocratique du Congo).  

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 results. First, 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. Within the country, the 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. And finally, from outside the DRC, the genocide in Rwanda spurred the flight of millions of refugees and genocidaires into eastern Congo and the Rwandan army’s consequent incursions into eastern Congo in the mid-1990s.

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 ubiquitiousness of the atrocities that characterized the war and that continue in the ongoing conflict; (2) the virtually universal impunity for those atrocities thus far; (3) the limited capacity of both the national and international legal systems to address these

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atrocities;\textsuperscript{83} (4) the deep suspicion in the DRC of foreign motives for any proposed involvement in Congolese affairs;\textsuperscript{84} and (5) the similarly strong distrust among the Congolese people of domestic government institutions.\textsuperscript{85}

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 chaos, time and distance from many of these events to the present has obliterated many of the crucial details and evidence and permanently separated perpetrators from their victims and the scenes of their crimes. Where perpetrators can be found, some are shielded from arrest or prosecution by political and military leaders.\textsuperscript{86} On an institutional level, the national justice system was decimated by the war and does not exist at all outside urban areas,\textsuperscript{87} and neither the international nor the national justice systems have the capacity to take on more than a few cases.\textsuperscript{88} Finally, neither the international nor the national justice systems have the confidence of the Congolese people that would imbue their judgments with credibility and legitimacy.\textsuperscript{89} It is in this context that Congolese prosecutors brought the three cases described below.

\textbf{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

\textsuperscript{83} SOS JUSTICE, \textit{supra} note 82, at 6-8; see part I.A, \textit{supra}, concerning international system.


\textsuperscript{85} \textit{Id.}


\textsuperscript{87} SOS JUSTICE, \textit{supra} note 82, at 6-8.

\textsuperscript{88} \textit{Id.}; Marlise Simons, \textit{Congo Warlord’s Case is First for International Criminal Court}, N.Y. TIMES, Nov. 10, 2006, \url{http://select.nytimes.com/search/restricted/article?res=FA0917FA345B0C738DDDA80994DF40482}.

Statute directly in lieu of national legal standards. There were several tangible effects on these judgments. In each instance, by applying the Rome Statute, the national court substantially improved upon the standards that would have been applied under national law, in that it brought the rules used in these trials into better accord with widely recognized substantive and due process standards.

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.\textsuperscript{90} All of the attacks took place between 2003 and 2005, well after peace had been declared and also after the DRC ratified the Rome Statute in 2002. In one of the cases, the defendants were soldiers enlisted in the DRC army; in the others, they were members of nongovernmental militias.\textsuperscript{91}

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, the UN mission in Congo, 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”\textsuperscript{92} and that killings, rapes, and abductions of civilians by armed militias likewise “continue unabated” in the contested regions of the country.\textsuperscript{93}

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

\textsuperscript{90} 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 obtained copies of them through personal contracts as well. December 2006 MONUC Report, \textit{supra} note 86, at 23.

\textsuperscript{91} \textit{Id.} at 2; December 2006 MONUC Report, \textit{supra} note 86, at 13-17 & 19-20

\textsuperscript{92} June 2006 MONUC Report, \textit{supra} note 86, at 8.

\textsuperscript{93} June 2006 MONUC Report, \textit{supra} note 86, at 10; December 2006 MONUC Report, \textit{supra} note 86, at 17-20.
“mainly to undue external interference, but also to the lack of will, resources and capacity,” noting 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.” News reports confirm that this pattern continues, describing “rampant political interference” that affects not only decisions concerning arrest and prosecution, but the judicial process itself, resulting in acquittals and overturned convictions that observers allege were produced by political pressure.

Each of these trials was heard by a military tribunal, for under the DRC’s 2002 code of military justice, war crimes, crimes against humanity, and genocide all fall under the jurisdiction of the military courts. These are not special military tribunals, but rather a permanent system of courts. The military courts are seen at least by some as being more functional than the civilian courts. They are the only venue for prosecution of these crimes within the DRC.


a. L’Auditeur Militaire contre Blaise Bongi Massaba

Blaise Bongi Massaba was a captain in the DRC army. 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

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94 June 2006 MONUC Report, supra note 86, at 11-12; December 2006 MONUC Report, supra note 86, at 17-20; G Interview, supra note 82.
98 Clifford, supra note 95, (quoting Harriet Solloway, Director of MONUC’s Rule of Law Unit); F Interview, supra note 89.
99 Code Judiciaire Militaire, supra note 96, art. 76. In addition, the military courts have jurisdiction over anyone accused of the relevant crimes, including civilians. This has, unsurprisingly, been the subject of criticism. June 2006 MONUC Report, supra note 86, at 2, 6, & 11-12. 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. Commission Permanente de Réforme du Droit Congolais, Avant projet de loi portant mise en oeuvre du Statut de la Cour Penale Internationale, Juillet 2003, available at http://web.amnesty.org/web/web.nsf/pages/int_jus-legislation_drc_draft.fra/$FILE/int_jus-legislation_drcdraft-fra.pdf [hereinafter Avant projet de loi].
secure an assigned area with the purpose of suppressing the militia activity there.\textsuperscript{100}

On October 12, 2005, Massaba and his troops arrested five boys, mostly students. They 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.\textsuperscript{101} For these acts, the court convicted Massaba of war crimes under the Rome Statute, sentenced him to life imprisonment, and ordered him to pay $300,000 in damages to the families of the murdered boys.\textsuperscript{102}

b. \textit{L’Auditeur Militaire contre Lieutenant Eliwo Ngoy, et al.}

The defendants in this case were members of the MLC nongovernmental militia. 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. The DRC has been working to integrate militias into its regular army, and shortly before this incident, the local commander announced that these units of the MLC were to be integrated into the DRC army. Consequently, the soldiers would be moved to a new location, far from the compliant population of Songo Mboyo, but would also receive a pay raise that would increase their pay by five times. However, the commander did not pay the soldiers promptly, but 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, attacked him, and then went to Songo Mboyo, stole a large amount of personal and commercial property, and raped 31 women.\textsuperscript{103}

Seven of the defendants were convicted on charges of crimes against humanity under the Rome Statute for the rapes and sentenced to life imprisonment; five of those seven defendants were also convicted of pillage under the Congolese military penal code and sentenced to 20 year terms of imprisonment.\textsuperscript{104} The court also ordered the convicted defendants to pay damages of $5,000 to surviving rape victims, $10,000 to the families of deceased rape victims, and additional damages to those whose property had been stolen.\textsuperscript{105}

\textsuperscript{100} Massaba case, \textit{supra} note 10, at 4-6.
\textsuperscript{101} There is a discrepancy in the judgment as to whether five or six boys were kidnapped and killed. \textit{Id.}
\textsuperscript{102} \textit{Id.} at 18-19.
\textsuperscript{103} Ngoy case, \textit{supra} note 10, at 8-11.
\textsuperscript{104} Also, some defendants were acquitted and others convicted and sentenced to terms of imprisonment on various charges related to their military insubordination under the Congolese military penal code. \textit{Id.} at 37-38.
\textsuperscript{105} \textit{Id.} at 38-39.
c. *L’auditeur Militaire contre Kalonga Katamisi, et al*

Kalonga Katamisi, Sdt. Alimasi, and their unidentified accomplices were members of the Mayi-Mayi militia. In 2004, the defendants kidnapped ten women from the town of Kamanga, took them into the forest and raped them. Katamisi held one of the kidnapped women captive as his “wife” for three months.\(^{106}\)

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 contrast to the Massaba and Ngoy cases, the defendants in this case were tried for crimes against humanity under the Congolese Military Penal Code. Katamisi, Alimasi, and the unidentified accomplices were all convicted, sentenced to death and ordered to pay $20,000 in damages to three of the rape victims who brought claims in a related civil action.\(^{107}\)

2. Effects of the Rome Statute

There are two overlapping legal frameworks for prosecuting crimes against humanity, war crimes, and genocide in the DRC: one international and one national. In these cases, the courts made different decisions about which framework to apply: in the Massaba and Ngoy cases, the court chose international law, while in the Katamisi case, national law was applied.

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. By ratifying the treaty, states parties do not adopt those definitions, but rather, agree to cooperate with the court and create a nexus whereby the court might choose to exercise its jurisdiction.\(^{108}\) The DRC ratified the Rome Statute in March 2002, but has not yet passed implementing legislation.\(^{109}\)

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

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\(^{107}\) *Id.* at 8-9.


also differ in significant ways from those standards. Curiously, in September 2002, after ratifying the Rome Statute, the DRC passed legislation amending its military code to adopt new definitions of these crimes in terms that do not mirror the Rome Statute. As 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, it does not appear that the military penal code legislation was intended either to implement or to supplant the Rome Statute.

a. International Definitions

In both the Massaba and Ngoy cases, the court convicted the defendants of crimes under the Rome Statute, adopting its definitions of crimes, as well as its rules of procedure and evidence. These decisions had salutary effects upon the judgment, although not entirely as anticipated by ICC observers. At the most basic level, while ICC supporters anticipated that in many countries adoption of the Rome Statute’s definitions would have a revolutionary effect, for the first time enabling prosecutions to take place, in the DRC, this was not the case. Since the DRC also has national laws in place prohibiting crimes against humanity and war crimes, the defendants could have been trialed for many of these crimes with or without the Rome Statute, as demonstrated by the Katamisi case.

Adoption of the Rome Statute’s definitions did nonetheless have some significant influence, particularly in the Ngoy case. ICC observers have suggested that the Rome Statute might be a vehicle for developing the substance of international criminal law and have noted particularly the Rome Statute’s rules on sex crimes as being a likely area of influence. 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 extremely narrow, including only acts of

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110 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 Division, Report, The Human Rights Situation in the Democratic Republic of Congo During the period of April to December 2005 (10 May 2006), http://www.monic.org/downloads/MONUC_human_rights_2005_en.pdf [hereinafter December 2005 MONUC Report].
111 Code Pénal Militaire, supra note 96.
112 Bekou & Shah, supra note 109, at 502 & 509-11; Interview with Anonymous J, 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.
113 Ngoy case, supra note 10, at 26-38; Massaba case, supra note 10, at 11-12.
115 E.g., Burke-White, Future, supra note 58, at 200-01.
penetration committed by men against women. In contrast, the Rome Statute’s definition is broader, encompassing various forms of sexual assault. The Ngoy court applied the Rome Statute’s definition to draw in some assaults that would otherwise have been excluded.\footnote{Ngoy case, supra note 10, at 26-28.}

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. 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.\footnote{Rome Statute, supra note 108, art. 77; Code Pénal Militaire, supra note 96, art. 169.} Accordingly, in the Massaba and Ngoy cases the death penalty was not on the table, while in the Katamisi case the defendants were sentenced to death.\footnote{Massaba case, supra note 10, at 18; Ngoy case, supra note 10, at 12 & 38; Katamisi case, supra note 106, at 9.} In this respect, as in the area of sex crimes, the adoption of the Rome Statute advanced the growing international consensus on a substantive issue: the abolition of the death penalty even for the most serious of crimes.

However, in another sense the Congolese courts’ adoption of the Rome Statute’s sentencing provisions raise another fundamental justice question that is familiar from the ad hoc international tribunals: disparate sentencing. In Rwanda, defendants tried in national courts could be sentenced to death, while defendants tried in the international tribunals could not.\footnote{The former Yugoslavia’s criminal code also provided for the death penalty, but it has since been abolished in some if not all of the splinter states. William A. Schabas, \textit{Sentencing by International Tribunals: A Human Rights Approach}, 7 \textit{Duke J. Comp. & Int’l L.} 461, 476 & 478-79 (1997) [hereinafter Schabas, \textit{Sentencing}].} Since the defendants in the international tribunals tended to be among the most serious perpetrators, there is some fundamental unfairness in lower level perpetrators being sentenced to death while their superiors, also found guilty, were not.\footnote{Id. at 507-08; Robert D. Sloane, \textit{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).} Here also, the difference in sentences in these cases is not due to a difference in the severity of the crimes, but rather, to the application of international rather than national law. Furthermore, beyond the disparity issue, when the consensus within a country is that the only satisfactory penalty for such a horrific crime is death, a sentence of life imprisonment fails to satisfy many members of the local community that justice has been done.\footnote{Alvarez, \textit{Crimes}, supra note 20, at 407-09.} In the Congolese context, this issue might arise as well.

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.\footnote{Burke-White, \textit{Future}, supra note 58, at 204.} Here, the courts’ use of the Rome Statute promotes development of common, universal definitions of these crimes in one

\footnotesize{\begin{itemize}
  \item \footnote{Ngoy case, supra note 10, at 26-28.}
  \item \footnote{Rome Statute, supra note 108, art. 77; Code Pénal Militaire, supra note 96, art. 169.}
  \item \footnote{Massaba case, supra note 10, at 18; Ngoy case, supra note 10, at 12 & 38; Katamisi case, supra note 106, at 9.}
  \item \footnote{The former Yugoslavia’s criminal code also provided for the death penalty, but it has since been abolished in some if not all of the splinter states. William A. Schabas, \textit{Sentencing by International Tribunals: A Human Rights Approach}, 7 \textit{Duke J. Comp. & Int’l L.} 461, 476 & 478-79 (1997) [hereinafter Schabas, \textit{Sentencing}].}
  \item \footnote{Alvarez, \textit{Crimes}, supra note 20, at 407-09.}
  \item \footnote{Burke-White, \textit{Future}, supra note 58, at 204.}
\end{itemize}}
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, so long as the use of the Rome Statute’s definitions is not universal amongst domestic courts, this increased convergence between international and national law comes at the cost of increased divergence within national law and at the risk of increased local uncertainty concerning the applicable law.

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. However, where the issue does arise in the Massaba case, 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. In contrast, in the Katamisi case, 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.

In the Massaba case, the defendant was accused of war crimes for his role in pillaging and ordering his troops to kidnap and kill schoolboys. However, the national law on war crimes failed to state any penalty for war crimes.123 Since 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 national war crimes provisions would have placed the court in violation of both national and international due process mandates.124 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.125

In the Katamisi case, the court not only tries Sdt. Alamisi in absentia for crimes against humanity for his role in raping ten women, it also tries and convicts various unnamed codefendants. Trials in absentia raise enough questions of due process when the identity of the defendant is

123 Massaba case, supra note 10, at 11.
124 Id.; Code Pénal Militaire, supra note 96, art 2; but see Schabas, Sentencing, supra note 119, at 476 (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).
125 Massaba case, supra note 10, at 11 (“une lacune criante”). However, as discussed above, the court does not merely adopt the Rome Statute’s penalties as a gap-filling measure, but applies the Rome Statute and its rules of procedure and evidence to the case as a whole. Id. at 12-16.
known and s/he is simply not present at the trial, but to try and convict unknown, unnamed defendants violates any conceivable concept 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. Regardless, the Rome Statute does not permit trials in absentia, and so use of the international standard in this case would have precluded such a gross due process violation.\textsuperscript{126}

c. Protections for Victims

The Rome Statute offers extensive protections for victims and witnesses, including a Victims and Witnesses Unit tasked with making protective and security arrangements.\textsuperscript{127} 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.\textsuperscript{128}

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.\textsuperscript{129} In particular, the Ngoy court followed the Rome Statute’s procedures in holding in camera sessions to take testimony from rape victims\textsuperscript{130} Furthermore, the court’s attitude toward the victims’ testimony is strikingly sympathetic: it asserts that the effect of trauma and shame on the victims’ testimony must be taken into account and should not be permitted to undermine its veracity.\textsuperscript{131} It is notable that the tendentious arguments put forward by the defendants in this case seem to indicate that they expected a more skeptical approach to the victims’ testimony from the court.\textsuperscript{132} In the Katamisi case, in contrast, 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.\textsuperscript{133}

\textsuperscript{126} Rome Statute, supra note 108, art. 63.
\textsuperscript{127} Id., art. 43(6).
\textsuperscript{128} Id., art. 68(2).
\textsuperscript{129} Massaba case, supra note 10, at 12; Ngoy case, supra note 10, at 12.
\textsuperscript{130} Ngoy case, supra note 10, at 3; MONUC June 2006 Report, supra note 86, at 11; G Interview, supra note 82.
\textsuperscript{131} Ngoy case, supra note 10, at 27-28.
\textsuperscript{132} 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. In reality, the defendants argued, in such a situation 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. As one would expect, the court rejects this argument with indignation. Id. at 29-30.
\textsuperscript{133} Katamisi case, supra note 106; June 2006 MONUC Report, supra note 86, at 11.
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.\(^{134}\) 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 even arises. For, as I outline in the section below, 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.

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 less easy 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 also consider 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 that, while varying substantially in their particulars and in their normative claims, share certain commonalities that can be taken as fundamental. These theories lay the groundwork for this discussion in that 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.\(^{135}\)

\(^{134}\) See June 2006 MONUC Report, supra note 86, at 11 (identifying similar effects).

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.

For the DRC is exactly the sort of state that commentators expected would adamantly resist participating in the Rome Statute treaty regime: it is a war-torn state that has experienced horrific atrocities on a scale unrivaled by other ongoing conflicts, and its government and judicial system were left in tatters by decades of kleptocracy under Mobutu and then by the years of war that followed his departure.\textsuperscript{136} Contrary to all expectations, the DRC was not only one of the early states to ratify the ICC’s Rome Statute, it self-referred the situation within its borders to the ICC for investigation, and cooperated in turning over the ICC’s first defendant to the court.\textsuperscript{137}

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 DRC’s unanticipated, voluntary adoption of the Rome Statute as the rule of decision in domestic cases requires us to rethink our assumptions about how international law is drawn into domestic contexts. For once again, the forces that influenced the courts to undertake these trials and to apply the Rome Statute have taken a different course than commentators predicted.

It was expected that states would undertake prosecutions when necessary to shield their citizens from the ICC’s jurisdiction, and only when necessary to do so, by making use of the ICC’s complementarity provisions requiring the Prosecutor to defer to genuine state investigations and prosecutions. However, while 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.

Not only this, while 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, in the DRC, this development comes directly from the courts. The military tribunals 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 make extensive use of these sources in their analysis.

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, the UN Mission in the Democratic Republic of Congo, in investigating and pressing for prosecution of these crimes, as well as the work of NGOs and others. In particular, the dynamics of these investigations and prosecutions suggest the influence of transnational networks of UN officers and others with interest and experience in international criminal law. These networks of international, foreign, national, and local actors not only advocate for trials in general and for these trials in particular, they 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 then apply as national law. However, this did not happen here.

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138 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. Loi
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\(^{139}\) and it amended the national law on the same subjects to include provisions, including definitions of the relevant crimes, that are not the same as those in the Rome Statute.\(^{140}\) In practice, this has created a condition of legal pluralism in the DRC, in which, as we have seen, 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.\(^{141}\) 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 where 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.\(^{142}\) 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.\(^{143}\)

\(^{139}\) Avant projet de loi, supra note 99; Bekou & Shah, supra note 109, at 509-11.

\(^{140}\) Compare, for example, the provisions on crimes against humanity of the Code de Justice Militaire, supra note 96, arts. 165-72, with those of the Rome Statute, supra note 108, art. 7.

\(^{141}\) 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. 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.


\(^{143}\) Ngoy case, supra note 10, at 12; Massaba case, supra note 10, at 11-12. The DRC Constitution does not contain a last in time rule; thus, treaties appear to trump even subsequent domestic legislation. Constitution de la République Démocratique du Congo, art. 215 (2006); compare Conflicts Between Treaties and Subsequently Enacted Laws in Belgium: Etat Belge v. S.A. Fromagerie Franco-Suisse Le Ski, 72 Mich. L. Rev. 118 (1973) (Belgian law accords self-executing treaties precedence over subsequently enacted legislation but applies the last in time rule to non-self-executing 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. E.g., Interview with Alpha Fall, Senior Associate, International Center for Transitional Justice, Kinshasa, Dem. Rep. Congo (June 28, 2006) [hereinafter Fall Interview] (notes on file with author).
However, in so doing, the Congolese courts stand at odds with the other states parties to the Statute, as well as the conclusions of scholars who have considered the subject. For 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. 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 court. As noted by Antonio Cassese in his 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. 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, than it is difficult to imagine what the DRC legislature could possibly accomplish by proposing implementing legislation that includes provisions concerning the definitions of crimes and related issues. For 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.

In light of these countervailing considerations, it may seem that the Congolese courts were out in left field. But while their approach does appear to put them in a worldwide minority of one, if we take the constitutional provision at face value and presume that the DRC is simply at the extreme amongst monist countries in treating all international treaties as self-executing, then the courts’ decisions were correct as a matter of domestic constitutional law. As a matter of international 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

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http://jicj.oxfordjournals.org/cgi/content/full/5/2/493 (no page numbers in on line version); Turner, *Nationalizing*, *supra* note 1, at 8; Criminal Law Section, Legal and Constitutional Affairs Division, Report of the Commonwealth Expert Group on Implementing Legislation for the Rome Statute of the International Criminal Court ¶ 3 (Sep. 2004),

145 Rome Statute, *supra* note 108, art. 5-8 & 86.

146 *ANTONIO CASSÈSE & MIREILLE DELMAS-MARTY, JURIDICTIONS NATIONALES ET CRIMES INTERNATIONAUX* 94 (2002); *see also* Roscini, *supra* note 144.

147 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 99, at 16-24.
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 crimem, nullem poena sine lege* concerns to which Cassese referred in the Belgian context are substantially mitigated here.\(^{148}\)

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. As discussed below, these are no small matters in the context of the theory and realities of importation of international law into domestic contexts.

For one thing, 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 while 42 of the 50 African states had either signed or ratified the treaty, only one, South Africa, had passed implementing legislation.\(^{149}\) 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.\(^{150}\)

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 would develop influential rules and standards through the case law developed through their trials. However, here the Massaba and Ngoy courts rely primarily on the text of the Rome Statute itself, analyzing it directly rather than considering international case law or commentaries. The Massaba court does not refer at all to prior rulings by the ad hoc international tribunals on the issues raised, nor to any of the numerous articles and books commenting on the ad hoc tribunals and the International Criminal Court or the travaux preparatoires of the ICC Statute. Apart from the Rome Statute, it makes use only of some general international law treatises predating the Statute.\(^{151}\) The Ngoy court also engages primarily in direct analysis. It also draws from some more

\(^{148}\) *Id.* at 94; Massaba case, *supra* note 10, at 12; Ngoy case, *supra* note 10, at 26-27.

\(^{149}\) Bekou & Shah, *supra* note 109, at 501.

\(^{150}\) *Id.* at 501-05.

\(^{151}\) Massaba case, *supra* note 10, at 9-10 & 12-16.
directly relevant sources, including a Congolese treatise concerning the Rome Statute and a single reference to a case from the ad hoc International Criminal Tribunal for Rwanda.\footnote{152 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, so that this citation is a curious one-off. Ngoy case, \textit{supra} note 10, at 34.}

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.\footnote{153 See Massaba case, \textit{supra} note 10, at 26-27 (citing a 1988 International Committee of the Red Cross treatise on international humanitarian law).} 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.\footnote{154 June 2006 MONUC Report, \textit{supra} note 86, at 18; G Interview, \textit{supra} note 82; F Interview, \textit{supra} note 89; E-mail from Anonymous G to Elena Baylis, Associate Professor, University of Pittsburgh Law School (Feb. 18, 2008) [hereinafter February 18 e-mail] (on file with author).} Indeed, apart from such assistance, it is difficult to obtain case law and other current international and foreign legal resources within the DRC. 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.\footnote{155 Interview with Fred Robarts, Gestionnaire du Projet Renforcement des Capacités de Règlement des Contentieux Electoraux, Programme de Nations Unies pour le Développement (UNPD), Kinshasa, Dem. Rep. Congo (July 5, 2006) [hereinafter “Robarts Interview”]. I also found it difficult to obtain copies even of Congolese laws in the DRC, 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.} 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.\footnote{156 See also Widner, \textit{supra} note 16, at 74.} In a study sponsored by the UNDP, the judges of the DRC Supreme Court identified difficulty in obtaining copies of laws and judgments as a significant issue— all the more so for trial judges in isolated Ituri and Mbandaka.\footnote{157}
materials are available to the court 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.\footnote{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, \textit{supra} note 86.}

3. International Criminal Court

In their visions of how the International 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. 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 influence of the ICC in this setting 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 has had an enormous effect upon these cases.

However, since the DRC ratified the Rome Statute, 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, rather than any direct influence upon military prosecutors’ decisions to bring these charges and the Congolese courts’ decision to make use of the Rome Statute.

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 seems 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. Nonetheless, 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. William Burke-White has argued that this awareness has had fairly wide-ranging effects on a political level; to some extent (political interest in creating at least some appearance of transitional justice) this may be true, although in others (deterrence of further atrocities) it is clearly not. 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. 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 these 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, if not millions of others, and thus are not of interest to the ICC. 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.

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.

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158 Madidi Interview, supra note 51.
159 At a minimum, everyone with whom I spoke was aware of the ICC and the Lubanga case. E.g., Fall Interview, supra note 143.
160 See Burke-White, Community, supra note 40, at 30, 41 & 54; Burke-White, Complementarity, supra note 54, at 587; Jeffrey Gettleman, Rape Epidemic Raises Trauma of Congo War, N.Y. TIMES, http://www.nytimes.com/2007/10/07/world/africa/07congo.html?em&ex=1191902400&en=28e9336839fa9a1b&ei=5087%0A.
161 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 other suspects have easily evaded arrest or been cleared of charges under suspicious circumstances, the commonly held belief is that high 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, http://www.monuc.org/News.aspx?newsID=14592 [hereinafter MONUC April 2007 Assessment].
intended to publicize its work, but not in supporting or participating in domestic efforts at achieving justice. 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 on providing training on the relevant law, assistance with domestic cases, or capacity-building of domestic institutions.¹⁶²

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.

However, 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. It can thereby serve the useful if unglamorous purposes 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 the 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 their expertise. Indeed, as discussed below, not only are

¹⁶² E.g., 2007 ICC report, supra note 74, at 4-7; November 2006 ICC newsletter, supra note 74, at 5. 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 51.
court-to-court relationships not the only international-national interactions that can promote the cause of justice in post-conflict settings like the DRC, other liaisons may 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 directly related to the trials in question, and some indirectly shaping the domestic legal environment. The situation here demonstrates several of the common themes amongst theories of transnational legal interactions such as transnational legal process, global governance, policy-oriented jurisprudence, and legal pluralism: that the actors who influence the legal process will be not only those directly involved in trials, but both institutions and individuals, at both international and domestic levels, governmental and nongovernmental; that they will interact not only within the formal legal process but also informally, through institutions, and through networks; and that their involvement will be iterative as well as singular.163

A central player in these networks has been MONUC’s Human Rights Division, which has been intimately involved in the investigation and prosecution of international crimes in the DRC, including, among others, the Ngoy case.164 In language reminiscent of the hyperbole of ICC supporters, MONUC’s website asserts that its Human Rights Division “is to put an end to impunity and to ensure that those responsible for violations of international human rights and humanitarian law are brought to justice.”165

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 Human Rights Division organized a Special Investigations Unit that investigates massive human rights violations.166 This Unit does not

163 Berman, Global, supra note 135 (global legal pluralism); Koh, Transnational, supra note 135 (transnational legal process); Lasswell & McDougal, supra note 135, at 141-60 (policy-oriented jurisprudence); Reisman, et al., supra note 135, at 578-80 (policy-oriented jurisprudence); Slaughter, Real, supra note 135 (transgovernmentalism).
164 June 2006 MONUC Report, supra note 86, at 18.
simply conduct the general fact-finding, monitoring and reporting of human rights violations in which the Human Rights Division has long been engaged (as well, for that matter, as NGOs like Human Rights Watch). Instead, drawing from the experience of personnel in other post-conflict zones, it engages in “professional data gathering and analysis,”167 with the aim of producing evidence that can be used in criminal trials.168

Upon deciding to investigate an incident, the Special Investigations Unit puts together multidisciplinary teams of six to ten people from various MONUC units. This team travels to the affected area, conducts a physical investigation, and interviews victims and witnesses, as well as perpetrators when possible.169

For example, in the initial investigation that launched the Special Investigations Unit, the Human Rights Division carried out an inquiry into an attack called Effacer le Tableau (“erasing the board”) that took place in the Ituri town of Mambasa and nearby areas. The MLC (Mouvement de Libération du Congo) 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 this 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.170

The Human Rights Division’s Justice Support Unit picks up at the end of the SIU’s investigations, lobbying for the arrest and prosecution of suspects and providing “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.”171 Legal Officers have met with prosecutors and judges, discussed relevant legal issues, and provided them with legal materials, including copies of


168 Ricci, supra note 166, at 99; Telephone Interview with Anonymous R, (Feb. 14, 2008) [hereinafter R Interview] (contact information and notes on file with author).

169 Id.; see also Discussion Notes, Part Two, in CHALLENGES OF PEACE IMPLEMENTATION, supra note 166, at 130-31.

170 Id.; see also Discussion Notes, Part Two, in CHALLENGES OF PEACE IMPLEMENTATION, supra note 166, at 130-31.

international treaties. Part of this activity has been advocacy for use of the Rome Statute.\footnote{June 2006 MONUC Report, \textit{supra} note 86, at 11; F Interview, \textit{supra} note 89; G Interview, \textit{supra} note 82; February 18 e-mail, \textit{supra} note 154.}

So, for example, in the Mambasa situation, the Human Rights Division 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.\footnote{Information-sharing is, however, limited on a case by case basis for the protection of victims and witnesses. R Interview, \textit{supra} note 168.}

As the Mambasa cases progressed, other needs developed and additional partnerships were created to meet them. For example, both the defendants and the victims needed lawyers, and so the NGO Advocats sans Frontieres 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.\footnote{Id.}

Notably absent in all of this is any participation by the International Criminal Court. Indeed, while MONUC investigators made a point of getting victims’ and witnesses’ permission to share their statements with the ICC and while 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.\footnote{Id. In its peacekeeping capacity, MONUC has also agreed to offer support for arrests pursuant to ICC arrest warrants. 2007 ICC report, \textit{supra} note 74, at 8.}

Also notable is that much of this activity has been driven, not by institutional directives or policy, but by individual initiative. 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. However, these initiatives 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 Human Rights Division. 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. MONUC continued to be actively involved while I was in Kinshasa, with special investigations continuing, and human rights officers continuing to provide legal support to the trials and to follow the outcomes.\footnote{F Interview, \textit{supra} note 89; G Interview, \textit{supra} note 82; R Interview, \textit{supra} note 168; E-mail exchange with anonymous A, October 24-29, 2007 (e-mails on file with author); see also MONUC, HR Component of the UN Peace Mission in Democratic Republic of Congo, \url{http://www.unhchr.ch/html/menu2/5/rdc.htm}}

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 for lack of personnel and resources.\footnote{Discussion Notes, Part Two, \textit{supra} note 170, at 123, 125 & 129.} 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.\footnote{R interview, \textit{supra} note 168.}

As other investigations and prosecutions have proceeded, the network of NGOs, international organizations, government and local actors have continued to evolve and expand. The most direct role in the trials has continued to be played by the NGO Advocats sans Frontières, which has worked with defense attorneys for the defendants in some of these prosecutions.\footnote{J Interview, \textit{supra} note 112.} ASF has also continued to work with MONUC on prioritizing trials and providing other assistance for victims and for defendants.\footnote{F Interview, \textit{supra} note 89.} The international NGO Global Rights has been organizing a trial monitoring program for these trials as well as others in military and civilian courts.\footnote{LaRoche Interview, \textit{supra} note 86.} 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.\footnote{December 2005 MONUC Report, \textit{supra} note 86, at 15.}

Nor are the efforts of these networks 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 front, for example, Global Rights and USAID promoted legislation reforming the laws.
against sexual violence to cover a broader range of sexual attacks, which have been endemic in the conflict, and this legislation was passed while I was in Kinshasa in June 2006.\footnote{Interview with Deko Moleka-Bekangba, Program Officer, USAID, Kinshasa, Dem. Rep. Congo (June 20, 2006) (notes on file with author); see also LaRoche Interview, supra note 86 (describing other legal reform projects); U.S. AGENCY FOR INTERNATIONAL DEVELOPMENT & GLOBAL RIGHTS, UNE NOUVELLE LÉGISLATION SUR L’INDÉPENDANCE DU POUVOIR JUDICIAIRE: CHEMIN OBLIGE POUR L’INSTAURATION DE L’ÉTAT DE DROIT EN RDC (2006) (pamphlet concerning proposed legislation on judicial independence, on file with author).} Global Rights, with support from USAID, also produced a pioneering study in August 2005 on the problem of violence and impunity in eastern Congo, which 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.\footnote{GLOBAL RIGHTS, S.O.S. JUSTICE: QUELLE JUSTICE POUR LES POPULATIONS VULNÉRABLES À L’ÈST DE LA RDC?, RAPPORT D’ÉVALUATION DU SECTEUR DE LA JUSTICE AU NORD ET SUD KIVU, MANIEMA ET NORD KATANGA (Août 2005). 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 86.} REJUSCO is a major program to address the gaps identified by Global Rights in its study of eastern Congo, and USAID and the aid branches of other foreign embassies have been the central partners in this initiative.\footnote{Interview with Pierre Kanika, Ministry of Justice, Kinshasa, Dem. Rep. Congo, (June 27, 2006) (notes on file with author).} The NGO Réseau Citoyens Network has developed a number of 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. These programs are also funded primarily by embassies.\footnote{Interview with Aurore Decarnieres and Delphin Bulambo, Réseau Citoyens Network, Kinshasa, Dem. Rep. Congo (June 28, 2006) [hereinafter Decarnieres & Bulambo Interview] (also describing other projects, notes on file with author).} Similarly, DFID (the British equivalent to USAID) funded an Advocats Sans Frontières program to develop “mobile courts” to travel to rural areas and hear cases, filling some of the gaps created by the dearth of courts in most of the country.\footnote{Interview with Oliver Blake, Governance Advisor, Department for International Development, Kinshasa, Dem. Rep. Congo (June 23, 2006) (also describing other projects, notes on file with author).} Likewise, the Human Rights Division’s efforts also extend beyond these trials to broader legal reform issues. Human Rights Officers have also worked on a range of other issues relating to problems of impunity and Congo’s inadequate judiciary. Concerning the problem of arbitrary arrests and long periods of preventative detention, for example, officers visited more than 30 prisons, produced a report, offered some technical assistance, and pushed the lead prosecutor to circulate a memo to all prosecutors instructing them to follow new procedures that would comply with human rights norms. The Division has also been involved in developing recommendations for reform legislation and other work on transitional justice issues.\footnote{F Interview, supra note 89.
Thus, a vast network of national and international actors is pressing a transitional justice agenda for reform and rebuilding of the judicial system, of which atrocity trials are one part. MONUC, NGOs, local attorneys and government officials, and the aid branches of foreign embassies have played a range of roles in these trials and in promoting post-conflict justice more generally; frequently, embassies finance projects that are then carried out by international and national NGOs, who themselves frequently manage the projects through local partners.

5. Conclusions Concerning Mechanisms

Three conclusions relevant to this inquiry 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. In order to address the atrocities committed during the conflict, such as widespread sexual violence, MONUC, NGOs, embassies and others are not only pushing these trials and the use of international law within these trials, but also pursuing fundamental legal reforms such as legislative changes to the criminal code. Furthermore, these reform programs are not the work of individual actors in isolation, but rather, embassies, international organizations, and NGOs are forming shifting and overlapping partnerships to address different aspects of the post-conflict justice problem. Finally, the exception to these practices of partnership and legal reform efforts is the ICC, which has worked primarily in pursuit of its own investigation and informing the public about its own activities, rather than joining with other organizations to support national efforts at reform and justice.

Indeed, the most obvious and traditional mechanisms by which legal rules are transmitted have proven to be the most feeble in moving the Rome Statute from the international realm to its place in the Massaba and Ngoy 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 domestic incorporation with its investigations and prosecutions. Nonetheless, the Statute and its norms would have languished unused as mere formal rules but for the decisions of domestic judges, facilitated by a network of embassy donors, facilitating NGOs, local attorneys, and the entrepreneurial officers of MONUC, to bring them into use.

D. Crucial Features: Functional Hybrids and Domestic Control

In the section above, 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 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 networks described above. While I find these theories descriptively useful at varying levels, 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, is nonetheless necessary to promote domestic institution-building and the long-term goals of post-conflict justice.

1. 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 with their foreign counterparts, particularly in the context of economic regulation. But recently, scholars have begun to suggest that the sorts of transgovernmental networks that have strengthened domestic capabilities and promoted transnational norm convergence in the regulatory and economic contexts might also be useful in the spheres of justice and human rights.

At the same time, scholars concerned with international criminal law and international human rights law have identified looser transnational networks operating in these arenas. Rather than being strictly transgovernmental in nature and consisting of domestic officials and their horizontally matched foreign counterparts, these networks have wide-ranging members, from state actors, to NGOs, to international organizations, to domestic attorneys and associations. Rather than being

characterized by the development of formal, structured associations and cooperation, these networks interact in a looser, more ad hoc fashion. The forces promoting the importation of international criminal law norms and the pursuit of domestic trials for violation of those norms in Congo seem to be another example of such a network.

For example, Margaret McGuinness has written about the role of transnational advocacy networks and what she calls “norm portals” in the importation of international human rights norms concerning the death penalty into the U.S. legal system in ways that present some relevant parallels to the situation in the DRC.\textsuperscript{191} She describes an ad hoc network of foreign governments, domestic attorneys, and, to a lesser extent, international organizations, coalescing around a common substantive issue (abolition of the death penalty), catalyzed by individual death penalty cases in the U.S.\textsuperscript{192} Like the networks at work in Congo, these are a diverse group of actors brought together by their interest in a particular substantive issue, rather than by more general associations or relationships as horizontal counterparts.

Further, McGuinness describes a process of transnational norm transfer that is characterized by a combination of formal and informal mechanisms, and in which the primary point of entry into the domestic legal system is a formal, domestic legal mechanism.\textsuperscript{193} Similarly, in Congo, the formal mechanism of ratifying the ICC treaty, together with the less formal effects of cooperation with the ICC in the Lubanga investigation, the voluntary work of MONUC investigatory and legal teams and the work of domestic attorneys on these particular 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 these cases. 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 provide a legal basis for courts to adopt the international norms in question over competing domestic norms.\textsuperscript{194}

Jenia Turner has described nascent international criminal law networks, focusing on international criminal law in the sense in which this article discusses it – the crimes of genocide, war crimes, and crimes against humanity.\textsuperscript{195} Although she describes these networks as “transgovernmental” and treats as her core models existing investigatory, prosecutorial and judicial networks of national government counterparts, she both describes and advocates the development of broader transnational networks with vital roles for nongovernmental entities and

\textsuperscript{191} Margaret E. McGuinness, Medellín, Norm Portals, and the Horizontal Integration of International Human Rights, 82 NOTRE DAME L. REV. 755 (2006).
\textsuperscript{192} Id. at 808-24.
\textsuperscript{193} Id. at 832-33.
\textsuperscript{194} Id. at 837-39.
\textsuperscript{195} Turner, Transnational, supra note 30.
actors, focusing in particular on NGOs and the ICC. 196 Turner is particularly concerned with the potential for joint action networks, networks which “engage [transnational] participants daily in face-to-face joint activities – investigation, adjudication, prosecution – for a sustained period of time.” She cites hybrid courts as one institutionalization of such a network, 197 and promotes the future formation of hybrid courts formed in cooperation with the International Criminal Court in particular. 198

While the networks that Turner describes and advocates are considerably more formal and structured than those at work in the Congo now, 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, and to the particular importance of engaging these actors in states where domestic institutions are weak. 199 These characteristics are of course particularly salient in places like the Congo, where rebuilding domestic institutions is a primary goal of the operating networks.

The networks involved in the military trials here 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 (for example, MONUC seems to take the lead in the investigative phase, with some interaction with government investigators, but then ASF assists defense attorneys in the trial phase with some support from MONUC). 200 Nonetheless, they involve members of different parts of the network 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, reinforcement, and other benefits.

Furthermore, there is another important characteristic of the networks at work in the Congo that is not mentioned by either Turner or McGuiness in their descriptions of the transgovernmental networks they have studied: the rapid transfer of personnel and thus of information and skills from one international administration setting to another. Here, the phenomenon that I call “tribunal-hopping” 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 Kosovo, to Sierra Leone) and from UN administration to UN administration (e.g., from Kosovo to the DRC), bringing their experiences of the norms and processes at work in each tribunal and administration along with them.

196 Id. at 1000-17.
197 Id. at 1017.
198 Turner, Nationalizing, supra note 1.
199 Turner, Transnational, supra note 30, at 1000-06.
200 G Interview, supra note 82; F Interview, supra note 89; J Interview, supra note 112.
and spreading them from one distant location to another.\textsuperscript{201} A similar phenomenon occurs in other foreign service institutions, including USAID, DFID and their counterparts in other foreign embassies, as well as NGOs.\textsuperscript{202} Many of these have taken on the causes of combating impunity for international crimes, promoting rule of law, and building up local legal institutions. The consequence is that the “lessons learned” of one post-conflict setting move quickly to the next, and also that people within the network maintain personal contacts from one post to the next, facilitating the effective functioning of the networks.

The transnational networks that Turner and McGuinness have studied are of course not identical to those at work in the Congo, and in particular, do not seem to share this crucial characteristic of rapid movement of personnel. Nonetheless, all in all, these descriptions of transnational networks driven by individual interactions and harnessed to achieve a particular goal seem to most accurately capture the interactions at work in the Congo surrounding these military trials, the import of the Rome Statute, and the work on post-conflict justice and legal reform described above.

b. Transnational Judicial Dialogue

Transnational judicial dialogue, as the name suggests, describes national and international judges engaging in a dialogue concerning national and international legal norms that goes beyond the paradigm of national courts importing international law in the cases before them.\textsuperscript{203} Thus, national judges are said to take part in a “much more messy and
diverse 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.\textsuperscript{204}

In this respect, the Congolese courts’ interface with international law looks much more like the traditional model. Here, as suggested above, the Congolese courts are almost absolutely isolated from their international and foreign colleagues by the dearth of conduits of information that exist in the country. With rare exceptions, the Congolese courts do not cite foreign or international judgments, much less have more robust contacts with their counterparts abroad. 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, and accordingly, it has typically been applied to such contexts.\textsuperscript{205}

One question, however, which this theory raises is whether crafting a connection to these 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, both in that they cannot benefit from the norms produced by that dialogue and in that their experience and views do not play a role in crafting 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.”\textsuperscript{206} 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.”\textsuperscript{207}

This is a particularly troubling dynamic in the context of post-conflict justice and atrocity trials, as the states like Congo that are cut off from this dialogue are by and large the states in which atrocities occur and thus the states with the most immediate interest in the development of the relevant international criminal law norms. While 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. Furthermore, the jurisprudence coming out of the international and hybrid tribunals is dominated by the views of jurists

\textsuperscript{204} Slaughter, \textit{Judicial, supra} note 203, at 1104.
\textsuperscript{205} Waters, \textit{Normativity, supra} note 35, at 464.
\textsuperscript{206} Id.
\textsuperscript{207} Id. at 465.
from such states. 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 utterly lacks any experience of the violence with which the law is concerned. Similarly, for internationalists in the ICC and elsewhere, a lack of judicial dialogue 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.\(^\text{208}\)

c. Transnational Legal Process

Transnational legal process theory also provides a good description of the mechanisms at work in the Congo. 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.”\(^\text{209}\)

Descriptively, in considering what kinds of processes and participants might affect a state’s incorporation of international law, transnational legal process draws our attention to processes, actors, and venues similar in kind to those described by transnational network theorists, above. In particular, Koh describes transnational issue networks of transnational norm entrepreneurs and governmental norm sponsors who seek law declaring fora where norms can be introduced\(^\text{210}\) – a succinct description of the process by which the Rome Statute was introduced into military courts in the Congo. The theory points to relevant characteristics of the activity in the Congo in other senses as well, looking to networks of international and domestic actors, state and nonstate actors, and dynamic movements of legal norms from international to domestic, public to private fora and back again.\(^\text{211}\)

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.\(^\text{212}\) Certainly such benefits were a strong incentive for the DRC’s initial decisions to participation in the Rome Statute treaty

\(^{209}\) Koh, Transnational, supra note 135, at 183-84.
\(^{211}\) Koh, Transnational, supra note 135, at 184.
\(^{212}\) Id. at 203.
system and to refer its situation to the ICC. 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 more fully address the atrocities that have occurred through more extensive trials, and 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, 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 and 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.

Koh’s normative claims for transnational legal process also do not provide a lot of traction on the processes at work in the Congo, primarily because the theory is intended to answer a very particular question, “why nations obey” international law, that is not the most useful line of inquiry here. 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. 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. I am less sanguine about the notion that compliance with international law is or should be the goal of the process in the Congo. The fundamental problem of impunity in the Congo, in my view, 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. There are any number of approaches – international, national and local, legal and quasi-legal – that would represent improvements on the present situation, of which 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 importation of 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.

What international law has going for it in this instance is in some part the existence of those

214 Koh, Transnational, supra note 135, at 183.
215 Id. at 192-93.
216 Id. at 199.
217 See MONUC April 2007 Assessment, supra note 161, ¶ 67.
218 See discussion, infra, part I.E.2.a concerning the benefits of multiple mechanisms to redress atrocities; DRUMBL, ATROCITY, supra note 15, at 194-205.
very 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 these gaps. This does not mean, however, that compliance with international law is an end in itself, but rather, that international law might be a means toward the reinstatement of post-conflict legal order.

Furthermore, Koh’s analysis seems to presume the inevitable final triumph of international law. The cases he describes are narratives of marches toward international compliance marked by setbacks and about-faces but nonetheless eventually arriving at their goal. 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. 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.

Nonetheless, transnational legal process and transnational network theory offer valuable descriptions of the processes by which the Rome Statute made its way into Congolese military trials and useful categories for breaking down and understanding these processes step by step in a mechanistic sense. In turn, the interchanges between international and domestic actors in the DRC seem to confirm these theories’ on the ground accuracy and usefulness. However, these theories do not offer a means of identifying the crucial features of these interchanges in bringing about an international-law-incorporating result, nor in answering 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, by drawing our attention to the particular context and character of the processes by which the Rome Statute was incorporated into these decisions, 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, what paradigm (if any) does describe the dynamic at work, and what should be the aim of these interactions?

219 Clifford, supra note 95.
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 a world in which this multiplicity creates complex and dynamic interchanges between overlapping and contesting legal systems.\(^{220}\) As described above, the overlapping international and national definitions of 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, three systems of investigation of atrocities for purposes of criminal prosecution are at work: the ICC’s, MONUC’s and the Congolese system. The ICC prosecutor and Congolese prosecutors make formally authoritative (though not always implemented) decisions about whom to prosecute, while the MONUC human rights division make strong, albeit unauthoritative, recommendations to the same effect.\(^{221}\) In addition, NGOs have conducted their own investigations, which while not intended to produce evidence for criminal trials, add compelling accounts to the depictions of the atrocities and the corresponding calls for justice.\(^{222}\) Particularly since it is so difficult logistically to acquire information about what is happening in Eastern Congo, and since 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 accounts of the problem and to legitimize proposed legal and extralegal responses.

Also, 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 these atrocities and other conflict-related harms through legal processes. Some of these initiatives compete with these trials: for example, some NGOs have called for jurisdiction over war crimes and crimes against humanity to be transferred from military to civilian courts, apparently from a skepticism of the capabilities of military courts.\(^{223}\) 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


\(^{221}\) 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. \textit{See} United Nations Peacekeeping Operations, Background Note: 31 October 2007, \url{http://www.un.org/Depts/dpko/dpko/bnote.htm#monuc}.

\(^{222}\) \textit{E.g.}, SOS \textit{JUSTICE}, supra note 82.

\(^{223}\) Clifford, \textit{supra} note 95.
regimes with in the Congo but rather can be prosecuted solely in their home countries, if they are prosecuted at all. Other initiatives supplement the military trials: Global Rights and USAID promoted a law against sexual violence, passed in June, 2006, that imposes criminal liability for a broader range of sexual offenses than were previously recognized under Congolese criminal law, thereby extending the reach of the civilian courts to those crimes. Another NGO, Réseau Citoyens Network, is working with local chefs coutumier in eastern Congo to develop local legal processes in accordance with national law for resolving land disputes arising from the return of internally displaced persons to homes now often occupied by others.

I could go on recounting pluralities for pages, but this should suffice to prove the point. But does recognizing these pluralities give us any additional traction on the dynamics of the interactions in 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. So whereas Koh’s transnational legal process presumes the ultimate end of compliance with international law and sees the continued existence of discrepancies between national law and behavior and international legal norms as a problem to be solved, legal pluralism takes a different tack. It suggests that this overlap of legal regimes and the hurly-burly it creates is inevitable in view of the overlapping claims of interest and overlapping communities that underlie the contesting legal systems. Far better then, legal pluralism would suggest, to develop hybrid institutions and processes that provide opportunities for multiple voices to be heard in multiple contexts, in order to genuinely accommodate those multiple interests and communities.

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. 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

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226 Decarnieres & Bulambo Interview, *supra* note 186.
228 Id. at 1237; see also DRUMBL, *ATROCITY*, *supra* note 15, at 182-87.
229 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.
hybrid domestic-international process. Hearkening 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, and on the other, of having a foolishly consistent normative commitment to plurality regardless of the comparative value of the positions at stake. Here, while 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, “[d]escribing mechanisms for managing hybridity does not tell us how best to actually manage hybridity in any given case.”

Perhaps these Congolese hybrid processes are merely a MacGyveristic 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 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. Whereas 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, 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 provide 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 these atrocities. While 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

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231 Berman, Global, supra note 135, at 1196-97.
232 “MacGyver” was a TV show that aired from 1985-1992. 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. Such inventions have become known as “MacGyverisms.” MacGyver, http://www.tv.com/macgyver/show/706/summary.html.
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. 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 them to necessarily fulfill some of the other goals of post-conflict justice, like reconciliation, accountability, and so on. By not attempting to resolve the messy plurality and hybridity of systems functioning in the DRC now, we will allow 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. 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.”

In the end, then legal pluralism suggests that rather than looking to increased compliance with international law as the aim of these 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 improve upon the performance of the purely national and purely international institutions involved 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 at a given. 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

233 See discussion, supra, part II.A.
234 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.
235 See DRUMBL, ATROCITY, supra note 15, at 182-87; see also Berman, Global, supra note 135, at 1197.
the aegis of law, as legal pluralism does. Instead, it defines law more narrowly “as authoritative decision, in which elements of both authority and control are combined.” “Authority” in this context refers to 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. 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 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 as 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 each are equally authoritative decision-makers in terms of having been vested with the formal office of a judge. Nonetheless, the foreign judges have actual control over the courts’ decisions. In both Kosovo and Sierre 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. In the context of the Congolese national trials, in contrast, the foreign participants may control the process of investigating, gathering evidence, developing dossiers and reports, conducting legal research, and preparing legal briefs, but at this point they must turn over control of the legal decision itself 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 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

239 Lasswell & McDougal, *supra* note 135, at 26; Reisman, et al., *supra* note 135, 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 & McDougal, *supra* note 135, at 403.
241 Baskin, *supra* note 22, at 20-22 (Kosovo); Chambers, Special Court of Sierra Leone, [http://www.sc-sl.org/chambers.html](http://www.sc-sl.org/chambers.html).
landmark cases,” 242 at the “important Ituri warlords” who “continue
to enjoy impunity for their crimes,” 243 and at the overall “reluctance of the
judicial authorities to progress in their investigations.” 244 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: in one case,
for example, “[m]ilitary prosecutors …are refusing to bring [the
defendant] to trial on the basis of available evidence,” 245 and in another,
“despite several substantiated complaints for serious crimes filed before
military authorities, no judicial action was taken against [the defendant]
or any of the men under his command.” 246

In this sense, MONUC’s reports echo a widely held belief that
control over such cases is not in the hands of the judges either, but rather,
is exerted in many instances by political actors. 247 MONUC itself
attributes the courts’ abovementioned “reluctance” to move these cases
forward “mainly to undue external influence, but also to the lack of will,
resources, and capacity.” 248 It is not clear from these reports whether
political forces always determine outcomes – that is, whether 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; or whether, on the contrary, political actors are also
actively at work in directing prosecutions and convictions. 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 while in a superficial
sense authority and control are better integrated in this hybrid process
than in hybrid courts, nonetheless in reality there is merely a different
disjunct, for turning authority over to domestic legal actors means
turning control over to political actors. Accordingly, it is perhaps
unsurprising that the idea 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. 249 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.

243 Id. at 12.
244 Id.
246 Id. at 12.
247 E.g., SOS JUSTICE, supra note 82, at 6-8.
248 June 2006 MONUC Report, supra note 86, at 12; see also December 2006
MONUC Report, supra note 86, at 17-20.
249 December 2005 MONUC Report, supra note 110, at 15; Discussion Notes, Part
Two, supra note 170, at 128.
But more than this, I am concerned that there is a trade-off between international involvement and domestic development, on a variety of levels, and this trade-off is brought into focus by the control-authority distinction raised here. In a practical sense, financing hybrid panels tends to direct development resources toward foreign elements of the project rather than toward domestic institutions. The expense associated with importing and supporting foreign judges and their staff is exorbitant as compared to that of, for example, providing consistent, reasonable salaries for national judges so that it is at least conceivable for them to live on their salaries without taking bribes.\footnote{See Robarts Interview, supra note 84; J Interview, supra note 112; Tom Perrielo & Marieke Wierda, The Special Court of Sierra Leone Under Scrutiny, International Center for Transitional Justice Report 30 (March 2006); Sierra Leone: Special Court needs $30 million to see war crimes trials through, IRIN (25 May 2005), http://www.globalsecurity.org/military/library/news/2005/05/mil-050525-irin03.htm. 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 166, at 101.}

More fundamentally, international efforts to assert control over war crimes trial undermine 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 result\footnote{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.} 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”\footnote{June 2006 MONUC Report, supra note 86, at 12.} to a process they do not control. 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 as well, what then? As in Kosovo, domestic actors may step back and ask to be relieved entirely of their duties (i.e., may seek to abrogate their authority).\footnote{“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.” Baskin, supra note 22, at 21.} Certainly they will feel no sense of responsibility 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, and 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 otherwise influential actors. But this fact does not necessarily mean that control should be shifted to the international level. Rather, that is exactly why one of the purposes of post-conflict justice must be to reinstate (or even to instate) the authority of the judiciary, and a necessary though insufficient precondition for doing so is for the domestic judiciary to openly and obviously exercise control over the cases before it.\(^ {254}\)

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. However, in many cases 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 those trials will also promote 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 the 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 support for basic elements of a functioning judiciary. This has not, of course, yielded either instant or consistent results. However, it does 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 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

\(^ {254}\) Lasswell & McDougal, supra note 135, at 400 (“authority + control = law”).
international criminal law. However, they have certain crucial characteristics that seem to differ both from these other networks and from other 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 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 suggests that these members of transnational networks will be particularly well placed to bring information and skills quickly from one such zone to another, and that they will be specialists in post-conflict reconstruction and justice issues but will be relatively junior as compared to the judges who are typically recruited for hybrid courts. As such, they contribute to what I consider 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.

III. Conclusions

The transnational networks supporting atrocity trials in the Democratic Republic of 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 as well, 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 use of transnational networks rather than reliance on conventional mechanisms
of influence such as publication of judicial decisions; and (2) 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 of 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.\(^\text{255}\) Above, I suggested 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 due to limits on international capacity so that direct comparisons 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, deterrence. As Jane Stromseth and Mark Drumbl have argued, the notion that procedurally pristine trials will ensure public

\(^{255}\) E.g., Heller, \textit{supra} note 15; see also \textit{Drumbl, Atrocity, supra} note 15, at 189-91 (suggesting criteria for “qualified deference” to national tribunals).
confidence in the impartiality of the proceedings and the legitimacy of the results have not been borne out by the response to the ICTY and the ICTR in the former Yugoslavia and Rwanda respectively. The expectation that such trials will achieve the more highfalutin 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 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, looking 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 rule of law reforms.”

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, the potential for abuse of the system to oppress political opponents or minority ethnic groups or to take personal revenge for private grievances among them. While the cases I discussed here seemed to benefit from the introduction of international law, more recent cases have reportedly been undermined by political interference. There is also reason to heed the warnings of the long literature on legal transplants and to be nervous about the effects of massive international influence upon national legal reform.

Nonetheless, a functioning judicial system represents post-conflict justice’s potentially most valuable and lasting legacy. As I have argued in other 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. 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. 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 and is therefore worth pursuing even if not immediately attainable.

256 Druml, Atrocity, supra note 15; Stromseth, supra note 1, at 258-80.
257 Stromseth, supra note 1, at 256.
258 Clifford, supra note 95; February 19 e-mail, supra note 109.
259 Baylis, Parallel, supra note 23, at 3-4.
Under what circumstances does investing in troubled national systems make 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 soldiers 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 one. However, some “self-limitation on capriciousness” 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 what sorts of factors indicate potential for the success of such investments and 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, including the work 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

261 Lasswell & McDougal, supra note 135, at 409 (“…‘self-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.”)
mechanism 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.