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INTERNATIONAL CRIMINAL COURT

Complementarity in Practice: The International Criminal Court as Part of a System of Multi-level Global Governance in the Democratic Republic of Congo

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Abstract

This article asserts the emergence of multi-level global governance through an analysis of the relationship between the International Criminal Court and the Democratic Republic of Congo. The article suggests a far deeper set of influences than previously anticipated, presenting research on how the ICC is directly influencing Congolese domestic politics and how some actors within the Congo are seeking to manipulate the Court for their own political benefit. Further, the article considers the self-referral by the Congolese government, the early impact of complementarity, and efforts at judicial reform in the Congo. In the process the article develops a set of criteria to evaluate the 'total or substantial collapse' provisions of the complementarity regime.

Key words

International Criminal Court; complementarity; Democratic Republic of Congo; global governance; Joseph Kabila

The entry into force of the Rome Statute of the International Criminal Court in July 2002 marked a major milestone in the process of ensuring accountability for international crimes. The complementarity provisions of the Rome Statute highlight the Court's role as a backstop to national jurisdictions.[1] The logic of complementarity expressed at Rome was that the Court, where seized of jurisdiction, would merely step in where national courts fail to act.[2] The ICC, it was thought, would provide a simple

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1. See Rome Statute of the International Criminal Court, at Art. 17. See also J. Holmes, 'The Principle of Complementarity', in R. Lee (ed.), *The International Criminal Court, The Making of the Rome Statute: Issues, Negotiations, Results* (1999), 41; J. Holmes, 'Complementarity: National Courts versus the ICC', in A. Cassese (ed.), *The Rome Statute of the International Criminal Court: A Commentary* (2002), 667 (noting that 'Ironically, however, the provisions of the Rome Statute itself contemplate an institution that may never be employed').
2. See Holmes, 'Complementarity: National Courts versus the ICC', *supra* note 1, at 667 (noting: 'Of course, in reality there is a need for the ICC, since States may be unwilling to exercise jurisdiction over international crimes').

substitution of an international forum for a domestic one. The first investigation by the ICC in the Democratic Republic of Congo suggests, instead, a much deeper and more complex interplay between national and international law and politics, best captured by the concept of multi-level global governance.

The idea of multi-level global governance draws on the works of scholars such as James Rosenau, who sought to identify and apply international structures that reach beyond states and to proscribe transnational solutions for global problems.[3] In so doing, they identified new kinds of interaction between national and international institutions and structures. Rosenau recognized a shift away from hierarchical organization generated by the distribution of power in the international system toward 'spheres of authority' in which states and non-state actors alike collectively utilize their authority to achieve shared goals.[4] The concept of multi-level global governance goes a step further, suggesting that international and domestic governance structures (such as courts) are engaged in deeply interconnected governance efforts whereby each level of authority continuously cross-influences, reshapes, and, ideally, reinforces activities at other levels of governance.

As the first investigations by the ICC have begun to unfold, what has emerged begins to look far more like the complex sharing of authority and multi-dimensional influences between national and international structures suggested by the global governance literature than the simple substitution of an international court initially anticipated by the Rome Statute. Understanding this interaction requires shifting our mental maps of complementarity from the substation model to one which sees the ICC and national governments as two distinct layers of governance authority engaged in political and legal interactions whereby each level is continuously responding to and impacting actions at the other level. These interactions include everything from the political posturing of national officials and the reform of domestic courts to the application of the complementary criteria by international officials.[5]

The first investigation launched by the ICC, the situation in the Democratic Republic of Congo, offers a powerful example of the multi-level global governance model of interaction between the Court and national governments created by the complementarity regime.[6] This article argues that the relationship between the ICC and the Democratic Republic of Congo is far deeper and more complex than the simple substitution model of complementarity and that the theoretical framework

3. This new scholarship can largely be traced to the writings of James Rosenau's seminal work in 1992. See J. Rosenau, 'Governance, Order, and Change in World Politics', in *Governance Without Government: Order and Change in World Politics* (1992) 1, at 4. Elements of global governance thinking can be found in the earlier writings of the English School in political science. See generally, H. Bull, *The Anarchical Society* (1977). The growing scholarship in the field of global governance led to the foundation of a new journal in the mid-1990s entitled *Global Governance*, which has been the focal point of writings on the topic.
4. J. Rosenau, *Along the Domestic–Foreign Frontier: Exploring Governance in a Turbulent World* (1997), at 45.
5. In the global governance literature, such interactions are said to occur along a governance frontier. Rosenau suggests that the frontier is 'space in which world affairs unfold . . . the arena in which domestic and foreign issues intermesh'. Rosenau, *supra* note 4, at 5.
6. On 8 September 2003 Prosecutor Louis Moreno-Ocampo announced that the situation in the Ituri region of the Democratic Republic of Congo would be the first 'which merits to be closely followed by the Office' of the Prosecutor. Luis Moreno-Ocampo, Second Assembly of States Parties to the Rome Statute of the International Criminal Court Report of the Prosecutor of the ICC, Mr Luis Moreno-Ocampo, 8 September 2003, available at http://www.icc-cpi.int/otp/030909_prosecutor_speech.pdf.

of multi-level global governance best captures four distinct but interrelated influences between the international Court and the target state of investigation. First, the existence of the ICC has offered a politically expedient solution for the Congolese president to deal with potential electoral rivals, resulting in the somewhat surprising referral of the situation to the Court by the Congolese government itself. Second, the complementarity regime has divided elements within the Congolese government, such that those factions opposed to international prosecutions have sought to strengthen the hand of the domestic judiciary in order to exercise primacy over the ICC. Third, the requirements of complementarity are providing important, but incomplete, guidelines for the reform of the Congolese domestic judiciary. Finally, the threat of international prosecution may already be providing a deterrent effect on rebel leaders within the Congo.

Moving from a simple substation model of complementarity to a multi-level global governance model has profound implications for understanding international judicial institutions such as the ICC. In the multi-level global governance model, the ICC itself becomes a participant in the domestic process, altering political as well as legal outcomes. Similarly, the international Court itself may become an instrument of actors at the domestic level. National and international officials alike must recognize and adapt to this more expansive role of the ICC. If the Court's broader role is used wisely, it may well promote domestic reform, good governance, and accountability. If ignored, however, the Court's position in a system of multi-level global governance may well invite dangerous political manipulation.

This article begins by briefly discussing the methodology of the in-depth case study research utilized herein. Part 2 sketches a short but critical history of the Congo conflict. Part 3 addresses the ways in which the ICC has reshaped the incentives of actors within the Congolese domestic government and seeks to explain the surprising decision by President Kabila to refer the Congolese situation to the ICC. Part 4 examines how the complementarity regime has divided the Congolese domestic government and is catalyzing judicial reform efforts in Congo. Part 5 considers the Rome Statute's partial, but insufficient, guidelines for the reform of domestic judiciaries, proposes a more detailed set of criteria for the ability of a state to prosecute, and argues that presently the Congo must be deemed 'unwilling or unable' to prosecute international crimes. Finally, Part 6 analyzes the ways in which international justice efforts may already be having a deterrent effect on rebel leaders in Congo.

1. Research and methodology

This article is based on an in-depth evaluation of the situation in the Democratic Republic of Congo and draws heavily on interview research in the Congo and elsewhere in the fall of 2003 and throughout 2004. The general methodology employed is that of qualitative case-study research.[7] Such a research methodology is particularly

7. For a general discussion of such research, see D. Silverman (ed.), *Qualitative Research, Theory, Method and Practice* (2004).

useful when there is little, if any, quantitative data available and the focus is on 'the process by which events and actions take place' and the causal relationships among observed phenomena.[8] The overall goal of this study is to examine the nature of interaction between the ICC as an institution of supranational governance and the domestic governmental structures in the Congo. Qualitative research provides unique insight into the processes and causal relationships at work in these interactions.

The primary data analyzed herein derive from numerous interviews conducted over the past two years. In October and November 2003 a ten-person research team conducted field interviews in the Democratic Republic of Congo (Kinshasa, Kisangani, Bukavu and Goma), Rwanda (Kigali), Uganda (Kampala), France (Paris), Belgium (Brussels) and the Netherlands (The Hague and Amsterdam). Over 100 interviews were conducted with government officials, judicial personnel, local and international NGOs, and rebel leaders.[9] These interviews are supported by documentary analysis, such as the consideration of court documents, governmental communiqués, and NGO reports, where available.[10]

Interviewees were selected for this study based on three main characteristics: their position in governmental or non-governmental organizations with direct bearing on the issues in hand, their particular expertise or knowledge on these issues, and/or their first-hand observation of the phenomena under consideration. Such selection is generally referred to as 'purposeful sampling' in the qualitative research literature.[11] In purposeful sampling, interviewees 'are selected deliberately in order to provide important information that can't be gotten as well from other choices'.[12]

Interviewees were contacted in advance (usually via telephone) and asked to participate in a conversation with an academic research team from Princeton University in the United States. They were not provided with questions in advance and their responses were spontaneous. Similarly they were given no incentives, financial or otherwise, for their participation. They were told that the interview team had no particular political motivations and, where requested, anonymity was granted. Most interviews were tape recorded, though hand notation was offered as an alternative when subjects were uncomfortable with an audio recording being made.

In any such qualitative research project a number of biases are possible. First, there may be a selection bias inherent in the choice of interviewees. Despite efforts to select interview participants for purposive reasons, issues of availability, access and fear of reprisals for participation may result in a skewing of interview subjects. Second, a key information bias may be present, whereby major parts of the data may

8. J. Maxwell (ed.), *Qualitative Research Design: An Interactive Approach* (1996), 19–20.
9. For a discussion of the basic techniques used in qualitative interview analysis, see J. Miller and B. Glassner, 'The "inside" and the "outside": Finding realities in interviews', in Silverman, *supra* note 7, at 125–35; J. Morse, 'Emerging from the Data: The Cognitive Process of Analysis in Qualitative Inquiry', in J. Morse (ed.), *Critical Issues in Qualitative Research Methods* (1994) 44, at 56.
10. For a consideration of documentary analysis in qualitative research see 'Analyzing Documentary Realities', in Silverman, *supra* note 7, 56 at 56–76.
11. M. Patton, *Qualitative Evaluation and Research Methods* (1990), 169.
12. See Maxwell, *supra* note 8, at 70–2.

come from a small number of individuals.[13] Third, an inherent political bias may exist, in that respondents may have had a particular political motive in structuring their answers. Throughout the research, a range of techniques has been employed to limit the danger of such biases in research methodology. These include triangulation, rich data, comparison, and documentary corroboration.[14]

The result of this research project is an original analysis of the relationship between the ICC and the DR Congo. The data analyzed herein provides clear evidence of the operation of multi-level global governance in international law enforcement. This study is not intended to be, nor do the research methods employed herein allow it to provide, concrete proof of the relationships suggested between national and international actors. Some areas of consideration remain speculative. Yet, as a preliminary investigation, it is intended to offer a compelling picture of a far more complex relationship between the ICC and national governments than was heretofore understood.

2. History and context of the Congo war and peace process

Understanding the operation of multi-level global governance in the enforcement of international criminal law in the DR Congo requires reference to the historical context and present circumstances of government in the country. The International Rescue Committee, which has conducted the most thorough studies of mortality rates in Congo, found that 3.3 million people have died during the past decade in Congo from war-related famine and disease, international crimes, and war.[15] The Congo war and the horrible death toll associated therewith can largely be divided into four separate, but interrelated, conflicts. First, beginning in 1996, Laurent Kabila, with the backing of Rwanda and Uganda staged a revolt and led a military drive toward Kinshasa against the forces of then ailing President Mobuto, leaving a trail of largely civilian blood.[16] On 17 May 1997 Kabila took Kinshasa and established a new government.[17]

After Kabila distanced himself from his Tutsi supporters in Rwanda and Uganda in 1998 and 1999, military forces in both those countries entered and occupied large portions of Eastern Congo.[18] While the ostensible justification for this intervention was to prevent military action by Hutu Interahamwe groups then residing in Eastern Congo, both Rwanda and Uganda also sought to lay claim to vast natural resources

13. For a discussion, see ibid., at 73.
14. For a consideration of how these techniques can be employed to enhance the validity of qualitative research results, see ibid., at 90–5.
15. International Rescue Committee, 'Mortality in the Democratic Republic of Congo: Results from a Nationwide Survey', Conducted September–November 2002, Reported in April 2003, at i, (noting that 'Based on past and current IRC data, it is estimated that 3.3 million people have died as a result of this war').
16. R. Edgerton, *The Troubled Heart of Africa: A History of the Congo* (2002), at 218–21. Reports suggest that during this drive for power, Kabila's army murdered thousands – if not tens of thousands – of Hutu militiamen and their supporters. Edgerton, *supra*, at 229.
17. Edgerton, *supra* note 16, at 221, 223–7.
18. Ibid., at 229.

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in the region including gold, diamonds and coaltan.[19] Throughout 2000 and 2001 various foreign militaries engaged in fierce combat in the region surrounding the central Congolese city of Kisangani, again killing countless civilians and pillaging villages for resources, food, and sexual services.[20]

In the third aspect of the conflict, rebel groups in the eastern half of Congo, namely the Congolese Rally for Democracy (RCD) and the Movement for the Liberation of Congo (MLC), revolted against the Kabila regime and established what was effectively a separate state in Eastern Congo from 2000 to 2002.[21] All commerce, trade, and transport between the eastern and western portions of the country were stopped. During this period of a divided state, the RCD and MLC inflicted a systematic campaign of terror against local civilians, demanding food and resources as well as kidnapping local women.[22]

Finally, in the decade from 1994 to 2004, a range of ethnic groups in Eastern Congo also committed serious inter-ethnic crimes including murder and rape. At various times these crimes have been perpetrated by and directed against the Hema, the Lendu, the Mai-Mai and the Pygmies. For example, after the occupation of Eastern Congo by Rwanda and Uganda, Hutu loyalists 'unleash[ed] a bloody pogrom' against Tutsi civilians in the region.[23] Most recently, these crimes have been rampant in the Ituri region of Eastern Congo, with reports of widespread killing and cannibalism.[24]

In December 2002, the various parties involved in the Congo conflict reached an 'all inclusive peace agreement' during a meeting at Sun City, South Africa.[25] This agreement, which serves as the basis of the current transitional government, creates a power-sharing arrangement among the former government, the RCD, the MLC, and the unarmed opposition.[26] Substantial progress toward a lasting peace has been made since the transitional government took power in July 2003. While the country

19. See ibid., at 230. For a discussion of Rwanda's motivations for action in Congo, see T. Longman, 'The Complex Reasons for Rwanda's Engagement in Congo', in J. Clark (ed.), *The African Roots of the Congo War* (2002), 128, at 136 (noting 'opportunity for both personal and national enrichment'). Rwanda's previously non-existent exports of coaltan rose to US$20 million per month after the occupation. Similarly, diamond exports rose from 166 carats per year in 1998 to 30,500 carats in 2000. Longman, *supra*, at 136. Coaltan is a valuable and scarce mineral used in the production of cell phones and other electronic devices. For a discussion of Uganda's motivations, see J. Clark, 'Museveni's Adventure in the Congo War', in *supra*, at 145–165.
20. Human Rights Watch, Democratic Republic of Congo: War Crimes in Kisangani: The Response of Rwandan-backed Rebels to the May 2002 Mutiny 5. See Edgerton, *supra* note 16, at 230–2.
21. Human Rights Watch, *supra* note 20, at 5.
22. Edgerton, *supra* note 16, at 230.
23. Ibid., at 229.
24. For a discussion of these crimes in Ituri, see 'Ituri: Covered in Blood: Ethnically Targeted Violence in Northeastern DR Congo', *Human Rights Watch Report* (July 2003) (noting that 'Human Rights Watch estimates that at least 5,000 civilians died from direct violence in Ituri between July 2002 and March 2003. These victims are in addition to the 50,000 civilians that the United Nations estimates died there since 1999). See also, D. Bergner, 'The Most Unconventional Weapon', *The New York Times Magazine*, 26 October 2003.
25. This framework is memorialized in the Global Inclusive Agreement which concluded the Inter-Congolese Dialogue. See 'Accord Global et Inclusif sur la Transition en République Démocratique du Congo', 17 décembre 2002, adopted at Sun City, South Africa, 1 April 2003, reprinted in *Journal Officiel de la République Démocratique du Congo*, 44 année, 5 April 2003.
26. See Accord Global et Inclusif sur la Transition En République Démocratique Du Congo, *supra* note 25, at Art. 1 (providing: 'Les Parties au présent Accord et ayant des forces combattantes, a savoir le Gouvernement de la RDC, le RCD, le MLC, le RCD-ML, le RCD-N, et les Mai Mai renouvellent leur engagement, conformément a l'accord de Lusaka ... de cesser les hostilités et de rechercher une solution pacifique et équitable à la crise que traverse le pays').

is still highly unstable, the transitional government has effectively reunified eastern and western Congo and relative peace has been restored in much of the country. Based on the framework agreed to at Sun City, the government's current focus is on preparations for forthcoming elections.

Despite the Sun City Agreement in December 2002 and the installation of the transition government in July 2003, international crimes have continued in the regions of Ituri and South Kivu – located in North-West Congo.[27] These include a systematic campaign of cannibalism against local Pygmies as well as more conventional attacks on civilian populations throughout the region.[28] In June 2003, the International Crisis Group observed that Ituri 'has been the theatre of spiraling violence bordering on genocide'.[29] With some support from Rwanda and Uganda, two ethic groups turned militias – the Hema and the Lendu – have committed numerous international crimes since the Rome Statute came into force.[30] For example, in August 2003 hundreds of civilians were massacred near the town of Songolo[31] and in October 2003 the bodies of 16 women and children were found in a fresh mass grave in the village of Ndunda.[32] Even as recently as June 2004, rebel leader General Laurent Nkunda seized the city of Bukavu in South Kivu, leading to looting, plunder and rampant attacks on civilian populations.[33] These continuing crimes in eastern Congo are the likely target of any ICC prosecutions as they fall within the temporal and territorial jurisdiction of the ICC.[34] As of mid-2005, the situation remains unstable, violence continues and it is unclear whether elections will occur in the next year as planned.

3. The Congolese referral: the ICC and the alteration of national preferences in the DR Congo

A first incidence of the operation of multi-level global governance in the working of the ICC is the decision of Congolese President Joseph Kabila to refer the situation in the Congo to the ICC.[35] This move was greeted with some surprise internationally given that, during the negotiation of the Rome Statute, most commentators assumed

27. See generally, Bergner, *supra* note 24.
28. See generally, ibid.; 'Ituri: Covered in Blood', *supra* note 24.
29. International Crisis Group, 'Congo Crisis: Military Intervention in Ituri', 13 June 2003, ICG Africa Report No. 64, at i.
30. Ibid., at 1.
31. See 'Ituri: Covered in Blood', *supra* note 24.
32. 'World Briefing Africa: Congo: U.N. Finds New Massacre', *The New York Times*, 11 October 2003.
33. 'DR Congo Slams Rwandan Invasion', *BBC News*, 3 June 2004, available at http://news.bbc.co.uk/1/hi/world/africa/3771729.stm.
34. The Rome Statute limits the jurisdiction of the ICC to crimes committed after the entry into force of the Statute in July 2002.
35. On 19 April 2004, the ICC Prosecutor received a formal referral of the situation in the Congo from Joseph Kabila, President of the Democratic Republic of Congo. Press Release: 'Prosecutor receives referral of the situation in the Democratic Republic of Congo', 19 April 2004, available at http://www.icc-cpi.int/newspoint/pressreleases/19.html. A similar referral by the national state has been made by Uganda with respect to crimes committed in Uganda. See Press Release: President of Uganda refers situation concerning the Lord's Resistance Army (LRA) to the ICC, 29 January 2004, availabe at http://www.icc-cpi.int/newspoint/pressreleases/16.html. Likewise, the Central African Republic has referred the situation on its territory to the Court. See 'Prosecutor Receives Referral Concerning Central African Republic',International Criminal Court Press Release, 7 January 2005, available at http://www.icc-cpi.int/press/pressreleases/87.html.

situations would be referred by third states[36] or would be initiated under the *proprio motu* powers of the Prosecutor.[37] Yet Congolese President Kabila himself chose to refer the situation in his own country to the Court, even though such a referral could not be limited only to rebel groups and the ICC investigation might eventually turn against the very government that referred the situation in the first place. This section offers an explanation of the Congolese referral through the lens of multi-level global governance. In short, it argues that the existence of the Court sufficiently shifted the incentive structure for the national government such that President Kabila perceived it to be in his own interests to refer the case.

Viewing the ICC as engaged in a dynamic legal and political interplay with the Congolese government offers the necessary perspective to explain President Kabila's referral. This move requires disaggregating the state – peering into the 'black box' of the nation state and examining the interests of various actors within the state and the interaction between these sub-state elements and the ICC itself.[38] The new transitional government that took power in Kinshasa in July 2003 is based on a power-sharing agreement among the four parties to the Inter-Congolese Dialogue – the government, the unarmed opposition, the RDC and the MLC.[39] The transitional government is led by President Joseph Kabila, son of Laurent Kabila, who rode the 1996 rebellion into power. Under Kabila are four vice presidents, one from each of the primary factions to the Congolese civil war.[40] Each of the vice presidents has a range of ministries under his authority. Those ministries are led, in turn, by ministers appointed by a different party to the peace agreement. This produces a situation in which former enemies directly report to one another, often resulting in political maneuvering and dangerous infighting. Under the transitional constitution, this power-sharing government is scheduled to remain in place until new elections, originally slated for summer 2005, but now postponed till 2006.[41]

Within this framework, during the short time period before national elections, the primary political actors have a strong incentive to position themselves for

36. Article 14 of the Rome Statute grants any state party the power to refer a case within the jurisdiction of the Court to the Prosecutor. It was initially assumed that most such referrals would involve a state party on whose territory the crime did not occur referring the situation in another state to the Court. See P. Kirsch, 'Referral by States Parties', in Cassesse, *supra* note 1, at 619.

37. Article 15 of the Rome Statute gives the Prosecutor the authority to 'initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court' if the Pre-Trial Chamber 'considers that there is a reasonable basis to proceed with an investigation'. Rome Statute, Article 15. See also P. Kirsch and D. Robinson, 'Initiation of Proceedings by the Prosecutor', in Cassesse, *supra* note 1, at 657.

38. Such an approach is largely based on liberal international relations theory. For a discussion of this approach, see A. Moravcsik, 'Taking Preferences Seriously: A Liberal Theory of International Politics', (1997) 51 *Int'l Org.* 513.

39. This framework is memorialized in the Global Inclusive Agreement which concluded the Inter-Congolese Dialogue. See Accord Global Et Inclusif sur la Transition en République Démocratique du Congo, *supra* note 25.

40. Constitution De La Transition, *infra* note 84, at Art. 83 (according to which 'Les Vice-Présidents sont issues respectivement des Composantes Gouvernement de la République Démocratique du Congo, le Rassemblement Congolais pour la Démocratie (le RCD), le Mouvement de Libération du Congo (MLC) et l'opposition politique').

41. See Accord Global et Inclusif sur la Transition en République Démocratique du Congo, *supra* note 25, at Art. IV (providing that 'Les élections se tiennent dans les 24 mois qui suivent le début de la période de transition'). The elections were originally scheduled for July 2005 but it now seems inevitable that a one-year extension provided for in the Constitution will be exercised.

electoral victory by undermining the position of other parties to the peace agreement. Given that many of the key political actors are implicated in international crimes, criminal justice offers a powerful mechanism to discredit enemies and reshape the domestic political landscape. The potential implications of a criminal indictment by national or international courts are significant.[42] If a senior government official were indicted or prosecuted, that individual might be unable to effectively compete in the upcoming balloting or might already be in The Hague facing prosecution. If used strategically, this could greatly enhance the electoral prospects of unindicted opponents.

For President Kabila, the ICC thus has the potential to serve as a political weapon in the forthcoming national elections. Kabila is unlikely to be the subject of any ICC investigation, yet two of his potential electoral opponents – Vice Presidents Jean Pierre Bemba of the MLC and Azarias Ruberwa of the RCD – are among those most likely to be the subject of any early investigation. Though Kabila's hands are not clean, it is unlikely that he has committed significant crimes within the jurisdiction of the ICC. He was a relative newcomer on the political scene when his father died in January 2001 and has not been directly involved in the ongoing conflict in Ituri and South Kivu.[43] Any crimes against humanity committed by Kabila likely occurred prior to 1 July 2002 and, as yet, there is little evidence that he has been directly involved in any of the major massacres in Congo within the Court's temporal jurisdiction. As a UN Mission in Congo (MONUC) official observes, one would expect Kabila, therefore, to support a tribunal with jurisdiction over 'genocide and war crimes'.[44]

Kabila's chief political rivals, however, were more directly involved in ongoing crimes in eastern Congo and could well find themselves the targets of international investigations, in turn strengthening Kabila's political hand in the transitional government and forthcoming elections. While an ICC investigation may only implicate a select few in the transitional government who have been involved in Ituri, both Bemba and Ruberwa are likely to be among them. Various reports to the Prosecutor have implicated Bemba personally in war crimes and crimes against humanity in the Ituri region.[45] Apparently he is sufficiently concerned by such potential prosecution that he keeps a fuelled helicopter next to his office for quick escape should it become necessary.[46] Similarly, the RCD Vice President Azarias Ruberwa is also implicated in numerous crimes during the period of RCD rule in Eastern Congo,

42. Though the actual implications of such an indictment or prosecution in the DR Congo remain to be seen, the impact on governmental officials, such as Slobodan Milošević and Charles Taylor, are already evident. For a discussion with respect to Milošević, see A. Danner, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court', (2003) 97 AJIL 510, at 544 (asking if 'the Prosecutor [should] worry about the risks of destabilizing delicate political situations through the publicizing of investigations or the bringing of charges' and discussing the implications of the Milošević indictment). See also P. Akhavan, 'Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities', (2001) 95 *AJIL* 7, at 9 (suggesting that 'the ICTY helped to delegitimize Milosevic's leadership').
43. See Edgerton, *supra* note 16, at 231.
44. Malik Dechambenoit, MONUC Political Officer, Personal Interview, Kinshasa, DR Congo, 28 October 2003 (interview conducted by Adrian Alvarez, Yuriko Kuga and Leslie Medema).
45. J. Astill, 'Congo Cannibalism Claim Provides First Challenge', *Guardian*, 11 March 2003.
46. M. Lacey, 'Hope Glimmering as War Retreats from Congo', *The New York Times*, 21 October 2003.

including Ituri.[47] The possible connections between Vice-Presidents Ruberwa and Bemba and crimes within ICC jurisdiction is not surprising, considering that both men were in direct control of rebel forces alleged to have committed war crimes and crimes against humanity in eastern Congo up to the mid-2003 peace settlement. A third vice president, Abdulaye Yerodia Ndombasi, though technically a Kabila ally as the 'government's vice president, could potentially pose an electoral threat to Kabila in 2005. He too might be the subject of ICC investigation and was previously indicted in Belgium for 'serious violations of international humanitarian law'.[48]

Even if an ICC investigation and prosecution were limited to warlords in eastern Congo outside the current government, Kabila could stand to benefit. Such prosecutions might well reveal information about crimes committed by Kabila's opponents or strengthen the hand of the sitting government vis-à-vis rebel groups.

Observers on the ground in Congo echo this analysis of the present political situation. As one MONUC official notes, 'transitional justice is more in the interest of President Kabila than others because he has the lightest balance sheet'. Speaking to audiences in the US and Europe, Kabila has called for an international criminal tribunal for Congo, in hopes of reaching an even wider set of potential rivals and political spoilers than might be subject to ICC prosecution.[49] These calls may be but political grandstanding to western audiences, but may also reflect strategic political calculations.[50]

Given the advantages prosecutions may offer Kabila, one might expect him to initiate domestic investigations of his potential electoral rivals. Domestic prosecutions, however, are not politically viable and the Congolese judiciary presently lacks the capacity to undertake the necessary investigations. The transitional government represents a precarious balance of interests between the government and the former rebel groups and any serious prosecutions launched by the government itself would likely destabilize the ongoing peace process.[51] Moreover, the capacity limits of the current Congolese judiciary make national prosecutions nearly impossible. As

47. J. Astill, 'Fighters Now Hold Their Punches in Muhammad Ali's Congo Hotel', *The Guardian*, 25 September 2003 (noting that Ruberwa is 'the former leader of a brutal Rwandan-backed rebel group' and perhaps the most loathed man in Congo').

48. *Case Concerning the Arrest Warrant of 11 April 2000* (*Congo v. Belgium*), Merits, 2002, at para 10. The proceedings against Ndombasi were stopped by the decision of the International Court of Justice in *Congo v. Belgium*, which held that the prosecution of Ndombasi violated the principle of sovereign immunity as he was then sitting foreign minister of Congo. Ibid.

49. J. Kabila, 'Intervention du Président de la République Démocratique du Congo a la 58ème session de l'Assemblée Générale des Nations Unies', New York, 24 September 2003 : 'Sur le plan international, nous pensons que le principal objectif en cette matière est, à titre de rappel, l'établissement, avec l'assistance des Nations Unies, d'un Tribunal Pénal International pour la République Démocratique du Congo, pour connaître des crimes de génocide, des crimes contre l'humanité, y compris les viols utilisés comme armes de guerre, et de violations massives des Droits de l'Homme. Par ailleurs, en vue d'assurer une couverture optimale en matière de protection des droits de l'homme ainsi que des droits humanitaires, la République Démocratique du Congo a ratifié plusieurs conventions internationales dont le Statut de Rome instituant la Cour pénale internationale'.

50. It is worth noting that, at home, Kabila has been largely silent on these issues, possibly due to the potential destabilizing effects international prosecution could have on the transitional government.

51. For discussions including the implications of such prosecutions as part of a transitional justice programme see generally M. Minow, *Between Vengeance and Forgiveness* (1999); R. Teitel, *Transitional Justice* (2002).

discussed in part 4 below, the Congolese judiciary is extremely weak and likely unable to mount a serious investigation of sitting government leaders.

Viewing the ICC as part of a system of multi-level global governance in international law enforcement offers a theoretical explanation for Kabila's decision to refer the case to the Court. Where the ICC is viewed as a simple substation mechanism for failed national prosecutions, decisions by the national government to act occur largely in isolation from international institutions. In the global governance model, however, the Court can be seen as shifting the incentives facing domestic actors, in this case by offering Kabila an alternative to national prosecutions – namely a referral to the Court. Such a referral serves Kabila's interests by possibly resulting in an investigation of his rivals while shifting the political costs of prosecution away from the weak national government and onto the ICC itself. In short, by referring the case to the ICC, Kabila can let the international community do his bidding, without bearing the domestic political costs of prosecution.[52] The interaction between the ICC and the Congo produces a heretofore impossible outcome – the threat of investigation by an international body without the same dangerous political repercussions for the national government.

The theory of multi-level global governance further suggests that these political dynamics at the national level may be altering the policies of the ICC itself. Kabila's referral may well be indicative of a broader phenomenon of weak states self-referring situations to the ICC, when sitting governments can benefit from prosecutions but the political costs of prosecuting at home are too great to allow domestic action. This is, apparently, the case in Congo and, arguably, in Uganda as well. The ICC has recognized the opportunity presented by such self-referrals and built them into its own operational strategy as a means of overcoming the inherent weaknesses of the Court. A recent policy memorandum from the Office of the Prosecutor outlines a strategy of co-operative complementarity. 'Where the Prosecutor receives a referral from the State in which a crime has been committed, the Prosecutor has the advantage of knowing that that State has the political will to provide his Office with all the co-operation within the country that it is required to give under the Statute'.[53] The obvious benefits for the ICC in such cases are the lack of challenges to admissibility and the co-operation of the national government.

While there are benefits, co-operative complementarity also carries with it significant difficulties, namely that the ICC may alter a delicate domestic political balance. The ICC must recognize that it is part of a system of global governance in international law enforcement, that its policies will alter incentives at the national level, and that in responding to actions by national governments it may be engaging in a potentially dangerous political game. The Prosecutor has noted that: 'Groups bitterly divided by conflict may oppose prosecutions at each others' hands and yet

52. For a discussion of political cost externalization in the context of international criminal prosecutions see W. Burke-White, 'A Community of Courts: Toward a System of International Criminal Justice', (2003) 24 *Mich. J. Int'l L.* 1, at 39–40, 47–54.

53. Annex to the 'Paper on Some Policy Issues Before the Office of the Prosecutor': Referrals and Communications, available at http://www.icc-cpi.int/library/organs/otp/policy_annex_final_210404.pdf.

agree to a prosecution by a Court perceived as neutral and impartial.'[54] Yet, at least in the Congo case, it seems likely that all groups may not necessarily support ICC involvement. The danger in such cases is that the Prosecutor will unwittingly or unintentionally play into the hands of the national government, and alter the political dynamic within the target state in favour of one particular side.

While the ICC's goal, as articulated in the Rome Statute, is to 'put an end to impunity',[55] the powers of prosecutorial discretion give the Prosecutor the ability to take into account the impact of his prosecutorial strategy on domestic political outcomes. Article 53(1)(c) of the Rome Statute allows the Prosecutor to consider whether 'Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice'.[56] While there are considerable limitations on the Prosecutor's decisions to initiate a case, and strict review by the Pre-trial Chamber the Prosecutor has considerable leeway to decide that a prosecution would not serve the interests of justice.[57] Given that the Court is part of a larger system of global governance through which decisions at the international level have profound implications for domestic outcomes and vice-versa, the Prosecutor ought to consider carefully how his policies will effect decision-making at the domestic level. Where externalizing the political costs of domestic prosecution supports a legitimate peace process or helps a democratic law-abiding government, this may be a win-win situation and the Prosecutor should proceed. But, where the ICC becomes an implement of a potentially despotic national government whose own hands may not be clean, the Prosecutor might be well advised to encourage national prosecutions that fully account for the political costs of justice or to delay international investigation until his actions are less likely to alter domestic political outcomes.

4. The complementarity regime and domestic judicial reform

The complementarity regime of the Rome Statute also serves as a catalyst for domestic judicial reform. The simple substitution model of complementarity suggests that the ICC will merely step in when domestic courts are unable or unwilling to act.[58] The multi-level global governance model instead recognizes that international and domestic institutions are engaged in complex interactions whereby the international level, and particularly the ICC's complementarity regime, may catalyze changes at the national level. This section examines the nature of these interactions, suggests that the complementarity provisions of the Rome Statute are,

54. Paper on Some Policy Issues Before the Office of the Prosecutor, September 2003 at 5, available at http://www.icc-cpi.int/library/organs/otp/030905_Policy_Paper.pdf.
55. 1998 Rome Statute of the International Criminal Court, at Preamble.
56. Ibid., at Art. 53(1)(c).
57. See A/CONF.183.C.1/SR.7, Rome Conference Travaux, 183; G. Turone, 'Powers and Duties of the Prosecutor', in Cassesse, *supra* note 1, at 1137, at 1142.
58. For a commentary on the complementarity provisions of the Rome Statute based on this substation model, see Holmes, 'Complementarity: National Courts versus the ICC', *supra* note 1. See also F. Lattanzi, 'The International Criminal Court and National Jurisdictions', in M. Politi and G. Nesi (eds.), *The Rome Statute of the International Criminal Co*urt (2001) at 177.

in fact, facilitating reform of the Congolese domestic judiciary, and provides a political account of this catalytic effect based on changes to structural incentives created by complementarity.

One way for a state to avoid an ICC investigation is to utilize its own national judiciary to prosecute in an exercise of primacy. For states with failed domestic institutions, such an assertion of primacy will often involve significant domestic reform. The suggestion that complementarity might be fostering domestic judicial reform in Congo as a means of asserting primacy seems to be in irreconcilable tension with Kabila's referral of the situation to the ICC. If the Congolese government did not desire ICC involvement in the first place, why refer the case at all and, if it does seek ICC action, there is no need to reform the judiciary in an attempt to assert primacy. However, the Congolese government – like any government – does not always act as a unified whole, but rather consists of a number of factions and elements with different spheres of authority and power. While President Kabila was able to refer the situation in Congo to the ICC largely on his own authority, his main political rivals, who are significantly more threatened by an ICC investigation, have powerful influence over domestic judicial reform. Vice Presidents Bemba and Ruberwa, among others, have been extremely active in attempting to enhance the capacity of the national judiciary so as to exercise primacy over the ICC should that become necessary.

Bemba and Ruberwa are among the most likely to be investigated or implicated by ICC action and their rational preference is to keep the ICC out of Congo at all costs. They control a number of key governmental portfolios including Justice, Finance, Budget, Foreign Affairs, and Defense, Demobilization and Demilitarization,[59] giving them authority over domestic judicial reform and potential leverage points to control domestic prosecutions.

As part of a global governance system, the ICC has again shifted the incentives for domestic actors. Were it not for the ICC, Bemba, Ruberwa and others would seek to keep national courts weak so as to avoid prosecution. Given the existence of the ICC and the operation of the complementarity regime, however, their incentives change in favour of strengthening the national judiciary. National prosecutions may seem a far lesser threat than those by the ICC. After all, it is likely that senior governmental officials would have sufficient control over such proceedings to minimize political damage. Though the ICC could still act if a strengthened national judiciary refused to investigate a case or undertook a sham prosecution to shield a particular suspect,[60] challenges to admissibility would likely delay any such trials until after the forthcoming elections.[61] As the ICC has shifted the incentives of domestic actors

59. For a breakdown of these portfolios, see *Balancing Peace, Justice, and Stability: A Special Tribunal for the Democratic Republic of Congo*, Woodrow Wilson School of Public and International Affairs (2004) at Appendix B (on file with author). Though Minister of Justice Ngoy is himself from the Unarmed Opposition, he reports directly to Vice President Ruberwa of the RCD. Ibid.

60. See 1998 Rome Statute of the International Criminal Court, at Art. 17(2).

61. See ibid., at Art. 17. The legal proceedings required to determine admissibility where the national state seeks to assert primacy involve a full review by the Pre-Trial Chamber, likely taking a considerable period of time. Article 18 requires the prosecutor to defer a case for six months when the national state claims it is investigating the matter. Similarly, Article 18 grants the national state a right to appeal a decision of

in favour of a stronger national judiciary, Bemba, Ruberwa and others threatened by international prosecution have sought to enhance the standing of the Congolese courts.

Since the Prosecutor's September 2003 announcement that he would closely follow the situation in the Congo,[62] elements within the Congolese government have responded by launching reforms of the national judiciary and establishing a Truth and Reconciliation Commission.[63] Immediately after the Prosecutor's announcement, key Congolese government figures sought to make a case for the assertion of primacy over the ICC. In late September 2003, a series of senior Congolese officials appeared on local TV and radio to argue that 'Congo is competent to try these cases'.[64] This proposition has been frequently repeated in Congolese media and governmental circles. Minister of Justice Honorius Kisimba-Ngoy argues: 'For crimes committed by Congolese, we will hold them accountable in national courts. For crimes committed by international actors, we will hold them accountable in international courts.'[65] In other words, Congolese citizens should be tried in Congo and the ICC should only be involved in prosecutions of Rwandan rebels active in eastern Congo. A human rights advocate in Kinshasa suggests that the minister is not alone in taking this stance: 'there will be no end of Congolese saying they are perfectly competent to try the case themselves'.[66]

Many in Congo recognize that any primacy claims over the ICC will fall on deaf ears in The Hague unless significant progress is made to enhance judicial capacity at home. Minister of Justice Ngoy's first efforts in this vein have focused on reunifying the judiciary, which had effectively been divided into totally separate eastern and western regions during the period of civil war. A conference of the entire judiciary is being planned in Kinshasa in 2005 to accomplish this task.[67] Similarly, a conference on the relationship between the ICC and domestic courts involving international advisors and government officials is to be held in early 2006.[68] Likewise, a number of commissions have been established to begin work on judicial and legislative reform. According to the Director of the Cabinet to the Minister of Human Rights, one 'local commission [is] studying how to adapt the ICC to the DRC'.[69] Similarly, 'a permanent committee within the Ministry [of Justice has been established] for reforming the

admissibility by the Pre-Trial Chamber to the Appeals Chamber. Even if heard on an expedited basis, such proceedings could well continue through the election period.

62. Luis Moreno-Ocampo, Second Assembly of States Parties to the Rome Statute of the International Criminal Court Report of the Prosecutor of the ICC, Mr Luis Moreno-Ocampo, 8 September 2003, available at http://www.icc-cpi.int/otp/030909_prosecutor_speech.pdf.
63. For a discussion of how an enhanced judiciary could serve this purpose, see Holmes, 'Complementarity: National Courts versus the ICC', *supra* note 1.
64. Joe Wells, International Human Rights Law Group, Personal Interview, Kinshasa, 27 October 2003 (interview conducted by Yuriko Kuga, Leslie Medema and Adrian Alvarez).
65. Honorius Kisimba-Ngoy, Minister of Justice, Personal Interview, Kinshasa, 29 October 2003, (interview conducted by Yuriko Kuga, Leslie Medema and Adrian Alvarez).
66. Joe Wells, International Human Rights Law Group, Personal Interview, Kinshasa, 27 October 2003 (interview conducted by Yuriko Kuga, Leslie Medema and Adrian Alvarez).
67. Honorius Kisimba-Ngoy, Minister of Justice, Personal Interview, Kinshasa, 29 October 2003 (interview conducted by Yuriko Kuga, Leslie Medema and Adrian Alvarez).
68. Report of the University of Amsterdam – No Peace Without Justice Experts Meeting, October 2004.
69. Olela Okondji, Director of the Cabinet to the Minister of Human Rights, Personal Interview, Kinshasa, DR Congo, 29 October 2003 (interview conducted by Yuriko Kuga, Leslie Medema and Adrian Alvarez).

domestic law' and is 'learning how to implement the ICC' crimes into domestic law.[70] This committee has been responsible for draft legislation to formally implement the Rome Statute. The so called *Project de Loi de Mise en Oeuvre du Statut de la Cour Penale Internationale* was drafted in July 2003 and is currently under review by the Ministry of Justice and the transitional parliament.[71] As of late 2004 a draft law was under consideration but had yet to be passed by the National Assembly. While the establishment of such commissions and the preparation of legal drafts is only a first step toward meaningful domestic judicial reform, it is a preliminary indication that national reform efforts are under way.

Similarly, in the eastern provinces, officials at all levels of government expressed strong desires to enhance the capacity and effectiveness of the domestic judiciary. The Prosecutor General of Kisangani, for example, observes the current weakness of the domestic judiciary: 'The underpaid and politically weak Supreme Court, under the current conditions, will not be able to prosecute a major political leader'.[72] He is simultaneously committed to improving judicial capacity, noting, 'Priority should be given to strengthening the power of the Supreme Court'.[73] Similarly, the Chief Prosecutor of the South Kivu Province comments: 'Currently our courts are very weak, but we want to improve them quickly'.[74] In fact, judicial officials in the East claim to be taking particularly aggressive steps to improve domestic judicial capacity, even in the face of serious resource constraints. As South Kivu provincial prosecutor Mirindi notes, 'even before Kinshasa takes real action, we are already trying to do much to improve here in Bukavu. We have been collecting books and materials, trying to be sure we have the most up-to-date legal codes. And we are all helping to train younger lawyers so we can handle more cases'.[75] Again, these may be small steps but, to the degree they are occurring across the country and eventually will be backed by politicians in Kinshasa and international donors,[76] they have the potential to result in substantial change.

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70. The Commission's formal name is the *Commission Permanente de Reforme du Droit Congolais*. Personal Interview, Director of the Cabinet to the Minister of Human Rights, Ms Olela Okondji, Kinshasa, 29 October 2003 (interview conducted by Yuriko Kuga, Leslie Medema and Adrian Alvarez).
71. See 'Democratic Republic of the Congo: Confronting Impunity', Human Rights Watch Briefing Paper, January 2004, at VI(b). The draft law 'provides a comprehensive definition of war crimes, crimes against humanity, and genocide'. In addition, it pledges the DRC to 'work with the ICC to prosecute such crimes'. Finally, it expands the jurisdiction of civilian courts to try soldiers accused of war crimes and crimes against humanity. Ibid.
72. Procureur of Kisangani, Personal Interview, 30 October 2004, Kisangani DRC (interview conducted by Christopher Broughton and Mariyan Zumbulev).
73. Ibid.
74. M. Mirindi, Prosecuting Magistrate, Personal Interview, Bukavu, DR Congo, 29 October 2003.
75. Ibid.
76. Significant international involvement in Congolese judicial reconstruction is already under way. Since 2001, the EU has had in place a multi-year €28 million judicial assistance programme and is currently considering plans to expand that programme. See Personal Interview, Emmanuel Altit, 8 December 2003 (interview by Jordan Tama). Under these auspices, an EU judicial assessment team visited Congo in late 2003 and is preparing an 'Organizational Audit of the Democratic Republic of Congo justice system'. See 'Democratic Republic of the Congo: Confronting Impunity', *supra* note 71, at I. In addition, human rights and the rule of law are one of the five strategic priorities of MONUC. According to William Swing, the Special Representative of the Secretary General in Congo, MONUC is in the process of establishing a Rule of Law Task-Force that will 'bring together many stakeholders including magistrates, NGOs, law enforcement officials'. Personal Interview, William Lacy Swing, Special Representative of the Secretary General, Kinshasa, DR Congo, 31 October 2003 (interview conducted by Yuriko Kuga, Leslie Medema and Adrian Alvarez). Swing further

Efforts have also been undertaken to enhance the capacity of the domestic police authority so as to be able to apprehend those suspected of serious crimes. Though the Congolese police force still remains weak, special police units have been established for the apprehension of serious crimes suspects. In March 2005, for example, Thomas Lubanga, the leader of the Congolese Patriotic Union, and Floribert Ndjabu, a rebel leader from Ituri, were arrested in Kinshasa.[77]

Throughout the country, both political and judicial officials attributed many of these reform efforts to the complementarity regime. The Governor of the South Kivu province observes: 'many horrible crimes were committed here in South Kivu. I want them prosecuted here in our courts. I am putting pressure on our courts to do a better job.'[78] Upon inquiry, the Governor was familiar with the concept of complementarity: 'I have heard that if our courts are good enough, the ICC will not be able to prosecute here. That is why we need to make these changes quickly'.[79] The general prosecutor of the South Kivu, as well as other judicial officials, had at least basic understandings of complementarity and expressed a desire to ensure that domestic courts function well enough that the ICC 'will not be able to try our people, but only the foreigners who are guilty'.[80]

Beyond reforming the domestic judiciary, the Congolese government is also actively pursuing the creation of a Truth and Reconciliation Commission (TRC). Although the TRC itself may not appear directly related to the complementarity regime, there is a widely held belief in Congo that a TRC investigation can prevent ICC action. TRC Chairman, Dr Jean-Luc Kuye Ndondo, asserts that the TRC can prevent the ICC from investigating low-level crimes by granting amnesty to perpetrators. He notes that 'for big crimes as crimes against humanity, it is better to go to international courts, for lesser crimes the TRC should take priority'.[81] The Rome Statute is silent on the question of whether a TRC-granted amnesty would be a bar to prosecution and the issue was 'evaded at the Rome Conference itself'.[82] Some authors contend that a legitimate amnesty along the lines of the South African model should be respected,

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notes that MONUC wants to 'build judicial capacity and that means improving and increasing the police force, reforming the structure, repairing courts, building prisons and jails'. Ibid. Consideration is being given to the creation of a special mobile investigative unit to address serious crimes. For a discussion of this proposal, see 'Democratic Republic of the Congo: Confronting Impunity', *supra* note 71, at V(a). In Bunia, the major city in the Ituri region, MONUC is in the final stages of constructing a new expanded prison facility. MONUC is also supporting the creation of the Truth and Reconciliation Commission, particularly the implementation of an Organic Law for the Commission, though Swing cautions that the TRC can only be effective 'if the right people are in place'. Personal Interview, William Lacy Swing, Special Representative of the Secretary General, Kinshasa, DR Congo, 31 October 2003 (interview conducted by Yuriko Kuga, Leslie Medema and Adrian Alvarez). Another proposal recently presented to the US Department of State would establish a special tribunal along the lines of that operating in Sierra Leone to prosecute a small group of those most responsive for atrocities since 1996 and involve a mix of foreign and local judges. See *Balancing Peace, Justice, and Stability: A Special Tribunal for the Democratic Republic of Congo*, Woodrow Wilson School of Public and International Affairs (2004), at 24 (on file with author).

77. 'Another Key Ituri Leader Arrested', *Integrated Regional Information Networks*, 22 March 2005; 'Warlord Arrest for Killings', BBC News, 1 March 2005, available at http://news.bbc.co.uk/2/hi/africa/4308583.stm.
78. Xavier Ciribanya, Personal Interview, Bukavu, DR Congo, 30 October 2003.
79. Ibid.
80. M. Mirindi, Prosecuting Magistrate, Personal Interview, Bukavu, DR Congo, 29 October, 2003.
81. Dr Kyue-Ndondo, President of the Truth and Reconciliation Commission, Personal Interview, Kinshasa, DR Congo, 27 October 2003.
82. J. Dugard, 'Possible Conflicts of Jurisdiction with Truth Commissions', in Cassesse, *supra* note 1, at 700. See also M. Scharf, 'The Amnesty Exception to the Jurisdiction of the ICC', (1998) 32 *Cornell Int'l L. J.* 507.

while others suggest that 'the establishment of the ICC testifies to the judgment on the part of the international community' that 'justice ... must take priority over peace and national reconciliation' and hence an amnesty should not bar ICC action.[83] While the effect of a TRC-granted amnesty remains an open question, the fact that it is perceived as a bar to prosecution in the Congo is sufficient to link the attention presently being paid to the TRC to the Rome Statute's complementarity regime.

The Congolese TRC grew out of the Inter-Congolese Dialogue and is written into the interim constitution.[84] The Constitution dictates the TRC be composed of eight parties: the government, the unarmed opposition, civil society, the RCD-Goma, the MLC, the Mai-Mai, the RCD-National and the RDC-KML.[85] In addition to the TRC Chairman, each of the eight parties has chosen one member of the Commission. After a long-delayed review process,[86] a February 2004 meeting of stakeholders in the TRC process held in Kinshasa brought the parties closer to an agreement on a draft text, but failed to produce a final result.[87] The organic law of the Congolese Truth and Reconciliation Commission was eventually adopted on 30 July 2004. Given concerns over the composition of the Commission appointed by the warring factions, the Organic Law provides for the appointment of an additional 13 members from 'religious institutions, academic institutions, associations of women and other associations whose activities are related to the objective of the TRC'.[88]

As mentioned earlier, although early drafts suggested that the TRC would only have the authority to amnesty low-level crimes,[89] the July 2004 law anticipates a broader amnesty grant by the national legislature and provides that the Commission will have the power, 'Under reserve of the amnesty law which will be voted by the National Assembly, [to] propose to the competent authority to accept or refuse any individual or collective amnesty application for acts of war, political crimes and crimes of opinion'.[90] As it stands, the current version of the law would allow the TRC to grant amnesties for crimes within the jurisdiction of the ICC that, at least in the view of Congolese officials, could in turn block ICC action. In addition, the Commission has the authority to offer reparations to the victims, though the source of funds for any reparations remains unclear.[91]

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83. Dugard, *supra* note 82, at 702.
84. Constitution De La Transition, Journal Officiel de la République Démocratique du Congo, 44 année, 5 April 2003, at Art. 154 (noting: 'Les Institutions d'appui a la démocratie sont: ... La Commission vérité et réconciliation').
85. Dr Kyue-Ndondo, President of the Truth and Reconciliation Commission, Personal Interview, Kinshasa, DR Congo, 27 October 2003.
86. See 'Truth Commission to be Established in Kinshasa', AFOL News, 19 February 2004, available at http://www.afrol.com/articles/11310.
87. See Y. Kabamab, 'National Consultations on DRC Truth and Reconciliation Commission', 19 February 2004, MONUC Press Release, http://www.monuc.org/news.aspx?newsID=1952. See also, 'Truth Commission to be Established in Kinshasa,' *AFOL News*, 19 February 2004, available at http://www.afrol.com/articles/11310.
88. Organic Law, 30 July 2004, cited in 'A First Few Steps: The Long Road to a Just Peace in the Democratic Republic of Congo', *International Center for Transitional Justice Occasional Paper*, October 2004 at 39–40, available at http://www.ictj.org/downloads/ICTJ.DRC.Eng.pdf.
89. For a discussion of the appropriate range of powers for such a TRC, see W. W. Burke-White, 'Reframing Impunity', (2002) 42 *Harv. J. Int'l L.* 467. For a discussion of similarly situated TRCs, see P. Hayner *Unspeakable Truths: Confronting State Terror and Atrocity* (2001).
90. Organic Law, *supra* note 88, at 43. It is worth noting that this amnesty provision has changed several times in the drafting process.
91. Organic Law, *supra* note 88, at Art. 41.

The government's efforts to create a TRC have been greeted with much scepticism by Congolese and foreign observers alike. The Commission's structure – with its members drawn from the warring factions – undermines much of its legitimacy. One senior US government official who spoke on grounds of anonymity observes: 'The TRC has been completely politicized, and many of the nominees have been authors of war crimes themselves'.[92] A second major failing of the TRC, according to representatives of victims' groups is that the membership of the commission and the lack of any witness protection may result in victims being unwilling to testify.[93] As it stands today, while the TRC has been a focus of the government's domestic judicial reform, it seems unlikely to develop into a successful and legitimate body.[94] Yet it is hardly a surprising response from a government that is internally divided and unsure whether it really wants an ICC investigation. The ambignity of the status of a TRC in the Rome Statute means that most domestic actors can support a TRC without having to confront its real implications for an ICC prosecution.

While efforts at judicial reform and the development of the Congolese TRC remain too preliminary to prove that complementarity has been a catalyst for reform, there are strong indications that the ICC, as a supranational layer of governance authority, is altering incentives at the national level and catalyzing reform efforts. As the Special Representative to the Secretary General William Swing observes: 'The ICC is ... one piece in the mosaic. It can be used as a means to put pressure on the people.'[95] Many Congolese officials are familiar with the concept of complementarity and, for political reasons, some are eager to exercise primacy vis-à-vis the ICC. Their actions to encourage reform of the domestic judiciary and the establishment of the TRC seem closely linked to this desire to keep prosecutions domestic. Clearly, both resources and political capital are sufficiently limited that reform may be far slower and less comprehensive than judicial officials anticipate. But the ICC appears to be playing a part in spurring on those efforts.

5. Complementarity as a benchmark for judicial effectiveness: evaluating the Congolese judiciary in light of ICC admissibility

A third means through which the ICC is emerging as part of a system of multi-level global governance in the Congo is by providing a set of benchmarks for judicial effectiveness. In the simple substation model of complementarity, Article 17 of the Rome Statute merely delineates the limits on admissibility of cases before the Court. Article 17 specifies that a case will not be admissible if it is being investigated or prosecuted by a national court, unless the proceedings were undertaken for 'the

92. Personal Interview, Kinshasa, DR Congo, 26 October 2003.
93. Round Table with Victims Groups, Personal Interview, Bukavu, South Kivu, 30 October 2003.
94. For a more general critique of the Commission, see 'A First Few Steps: The Long Road to a Just Peace in the Democratic Republic of Congo', *International Center for Transitional Justice Occasional Paper*, October 2004, at 39–40, available at http://www.ictj.org/downloads/ICTJ.DRC.Eng.pdf.
95. William Lacy Swing, Special Representative of the Secretary General, Personal Interview, Kinshasa, DR Congo, 31 October 2003 (interview conducted by Yuriko Kuga, Leslie Medema and Adrian Alvarez).

purpose of shielding the person concerned from criminal responsibility', there has 'been an unjustified delay in the proceedings', or the proceedings were not 'conducted independently or impartially'.[96] Further, in cases of judicial collapse, Article 17(3) of the Rome Statute instructs the Court to consider 'whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings'.[97]

Approaching these limitations from the perspective of multi-level global governance engages the ICC and its potential jurisprudence in a set of iterative interactions with national judicial systems. In this model, national governments may be seen as responding to the complementarity provisions of Article 17 in shaping their own judicial reform efforts. The basic provisions governing admissibility of cases before the Court simultaneously serve as benchmarks for the effectiveness of national judiciaries. Where national courts fail to meet these standards, they are deemed so ineffective that the ICC can intervene to replace the national judiciary. The incentive structure in this circumstance is such that national governments seeking to avoid ICC action will endeavour to meet the minimum benchmarks of effectiveness embedded in the complementarity regime. The Court and the Rome Statute can then be seen as guiding national governments in undertaking 'genuine' prosecutions.[98]

Admittedly, the admissibility criteria of the Rome Statute provide but a thin set of guidelines or a skeletal framework for national judiciaries. Commentators have sought to add substance to these criteria. John Holmes suggests that the goal at Rome was to offer a set of criteria as 'objective as possible' and that the use of the term 'genuine' in the Statute instructs the Court to consider whether the national government has acted 'in good faith'.[99] In assessing the inability of a state to prosecute, Holmes notes that the discussion in Rome included a consideration of 'the extent to which the State was exercising effective control over its territory, the existence of a functioning law enforcement mechanism, ... whether the State was able to secure the accused or the necessary evidence, ... the extent and scope of the crimes committed,' and the ability of the state to give 'full respect of the rights of the accused'.[100] Despite efforts to expand on the criteria developed at Rome, the Statute leaves much for the Court to specify in early cases testing admissibility.[101]

If the ICC is envisioned as part of a system of multi-level global governance and engaged in a kind of conversation with national judiciaries, a more detailed

96. 1998 Rome Statue of the International Criminal Court, at Art. 17(2).
97. Ibid., at Art. XVII (3).
98. The word 'genuine' was chosen in a compromise to avoid seemingly more intrusive scrutiny by the ICC under the proposed language of an 'effective' investigation or prosecution. At the very least, a genuine investigation or prosecution seems to be one that is undertaken with some diligence and could, potentially, lead to the criminal liability of the accused. See OTP Informal Expert Paper: The Principle of Complementarity in Praxis (2003) 8 para. 22. On this matter, cf. J. Holmes, 'The Principle of Complementarity', *supra* note 1, at 49.
99. Holmes, 'Complementarity: National Courts versus the ICC', *supra* note 1, at 674.
100. Holmes, 'The Principle of Complementarity', *supra* note 1, at 49.
101. The Pre-trial Chamber will make apply the complementarity provisions to make determinations of admissibility. For a discussion, see Lattanzi, *supra* note 58, at 49 (observing: 'it is always up to the Court to decide on issues of complementarity').

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specification of the complementarity criteria is essential. Such specification would provide national governments, particularly those emerging from a total or substantial judicial collapse, more specific benchmarks for their reform efforts and would offer important guidance to judges and jurists alike as to the necessary components of judicial effectiveness. While the Pre-Trial Chamber will, hopefully, provide such standards in its early decisions on admissibility challenges, the Office of the Prosecutor may be well served to develop and publicize a set of criteria that it will look to when deciding to proceed with an investigation. A more detailed set of criteria, even if not the operative law of the Pre-Trial Chamber, could more effectively catalyze judicial reform efforts by providing substantive guidance for national governments.

This section proposes a more detailed set of criteria to evaluate the ability of a national government to undertake genuine prosecutions, particularly in the wake of a total or substantial collapse of the national judiciary. Further, the section evaluates the Congolese judiciary in light of the criteria developed. Given the desire of some Congolese leaders to assert primacy over the ICC,[102] should national prosecutions be initiated in the Congo, the ICC may well be required to make a determination of admissibility.[103] The discussion that follows provides a preliminary analysis of the present ability of the Congolese judiciary to undertake genuine prosecutions.

Four key analytical factors can be derived from Article 17 of the Rome Statute, their commentaries, and a range of international agreements and instruments addressing judicial 'best practices' to judge the effectiveness of judicial systems in states recovering from a total or substantial judicial collapse. These include the availability of experienced and unbiased judicial personnel, the presence of a viable legal infrastructure, the existence of adequate operative law, and a sufficient police capability to undertake arrest and investigation. These factors are crucial to a genuine investigation and prosecution as they address the ability of the national government to apprehend suspects, collect evidence, provide security to victims and witnesses, and undertake unbiased adjudication.

This analysis suggests that presently the Congolese domestic judiciary is unable to undertake genuine investigations or prosecutions. On each factor in the proposed test, the Congolese government currently falls short. As a February 2004 Human Rights Watch briefing paper concludes: 'The DRC's national justice system is in a state of disarray ... It will likely take years to establish a functioning, independent, impartial and fair judiciary'.[104] The sections that follow develop each of the four prongs of the proposed test in more detail and apply them to the DRC.

5.1. Judicial personnel

The adequacy and independence of judicial personnel is an essential component of a state's genuine willingness and ability to prosecute international crimes. As

102. See text *supra* parts 3 and 4.

103. Article 17 of the Rome Statute starts from the presumption that cases are admissible before the ICC. The Court is instructed to deem the case inadmissible if it is 'being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution'.

104. 'Democratic Republic of the Congo: Confronting Impunity', *supra* note 71, at IV.

one commentator on the Rome Statute observes: 'the absence of sufficient qualified personnel to effect a genuine prosecution could be a determining factor in judging admissibility.'[105] Judges must have adequate training and experience, guarantees of personal safety, and both financial and political independence to act as impartial arbiters in any dispute. The International Covenant on Civil and Political Rights, for example, requires that 'everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law'.[106] Similarly, Transparency International's Bangalore Principles of Judicial Conduct make clear that 'Judicial independence is a pre-requisite to the rule of law'. More specifically, addressing the question of financial independence, the Principles expound: 'judge[s] ... shall neither ask for, nor accept, any gift, bequest, loan or favour in relation to anything done or to be done or omitted to be done by the judge in connection with the performance of judicial duties.'[107] In short, the Court must determine whether the national state has a sufficient number of competent lawyers and judicial officials who are free from political or financial bias to undertake an investigation and prosecution.

The DRC currently lacks adequate and independent judicial personnel to undertake investigations or prosecutions that meet the genuineness test under Article 17 of the Rome Statute. On one level Congo is blessed with a wealth of educated lawyers. One report suggests that there are at least 1,500 lawyers and 700 other judicial officials in the country.[108] While the actual number of judges may be small, for an extremely poor African state, Congo has a respectable enough pool of lawyers to operate a judiciary. At universities in Kinshasa and Bukavu, criminal and international law are regularly taught and law students are relatively familiar with international crimes.[109] Moreover, a number of judges have received international graduate training, particularly in Belgium and France.[110] Compared to other states such as East Timor, where international criminal tribunals have been established using national personnel, Congo is far better equipped with trained lawyers.[111] With additional training, the existent personnel pool could presumably provide an effective basis for the reform of the Congolese judiciary.

There are, however, significant problems with judicial independence. Judges often lack both political independence and financial impartiality. A recent report by the

105. Holmes, 'Complementarity: National Courts versus the ICC', *supra* note 1, at 678.
106. International Covenant on Civil and Political Rights, at Art. 14. For a more detailed discussion of judicial independence see, e.g., S. Shetreet and J. Deschenes (eds.), *Judicial Independence: The Contemporary Debate* (1985).
107. Transparency International, 'The Bangalore Principles of Judicial Conduct', available at http://www.transparency.org/building_coalitions/codes/bangalore_conduct.html.
108. Dominique Kamuandu and Theo Kasonga, Avocates Sans Frontières, Personal Interview, Kinshasa, DR Congo, 28 October 2003 (interview conducted by Adrian Alvarez and Yuriko Kuga. Human Rights Watch confirms that 'the latest figures released by the Ministry of Justice show that as of 1998, there were only 1448 judges and prosecutors in the entire country'). See 'Democratic Republic of the Congo: Confronting Impunity', *supra* note 71, at IV(b).
109. Dean of the Faculty of Law, University of Kinshasa, Personal Interview, Kinshasa, DR Congo, 27 October 2003. M. Mirindi, for example, completed an LL.M. at the Free University of Brussels.
110. M. Mirindi, Prosecuting Magistrate, Personal Interview, Bukavu, DR Congo, 29 October, 2003.
111. For a discussion of the problems with finding adequately trained judicial personnel in East Timor, see Burke-White, *supra* note 52, at 61–75.

Syndicat Autonome des Magistrats de la République Démocratique du Congo notes that 'the judges of our country have been wrongly and unjustly reduced to the rank of simple public functionaries of the state'.[112] The Congolese President has largely unchecked authority over the appointment of judges.[113] On this matter, Human Rights Watch suggests 'the constantly growing power of the executive since the mid-1970s has resulted in the *de facto* subordination of the judiciary to the executive branch'.[114] The problems of judicial independence are highlighted by the ongoing operation of the *Cour de Sûreté de l'Etat*, 'a special tribunal established in the 1970s to prosecute political offences', which is known to lack independence and find in favour of the government.[115]

Financial independence may be of even greater concern. Many judges in Congo have not been paid regularly in more than five years.[116] Particularly in the eastern part of the country, where most crimes have occurred, judges have simply not received compensation from the state. Even when paid, government salaries of no more than US $50 per month are wholly inadequate to prevent an overwhelming temptation for abuse and corruption.[117] Congolese judges are frequently seen travelling in chauffer-driven BMWs, clearly beyond the means of their salaries. These same unpaid judges often supplement their income with payments from the parties before them.[118] Rumour has it that for roughly US$1000, the official police and judicial apparatus can be purchased to assure the arrest and incarceration of an individual.[119]

Unpaid judges or those paid directly by the parties cannot be independent and are therefore unable to carry out genuine investigations and prosecutions. Unless the judges for any domestic accountability process receive adequate compensation such that they need not depend on pay-offs from the parties, Congo will likely remain unable to undertake a genuine judicial process. These problems could, however, be overcome through either outside financial assistance or the commitment of greater domestic resources to judicial salaries and serious anti-corruption efforts.

5.2. Infrastructure

A second necessary prong of the test of a state's ability and willingness to prosecute is the existence of sufficient judicial infrastructure to undertake international prosecutions. Article 17(3)'s reference to the 'total or substantial collapse or unavailability of its national judicial system' as grounds for ICC admissibility implies the necessity

112. *Memorandum du Syndicat Autonome des Magistrats de la République Démocratique du Congo*, Kinshasa, 25 August 2003, cited in 'Democratic Republic of the Congo: Confronting Impunity,' *supra* note 71, at IV(a).
113. 'A First Few Steps: The Long Road to a Just Peace in the Democratic Republic of Congo', *supra* note 88, at 24.
114. 'Democratic Republic of the Congo: Confronting Impunity', *supra* note 71, at IV(a).
115. Ibid., at IV(d).
116. M. Mirindi, Prosecuting Magistrate, Personal Interview, Bukavu, DR Congo, 29 October 2003; Personal Interview, Chief of the Cabinet of the Judiciary, Bukavu, DR Congo, 29 October 2003.
117. Dominique Kamuandu and Theo Kasonga, Avocats Sans Frontières, Personal Interview, Kinshasa, DR Congo, 28 October 2003 (interview conducted by Adrian Alvarez and Yuriko Kuga). See also Personal Interview, Luc Heymans, Director, UN Office of the Coordination of Humanitarian Affairs, Kinshasa, Congo, 25 October 2003.
118. M. Mirindi, Prosecuting Magistrate, Personal Interview, Bukavu, DR Congo, 29 October 2003.
119. Jo Wells, Human Rights Law Group, Personal Interview, Kinshasa, Congo, 25 October 2003 (interview conducted by Yuriko Kuga and Leslie Medema).

of some existent national infrastructure.[120] In the terms of the Statute, without some minimal infrastructure, a state is 'unable to otherwise carry out its proceedings'.[121] At the negotiations in Rome, the example of the Rwandan judiciary in the mid-1990s, which lacked any infrastructure whatsoever after the genocide, was often cited as an example of substantial collapse.[122] John Holmes, in a commentary to the Statute, notes the necessity of a 'functioning law enforcement mechanism' as a prerequisite to an effective prosecution.[123] Moreover, to meet minimum international standards, facilities are required to ensure security for victims, witnesses, judges and defendants.[124] Finally, some prison facilities are needed to ensure that those convicted of international crimes can be incarcerated.

Applying this infrastructure prong of the test for an effective judiciary to the DRC, the question becomes whether the Congolese judicial infrastructure has experienced a total and substantial collapse such that no genuine trial would be possible. Courts in the national capital of Kinshasa look and act like many of their counterparts in failed states – they operate in a general state of disarray.[125] However, despite the often limited resources and apparent chaos, some courts in Congo may be able to undertake genuine investigations and prosecutions.[126] The Congolese Supreme Court heard approximately 180 cases in 2003 and has two hearing rooms that appear to be used with some frequency.[127] While filing rooms at the Supreme Court in Kinshasa were subject to frequent leaks and flooding, often leading to the loss of documents, records were, at the very least, kept. Similarly, while courtrooms often lacked recording equipment or other modern conveniences, in Kinshasa adequate facilities do exist for some trials.[128] Research facilities were minimal, at best, but judges had office space and some law books on Congolese, Belgian and French law.[129] While the situation in the capital is better than in the rest of the country, only one serious prosecution for international crimes or human rights abuse has been undertaken since the transitional government came to power.[130] In early 2005, a number of rebel leaders were arrested, but prosecutions have yet to be initiated.

Despite the apparent viability of the judiciary in Kinshasa, the eastern part of the country suffers from a serious collapse of infrastructure. As one human rights

120. 1998 Rome Statute of the International Criminal Court, at Art. 17(3).
121. Ibid.
122. Holmes, 'Complementarity: National Courts versus the ICC', *supra* note 1, at 677.
123. Holmes, 'The Principle of Complementarity,' *supra* note 1, at 49.
124. For a discussion of the evaluation of judicial infrastructure and capacity in EU member states, which obviously requires a higher standard than what could be expected in post-conflict states in Africa, see EUMAP Monitoring on Judicial Capacity (2002), available at http://www.eumap.org/topics/judicial.
125. For a general discussion on the role of courts in Africa, see J. Widner, *Building the Rule of Law: Francis Nyalali and the Road to Judicial Independence in Africa* (2001).
126. Personal visit and interview, Supreme Court of the Democratic Republic of Congo, Kinshasa, 25 October 2003.
127. Yenyi Olungu Victor, Premier Avocat Général de la République, Personal Interview, Kinshasa, DR Congo, 29 October 2003 (interview conducted by Leslie Medema, Yuriko Kuga and Adrian Alvarez).
128. It seems most unlikely that the available facilities are sufficient to support comprehensive judicial activities for a country of 56 million. See *CIA World Fact Book: Democratic Republic of Congo*, available at http://www.cia.gov/cia/publications/factbook/geos/cg.html.
129. M. Mirindi, Prosecuting Magistrate, Personal Interview, Bukavu, DR Congo, 29 October 2003.
130. The case, being tried in a military, rather than a civilian court, involves 22 individuals suspected of serious human rights violations in Ankoro, Katanga Province. See 'A First Few Steps: The Long Road to a Just Peace in the Democratic Republic of Congo', *supra* note 88, at 18–20.

advocate in Kinshasa put it, 'there is no [judicial] capacity' in Eastern Congo.[131] Effective courts are only operating in three major cities – Bukavu, Kisangani and Goma.[132] In the entire Oriental Province, an area approximately the size of France, there is only one operational court.[133] To reach a functioning court and file a complaint or appear as a witness requires, for the vast majority of Congolese, a multi-day walk along often flooded 'roads' through dangerous territory. Even when they reach a major city, Congolese citizens are not guaranteed that courts will be functioning or will operate without bribes. As one recent study found, less than 20% of the Congolese population has access to any courts at all.[134] For the purposes of domestic prosecutions of international crimes, it is particularly problematic that the judicial infrastructure does not reach out into provinces where key evidence is likely to be found. Investigation of such crimes is thus extremely difficult, if not impossible. In many communities, the only available justice is the local *Baraza* system, in which community elders adjudicate petty crimes – a system largely unable to deal with the more serious international crimes.[135] The Congolese Minister of Justice sums up the problems in the east: 'in general the [judicial] situation is very bad'.[136] Similarly, a 2004 report by the International Center for Transitional Justice concludes: 'The infrastructure of the judicial system has all but collapsed; judges and prosecutors lack copies of basic laws and are in dire need of training or re-training'.[137]

Even in the major cities of eastern Congo – Bukavu, Kisangani or Goma – courts are only semi-operational. As one magistrate judge in Bukavu noted, 'everything is missing for us to do our work: money, buildings, even typewriters'.[138] These courts have no formal judicial library and many lack even copies of relevant statutory law. While the Bukavu Municipal Court has managed to hear approximately 500 cases in the past year, it has few if any records and only operates when the parties can bear the costs.[139] Moreover, the effective partition of Congo over the past few years has meant that these courts in Eastern Congo had no contact with the Supreme Court or Ministry of Justice in Kinshasa, preventing appellate review or national harmonization.[140]

131. Jo Wells, Human Rights Law Group, Personal Interview, Kinshasa, DR Congo, 25 October 2003 (interview conducted by Yuriko Kuga and Leslie Medema).
132. M. Mirindi, Prosecuting Magistrate, Personal Interview, Bukavu, DR Congo, 29 October 2003.
133. Procureur of Kisangani, Personal Interview, 30 October 2004, Kisangani DR Congo (interview conducted by Christopher Broughton and Mariyan Zumbulev).
134. Only 54 of the 180 'Tribunaux de Paix' were established by May 2004. See 'A First Few Steps: The Long Road to a Just Peace in the Democratic Republic of Congo', *supra* note 88, at 24.
135. Personal Interview, John Meyers, UN Office of Community and Humanitarian Affairs, Bukavu, DR Congo, 28 October 2003. Many of the problems with *Baraza* stem from its exclusion of women and ethnic minorities from deliberation proceedings. Personal Interview, PAIF, Promotion et Appui aux Initiatives Feminines, Goma, DR Congo, 31 October 2003 (interview conducted by Dawn Hewett and Barbara Feinstein).
136. Honorius Kisimba-Ngoy, Minister of Justice of DR Congo, Personal Interview, Kinshasa, DR Congo, 29 October 2003 (interview conducted by Leslie Medema, Adrian Alvarez and Yuriko Kuga).
137. See 'A First Few Steps: The Long Road to a Just Peace in the Democratic Republic of Congo', *supra* note 88, at 24.
138. M. Mirindi, Prosecuting Magistrate, Personal Interview, Bukavu, DR Congo, 29 October 2003.
139. Chief of the Cabinet of the Judiciary, Personal Interview, Bukavu, DR Congo, 29 October 2003.
140. Luc Heymans, Director, UN Office of the Coordination of Humanitarian Affairs, Personal Interview, Kinshasa, DR Congo, 25 October 2003.

A final area in which Congolese infrastructure has collapsed is the prison system. Prisons are, obviously, required to incarcerate those convicted of international crimes, but also to protect defendants from retribution before and during trials. Visits to prisons in Kisangani and Goma demonstrated the overwhelming insufficiency of resources. In Goma, men, women and even children were being housed in common facilities.[141] According to one observer in Kisangani, the local warden is unpaid and takes regular bribes from prisoners, while sexually transmitted diseases and other contagious illnesses are rampant.[142] Food and medical services were often available only when provided by families on the outside. One 2002 NGO report on prisons in Kinshasa describes the situation as nothing less than a 'catastrophe'.[143] While MONUC is in the process of building new prison facilities in Ituri and elsewhere, at present Congo lacks the facilities to imprison even a fraction of those who likely bear the greatest responsibility for serious international crimes.[144] In sum, Congo has undergone and still suffers from a significant collapse of domestic judicial infrastructure.

5.3. Legal framework

A third area relevant to the ability of domestic judicial mechanisms in a post-conflict state to undertake prosecution of international crimes is the legal framework for such prosecutions. The legal authority of the national government to prosecute an international crime can derive from two principle sources – domestic law or international law directly applicable in the state in question. Generalizing this prong of the test of a state's ability to prosecute is difficult as each state has its own legal and constitutional order governing both crimes punishable under international law and the domestic effect of international law. For a state to undertake a genuine prosecution of the crimes proscribed by the Rome Statute, those crimes must either be included in domestic penal legislation or the international legal proscriptions must have direct domestic effect. As Flavia Lattanzi notes in a commentary on the Statute: 'The lack of implementation in domestic legal orders of applicable international standards ... could lead to the Court's decision of the admissibility of a case, as a consequence of the 'incapacity' of the national jurisdictions to provide justice in the case.'[145]

Determining whether a state has a sufficient legal framework to prosecute raises a further question as to whether the state's ability to prosecute the constituent elements of crimes defined in the Rome Statute, rather than the crimes themselves, would meet the tests of complementarity. For states that have not incorporated the

141. Personal visit, Goma Provincial Prison, 31 October 2003.
142. Father Giovanni, Kisangani Catholic Parish of the Sacred Heart, Personal Interview, 30 October 2003, Kisangani, DR Congo (interview by Christopher Broughton and Mariyan Zumbulev).
143. Prisons in the Democratic Republic of Congo: A Series of Reports Commissioned by the Refuge Documentation Center Ireland 5 (2002) available at http://www.ecoi.net/pub/sb47/rdc-cod-prison0502.pdf. A 1994 report by Human Rights Watch reached a similar conclusion. See 'Prison Conditions in Zaire', Human Rights Watch Report (1994).
144. Luc Heymans, Director, UN Office of the Coordination of Humanitarian Affairs, Personal Interview, Kinshasa, DR Congo, 25 October 2003. For reference to minimum international standards of detention, see International Covenant on Civil and Political Rights, at Art. 10.
145. Lattanzi, *supra* note 58, at 181.

Rome Statute and in which international law does not have direct effect, national law may only address certain lesser included acts of international crimes (for example, murder as a lesser included offence of a crime against humanity). It remains an open question whether the investigation and prosecution of the included acts of an international crime would be sufficient to deny admissibility. Article 17 of the Rome Statute specifies that a case shall be deemed inadmissible if 'the case is being investigated or prosecuted by a state which has jurisdiction over it'.[146] The use of the word 'case' appears broad enough to include the investigation and prosecution of lesser offences. This would, however, be a sub-optimal result for a number of reasons. Such a prosecution would not respect the particularly heinous nature of the crimes in question, it may not provide for appropriate punishments, and it might allow for various domestic defences not available in international law. Where a state chooses to prosecute an accused of minor crimes or crimes which provide for only very light sentences,[147] Article 20 of the Statute would allow the ICC to retry the individual for the international offence if the domestic prosecution 'was inconsistent with an intent to bring the person concerned to justice'.[148] For the purposes of determining the state's ability to undertake a genuine prosecution, the existence of a legal framework allowing for the prosecution of the actual offences enumerated in the Rome Statute appears essential.

A final aspect of the statutory basis for prosecution is whether there exist any bars to domestic prosecution such as national amnesties or statutes of limitations in domestic law. While a Truth and Reconciliation Commission investigation followed by a narrowly tailored amnesty might meet the tests of complementarity,[149] a blanket amnesty denying domestic courts jurisdiction would result in the inability of national courts to investigate or prosecute.[150] Although statutes of limitations generally do not apply to international crimes such as those included in the Rome Statute,[151] they may well apply under national law to the prosecution of lesser included offences. In determining whether the national judiciary has the requisite legal framework to prosecute, it is necessary to ensure that there are no statutory bars to prosecution that would deprive national courts of jurisdiction.

Applying these criteria to the Congo situation requires first a determination of whether the crimes proscribed in the Rome Statute have been implemented into domestic law. Congo inherited its legal system from the Belgians upon independence in 1960. The system is split into military and civilian courts, with members of the

146. 1998 Rome Statute of the International Criminal Court, at Art. 17(1)(a).
147. An example of this that may eventually lead to an admissibility test before the ICC is a new Columbian law providing extermely light sentences for those convicted of international crimes, possibly as a way of shielding the accused from more serious punishment by an international court.
148. 1998 Rome Statute of the International Criminal Court, at Art. 20.
149. See generally, Dugard, *supra* note 82.
150. Examples of such blanket amnesties denying national courts jurisdiction over particular offences include Law of Amnesty, No. 2.191 (18 April 1978) (Chile) reprinted in *Americas Watch, Human Rights and the 'Politics Of Agreements': Chile During President Aylwin's First Year* (1991) 32; First Amnesty Law of 14 June 1995, No. 26479 (1995) (Peru). Such an amnesty could also be a strong indication of the unwillingness of the state to investigate or prosecute crimes within the Court's jurisdiction.
151. See 1998 Rome Statute of the International Criminal Court, at Art. 29.

armed forces tried before military courts, and others in civilian courts.[152] None of the international crimes proscribed in the Rome Statute have been implemented into the civilian penal code.[153] An update to the military penal code in 2002 has expanded the coverage of international crimes so as to penalize genocide and war crimes, yet these definitions still fall 'short of the elements of these crimes under both the Rome Statute and the Geneva Conventions'.[154] While the Congolese legislation implementing the Rome Statute will rectify many of these shortcomings, it has yet to be passed and will not apply retroactively. As a result, Congolese civilian courts are unable to prosecute the crimes in the Rome Statute and military courts, where they have jurisdiction, may not be able to prosecute 'genuinely'.

Reliance on the military penal code poses a further legal challenge in that the revisions of the military penal code of 2002 were adopted while the country was partitioned during the civil war. Congolese legal scholars differ on whether the amended military penal code has the force of law in the eastern half of the country, which was not subject to Kinshasa's rule at the time of enactment.[155] Although this could easily be remedied by a repassage of the law in the newly unified parliament, this has yet to be done.

To the degree that Congolese domestic law provides an insufficient legal basis for prosecution, it is necessary to consider whether international law can be invoked directly in Congolese courts. As Congo follows the monist legal tradition inherited from Belgium, international law can, theoretically at least, have direct effect, without the need for national implementing legislation. Congolese courts, however, have been reluctant to rely on international law in the absence of implementing legislation.[156] One Congolese legal scholar suggests that the Genocide Convention and the Rome Statute may have direct effect without the need for implementing legislation.[157] Moreover, there is no precedent in Congolese law for the direct application of customary international law.[158]

Finally, it is necessary to consider amnesties or other statutory bars to prosecution in Congolese law. On 15 April 2003, a presidential decree granted amnesty, pending adoption of an amnesty law by the National Assembly, for 'acts of war, political crimes and crimes of opinion committed during the period from 2 August 1998 and

152. Apparently any crime involving a firearm tends to end up in the military system. Personal Interview, Dominique Kamuandu and Theo Kasonga, Avocates Sans Frontières, Kinshasa, DR Congo, 28 October 2003 (interview conducted by Adrian Alvarez and Yuriko Kuga).
153. 'A First Few Steps: The Long Road to a Just Peace in the Democratic Republic of Congo', *supra* note 88, at 20.
154. 'Democratic Republic of the Congo: Confronting Impunity,' *supra* note 71, at VI(a); Personal Interview, Dominique Kamuandu and Theo Kasonga, Avocates Frontières, Kinshasa, DR Congo, 28 October 2003 (interview conducted by Adrian Alvarez and Yuriko Kuga). See also, 'A First Few Steps: The Long Road to a Just Peace in the Democratic Republic of Congo', *supra* note 88, at 20 (suggesting that the definitions of crimes in the military penal code 'do not conform to international definitions and are, at best, ambiguous').
155. ASADHO Organization, Personal Interview, Kinshasa, DR Congo, 28 October 2003 (interview conducted by Adrian Alvarez and Yuriko Kuga).
156. 'A First Few Steps: The Long Road to a Just Peace in the Democratic Republic of Congo', *supra* note 88, at 21. This view was also expressed by the Congolese office of Avocates Sans Frontières. Personal Interview, Dominique Kamuandu and Theo Kasonga, Avocates Sans Frontières, Kinshasa, DR Congo, 28 October 2003 (interview conducted by Adrian Alvarez and Yuriko Kuga).
157. Dean of the Faculty of Law, University of Kinshasa, Personal Interview, Kinshasa, DR Congo, 28 October 2003. M. Mirindi, for example, completed an LL.M. at the Free University of Brussels.
158. 'A First Few Steps: The Long Road to a Just Peace in the Democratic Republic of Congo', *supra* note 88, at 21.

4 April 2003 ... excluding war crimes, genocide and crimes against humanity'.[159] As a national amnesty law has yet to be passed by the Assembly, the Presidential Amnesty Decree does not appear to bar prosecution of crimes within the jurisdiction of the ICC, though it might bar prosecution of lesser included offences by national courts. A ten-year statute of limitations for most serious crimes may further hinder the prosecution of lesser included offences in domestic law.[160]

At present, the ability of the Congolese government to undertake genuine prosecutions depends largely on whether judges are willing to directly apply international legal instruments in domestic law. To the degree that they are willing to set new precedent and do so, Congo may well have the necessary legal framework to act. Nonetheless, this framework would be infinitely strengthened by the passage of the implementing legislation for the Rome Statute which would provide sufficient authority and clarity for meaningful prosecutions by national judicial institutions.

5.4. Policing and investigation

The fourth relevant area of enquiry necessary to establish the ability of a state to undertake genuine prosecutions is the policing capacity of the national government. The language of the Rome Statute suggests the critical importance of policing when it calls on the ICC to evaluate, in the case of state collapse, the ability of the state 'to obtain the accused or the necessary evidence and testimony' in making admissibility determinations.[161] Effective police power and investigatory mechanisms are essential components to the apprehension of suspects and the collection of evidence. Commentators on the Statute note the importance of the state's ability to 'secure the accused' in determining admissibility.[162] While the police capacity of the state need not reach the levels of the most developed states, at a minimum it must be sufficient to allow the capture of suspects, the acquisition of relevant evidence, and the protection of victims and witnesses.[163]

To date there has not been a systematic study of the policing capacity of the new transitional government. However, a number of reports and recent events suggest the inadequacy of the police force at maintaining rudimentary order, much less collecting evidence or apprehending war criminals. In May 2002, for example, upwards of 100 Congolese police officers simply disappeared during a revolt in Kisangani.[164] Other reports suggest that a group of Congolese police officers in the Ituri region was ambushed by rebel forces and left naked and weaponless. One MONUC official in the eastern part of the country observes: 'Civilian police have no

159. Presidential Decree no. 03-001 of 15 April 2003, on amnesty for acts of war, political crimes and crimes of opinion, Art. 1.
160. Article 24 of the Congolese Criminal Code stipulates a ten-year statute of limitations for crimes punishable by a jail sentence of more than five years. See 'A First Few Steps: The Long Road to a Just Peace in the Democratic Republic of Congo', *supra* note 88, at 22.
161. 1998 Rome Statute of the International Criminal Court, at Art. 17(3).
162. Holmes, 'The Principle of Complementarity', *supra* note 1, at 49.
163. An important, but open, question is whether the presence of an international peacekeeping force in the national state – such as KFOR in Kosovo or MONUC in Congo – should be considered part of the national judicial capacity in these cases.
164. 'DR Congo Police Officers "Missing"' BBC News, 21 May 2002, available at http://news.bbc.co.uk/2/hi/africa/1999902.stm.

pay, authority, or training to conduct proper arrests. Their role is currently limited to directing traffic.'[165] Although MONUC has begun police training programmes and is presently training 250 new Congolese officers, MONUC officials have questioned the capability of the government to provide anything resembling adequate policing.[166] Arrests of two key rebel leaders in early 2005 suggest that the policing capabilities of Congo may be improving, but they remain woefully inadequate given the number of suspects at large.[167]

Moreover, the investigative powers of Congo are extremely limited. Police or investigative teams are often unable to reach or operate in remote areas where crimes have occurred. Even if they are able to do so, there are neither facilities for, nor expertise in, war crimes investigation, criminal forensics, or evidence collection.[168] Human Rights Watch notes that 'criminal cases are in general poorly handled'.[169] In most cases, both the state and the defence lack the resources to undertake meaningful investigations. Even when one side is able to do so, there are no procedures in place to ensure some semblance of equality of arms or disclosure to the opposing party.[170]

Beyond Congolese government police forces, MONUC does have its own policing capability on the ground in Congo. MONUC's Civilian Police Component (CIVPOL) was established by the Security Council in 2001 and expanded numerous times.[171] It is charged with, *inter alia*, providing assistance to the Congolese police, assisting with security arrangements, and training local police officers.[172] Yet CIVPOL consists of only 182 police officers from 18 countries[173] – hardly adequate for a country of 2.3 million square kilometres.[174] The CIVPOL presence equates to four officers responsible for a territory the size of the Netherlands. On the positive side, however, MONUC's CIVPOL capacity is backed up by military forces numbering a total of 8,700 that have been given the expanded authority to use force as necessary to secure the peace, thereby enhancing the policing ability of CIVPOL.[175] Yet these forces are still regularly attacked and have yet to create real peace or stability in the Ituri region of north-eastern Congo.[176]

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165. Marie France, MONUC Kisangani Political Affairs Director, Personal Interview, 29 October 2003, Kisangani, DR Congo (interview conducted by Mariyan Zumbulev and Christopher Broughton).
166. Nishkala Suntharalingam, MONUC Political Officer, Personal Interview, Kinshasa, DR Congo, 26 October 2003.
167. See 'Another Key Ituri Leader Arrested', Integrated Regional Information Networks, 22 March 2005; 'Warlord Arrest for Killings', BBC News, 1 March 2005, available at http://news.bbc.co.uk/2/hi/africa/4308583.stm.
168. For a discussion of the standard contingent of a war crimes investigation team as early as the Second World War, see T. Borek, 'Legal Services During War', (1998) 120 *Mil. L. Rev.* 19, at n. 90.
169. Ibid., at IV(c).
170. See 'Democratic Republic of the Congo: Confronting Impunity', *supra* note 71, at IV(c).
171. See UNSCOR 1355 (2001).
172. See MONUC CIVPOL Mandate, available at http://www.monuc.org/Civpol/.
173. See MONUC CIVPOL Strength and Structure, available at http://www.monuc.org/Civpol/Strength.aspx.
174. *CIA World Fact Book*, *supra* note 128. That works out to approximately one police officer per 12,000 sq. km.
175. See UNSCOR 1493 (2003) (authorizing MONUC to 'take all necessary measures' to 'contribute to the security conditions').
176. See 'DRC: MONUC Investigators Attacked in Ituri', *The East African*, 5 February 2004, available at http://allafrica.com/stories/200402050162.html (reporting a 5 February attack by unidentified gunmen on UN investigators). Notably, even with its enhanced authority MONUC failed to repel a recent rebel advance on the city of Bukavu. See 'UN Troops Open Fire in Kinshasa', BBC News, 3 June 2004, available at http://news.bbc.co.uk/2/hi/africa/3773629.stm.

It seems fairly clear that the Congolese government presently lacks the ability to apprehend suspects and collect evidence in much of eastern Congo. Although, with MONUC support, Congo might arguably be deemed to meet a bare minimum of police capability to undertake genuine prosecutions, even this policing ability remains too weak to offer widespread accountability.

The proposed framework for evaluating the ability of a post-conflict judiciary to undertake genuine investigations and prosecutions suggests that Congo has experienced the very type of total or substantial collapse envisioned in the Rome Statute. Without adequately paid personnel, a minimal judicial infrastructure, sufficient legal authority or the ability to apprehend suspects, Congo is unable to investigate or prosecute. While Congo might come close to meeting some aspects of the test – for example legal authority or police capacity with the assistance of MONUC – taken as a whole, Congo is presently genuinely unable to investigate or prosecute international crimes.

Admittedly, many of these shortcomings can be rectified with sufficient attention from the national government, international financial assistance, and deeper co-operation with MONUC. If such efforts are undertaken, it seems quite possible that a small group of effective courts could be established in key areas. In cities such as Goma, Bukavu and Kisangani, sufficient funding, training, assistance and legal reform could allow the Congolese government to make a plausible case for the assertion of primacy over the ICC.

Recognition that the ICC is part of a system of multi-level global governance highlights the importance of more fully articulating the standards for genuine prosecutions by national governments. As states seek to meet the complementarity criteria, they will look to the Court for clarification on the specific requirements for an effective judiciary. As part of a global governance system, the ICC has an opportunity to offer invaluable guidance to national governments on where to channel available resources and attention to meet the test of effectiveness. Through an analysis of the Congolese judiciary, the preceding section has sought to begin this process by giving greater depth and substance to the criteria articulated in Article 17 of the Statute. The Office of the Prosecutor in its policy statements and the Pretrial Chamber in its early jurisprudence must further clarify the standards.

6. A DETERRENT EFFECT IN CONGO?

Conceiving of the ICC as part of a system of multi-level global governance further suggests that the Court will alter the incentives not just of government officials but also of the perpetrators or potential perpetrators of international crimes within its jurisdiction. The iterative interactions between the Court as a supranational governance organ and the state (or its citizens) should produce an observable effect on the behaviour of would-be criminals. The ICC and the larger project of international criminal accountability have been much lauded as a means of deterrence as well as retribution.[177] To date, however, there has been no systematic

177. See, e.g., Akhavan, *supra* note 42, at 7.

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study of the deterrent effect of international justice and, despite the rise of international criminal law over the past decade, international crimes have continued.[178] The recent experience of Congo suggests – at least in a very preliminary and anecdotal way[179] – that the ICC may well be serving as a deterrent to further international crimes. This is not to claim that the investigation in Congo has brought about an end to international crimes in the region. Nonetheless, interviews with high-level suspects of crimes in Ituri do suggest that the ICC investigation is altering the thinking and possibly the behaviour of criminal actors.

Thomas Lubanga is one of the most notorious warlords of Eastern Congo.[180] He is President of the Congolese Patriotic Union,[181] a rebel group in the Bunia region, is reported to have upwards of 12,000 men in his private army,[182] and is suspected of systematic campaigns of cannibalism against civilians in the region. In late October 2003, approximately 45 days after the Prosecutor's announcement of his plans to investigate Ituri, an extensive interview with Lubanga indicated that he was aware of the ICC and concerned by the prospect of a possible indictment. Lubanga was subsequently arrested in March 2005 by government forces and awaits potential trial in Kinshasa.[183]

For the 2003 interview, Lubanga arrived at the Grand Hotel Kinshasa with his lawyer, a local Congolese-trained former judge. In the conversation, Lubanga argued that the ICC must stay out of Congo, as any prosecutions would break the fragile peace. But he went on to request a copy of the Rome Statute in French, observing that he had yet to see its specific provisions.[184] In consultation with his lawyer, he carefully analyzed both the jurisdiction of the Court and the legal requirements for crimes against humanity. Though protesting his own innocence and asserting that the ICC could have little effect on him or his organization, Lubanga noted the Court's potential power: 'the Court has been a pressure on the political actors who were killing people ... these people are very afraid today to commit such slaughter'.[185] He went on to note that with the Prosecutor's announcement, 'there is a palpable pressure not to do certain things' and 'those responsible are now very worried'.[186] Whether Lubanga was obliquely referencing his own behaviour or merely reporting his observations of the Court's effect in Ituri is unclear. However,

178. Congo provides an all-too graphic example of how these types of crime have continued even in the face of international criminal law.
179. The methodological problems with such a claim are myriad. First, only a very few interview subjects are available as many perpetrators are inaccessible or refuse to talk to outsiders. Moreover, interviewees have a strong incentive to alter their responses given the potential prosecutions that many ensue, despite the non-judicial nature of such interviews. Finally, the potential causal variables of a reduction in crime are numerous – economic improvement, a new peace process, better policing, lower crime reporting, etc. With the available data, it is impossible to isolate a causal variable or even provide statistically meaningful evidence as to whether the ICC has had a direct effect. It is nonetheless interesting and arguably useful to observe the correlation between decreasing crime rates and statements by perpetrators that the ICC has been causal of their behaviour change.
180. 'Democratic Republic of Congo', 2004 *Economist Intelligence Unit Report*, at 14.
181. For more information on the Congolese Patriotic Union (UPC) see the group's website: www.upc-rp.info.
182. See http://observer.guardian.co.uk/print/0,3858,4735034-110490,00.html, 17 August 2003. See also http://news.bbc.co.uk/1/hi/world/africa/3025031.stm, 12 May 2003.
183. 'Another Key Ituri Leader Arrested', Integrated Regional Information Networks, 22 March 2005.
184. Personal Interview, Thomas Lubanga, Kinshasa, DR Congo, 26 October 2003.
185. Thomas Lubanga, Personal Interview, Kinshasa, DR Congo, 26 October 2003.
186. Thomas Lubanga, Personal Interview, 26 October 2003, Kinshasa, DR Congo.

for one of the principle suspects of international crimes in the region to be actively interested in the text of the Rome Statute and to claim the Court was altering the behaviour of suspected criminals is, at the very least, noteworthy.

Lubanga was not alone among Congolese warlords to recognize the ICC's possible deterrent effect. Similarly, Xavier Ciribanya, governor of Congo's South Kivu Province until 2004, indicated the ICC was having an effect on the behaviour of criminal actors in the region. Ciribanya is a noted former rebel leader of the RCD-Goma,[187] suspected of a range of crimes against civilians in both the Kivus and Ituri. He has also been sentenced to death in absentia by a court in Kinshasa for his alleged role in the assassination of former President Laurent Kabila.[188] In February 2004, the government in Kinshasa suspended Ciribanya from his post as governor, after his bodyguards clashed with government troops in Bukavu following the discovery of a large arms cache at one of his residences.[189]

Like Lubanga, Ciribanya was well aware of the ICC and noted that the Court could prosecute new crimes committed in Ituri. According to Ciribanya, 'many here in the East are afraid the Court will come. I hear they will go to Bunia [Ituri] first'.[190] Moreover, Ciribanya noted a possible deterrent effect: 'We all now are thinking twice. We do not know what this Court can and will do'.[191] That said, he remained sceptical of the ICC's enforcement powers: 'We do not know if this Court will be stronger than [the government in] Kinshasa. But there are many here who still have weapons'.[192] His veiled threat to the Court seems particularly apt in light of the recent firefight between Ciribanya's bodyguards and government troops.[193]

Congolese government and civil society leaders as well as MONUC officials likewise suggested the deterrent force of the ICC may already be felt. The Congolese Advocate General, Victor Yenyi Olungu, noted that the ICC 'is for everyone', suggesting that all those involved in international crimes have something to fear.[194] Marie-Madeleine Kalala, the Congolese Human Rights Minister, observed in January 2004 that the ICC 'has had a pronounced deterrent effect on armed groups in the strife-torn northeast'.[195] Raphael Wakenge, the Director of the Congolese Initiative for Justice and Peace in Bukavu claimed that individuals possibly as high up as Vice President Bemba are now asking 'maybe me too'.[196] Roberto Ricci of MONUC's

187. See Daily Press Briefing by the Office of the Spokesman for the Secretary General, 10 February 2003, available at http://www.un.org/News/briefings/docs/2004/db021004.doc.htm.
188. For a discussion of this death sentence, see *Democratic Republic of Congo News*: 28 February 2003, available at http://www.genocidewathc.org/congofebruary282003.htm.
189. See T. Tshibangu, 'Monitoring DRC', MONUC Briefing, 9 February 2004, available at http://www.monuc.org/News.aspx?newsID=1880; see also 'Xavier Chiribanya ou le sommet visible de l'iceberg, nkoko-mboka.com – hebo', 10 February 2004, available at http://www.nkolo-mboaka.com/Xavier-CHIRIBANYA-02.html. This was the same residence a which the interview was conducted.
190. Xavier Ciribanya, Personal Interview, Bukavu, DR Congo, 30 October 2003.
191. Ibid.
192. Ibid.
193. See Tshibangu, *supra* note 189.
194. Victor Yenyi Olungu, Premier Avocat Général de la République, Personal Interview, Kinshasa DR Congo, 30 October 2003 (interview conducted by Yuriko Kuga, Adrian Alvarez and Leslie Medema).
195. A. Deutch, 'Congolese Human Rights Minister: New Criminal Court Deters Tribal Warfare', The Associated Press, 22 January 2004, available at http://www.ictj.org/news.asp.
196. Raphael Wakenge, Initiative Congolaise du Justice et Paix, Personal Interview, Bukavu, DR Congo, 30 October 2003.

human rights division noted that the significant attention being paid to the ICC was having a deterrent effect in Ituri.[197] Moreover, the Court is empowering MONUC in its dealings with rebel groups by providing a new threat to use in negotiations. William Swing, the Special Representative of the Secretary General in Congo and the head of MONUC, observes: 'I certainly use it [the ICC] as a threat each time I speak to suspected war criminals. I tell them that they will be brought to justice.'[198] It seems the rebels may, in fact, be listening.

Since the establishment of the ICC, many rebel leaders have left the field and joined the peace process in Kinshasa, Congo's capital. Though crime statistics are imperfect and often unavailable, anecdotal evidence suggests that violence in the Ituri province has decreased since 2003. Admittedly, crimes have not ceased altogether and war criminals still live in impunity. But a sense of change is afoot. It may never be possible to show a causal relationship between the Court and decreased violence, but the comments of Lubanga, Ciribanya and others suggest the ICC may be playing an important part in this process.

Again, if the Court views itself as part of a system of multi-level global governance and recognizes that its interactions with domestic governance layers can alter the incentives of national actors and even potential criminals, there is much more it could do to enhance its deterrent effect beyond just prosecutions. Iterative interactions between the Court and potential criminals may well alter the preferences, actions and policies of the likes of Lubanga and Ciribanya.[199] Specifically, this vision of the Court suggests a need for greater emphasis on outreach programmes and the provision of information about the ICC in target regions.

7. Conclusion

This article has sought to provide an alternate means of conceptualizing the role of the ICC as part of a system of multi-level global governance. In this model, international institutions interact with and respond to governance structures at the national level, altering preferences, catalyzing domestic activity, guiding reform efforts, and possibly even deterring acts by potential individual criminals. As part of a global governance system, the ICC is not merely a significant new international mechanism for accountability. Nor are the complementarity provisions of the Rome Statute merely means for determining when cases will be admissible before the Court. Rather, the ICC and the complementarity regime are embedded in a system of interactions with national institutions that have the potential to collectively

197. Roberto Ricci, MONUC, Personal Interview, Kinshasa, DR Congo, 28 October 2003 (interview conducted by Adrian Alvarez, Yuriko Kuga and Leslie Medema). Notably, not all MONUC officials interviewed agreed with this position. Some suggested that 'many warlords don't know about [the ICC] yet. Only folks in Bunia do'. Personal Interview, Bukavu, DR Congo, 29 October 2003.

198. William Lacy Swing, Special Representative of the Secretary General, Personal Interview, Kinshasa, DR Congo, 31 October 2003 (interview conducted by Yuriko Kuga, Leslie Medema and Adrian Alvarez)

199. This process involves both changes to rational interest calculation and identity perceptions. For a discussion of the latter in the context of the transnational legal process, see H. Koh, 'Transnational Legal Process', (1996) 75 *Nebraska Law Rev.* 181.

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enhance the prospects for accountability and good governance at the national as well as supranational levels.

Through an analysis of the role of the ICC in the Congo, the article has identified four key areas of interaction where the ICC is already having or can easily have a pronounced effect beyond serving as a direct mechanism of prosecution: altering the preferences and policies of the national government catalyzing reform efforts; offering benchmarks for judicial effectiveness; and providing a deterrent from future crimes. From a theoretical standpoint, these or similar forms of interaction are likely to be present in the ICC's relationship with other states in the future, particularly those states recovering from a total or substantial collapse of domestic institutions. While the specific factors at play may vary from country to country, the global governance model indicates a far larger role and broader effect for the ICC and complementarity than previously envisioned.

As applied to the Congo, this alternative model helps answer a number of key questions. The Court's ability to alter the incentives of domestic actors helps explain President Kabila's decision to self-refer the situation in Congo. The complementarity provisions of the Rome Statute have provided incentives for Bemba, Ruberwa and others to strengthen the national judiciary should it become necessary to assert primacy over the ICC. Likewise, the criteria for admissibility of cases before the ICC may be serving as a benchmark for national judicial reform efforts, offering the Court significant leverage in guiding such reforms. Finally, the interactions of the ICC and the Rome Statute with potential perpetrators of international crimes may offer the first causal links between the ICC and deterrence.

If the ICC is to fulfil its mission in the broadest sense – 'to put an end to impunity'[200] – the Court and its senior personnel must recognize its larger place in a system of global governance. In so doing, the Office of the Prosecutor ought to be aware of the effects and incentives it creates for national governments. Where these incentives can benefit the larger mission of accountability, the Court should take full advantage of them. Where, however, national governments which themselves have unclean hands seek to use the Court as a political tool, caution must be exercised. Similarly, the ICC has an opportunity to use its position of leverage to enhance judicial reform efforts through a clearer set of principles for effective prosecutions and to promote deterrence through better outreach and information in target states. The fact that the ICC is embedded in a system of global governance gives the Court far-reaching powers to alter outcomes at the national level, leverage it has yet to fully recognize and use. The Congo situation offers the ICC an opportunity both to learn how it can be used by a national government and, in turn, to provide incentives and guidance to that government to further the quest for domestic and international accountability.

200. 1998 Rome Statute of the International Criminal Court, at Preamble.