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## *Articles*

GREGORY S. GORDON\*

### Complementarity and Alternative Justice

Guide them by edicts, keep them in line with punishments, and the common people will stay out of trouble but will have no sense of shame. Guide them by virtue, keep them in line with the rites, and they will, besides having a sense of shame, reform themselves.

—Confucius<sup>1</sup>

Let other nations think of retribution and the letter of the law, we will cling to the spirit and the meaning—the salvation and the reformation of the lost.

—Fyodor Dostoevsky<sup>2</sup>

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\* Associate Professor of Law, University of North Dakota (UND) School of Law; Director, UND Center for Human Rights and Genocide Studies. The author would like to thank his research assistants, Justin Keplinger and Amber Hildebrandt, for their invaluable assistance throughout the project. He is also grateful for the support of his family and friends.

<sup>1</sup> CONFUCIUS, *THE ANALECTS* 63 (D.C. Lau trans., 1979) (500 B.C.).

<sup>2</sup> FYODOR DOSTOEVSKY, *THE BROTHERS KARAMAZOV* 849 (Constance Garnett trans., Random House 1995) (1880).

If you want peace, work for justice.

—Pope Paul VI<sup>3</sup>

Over the past twenty years, thousands of children have been awakened at gunpoint in the middle of the night, beaten, terrorized, and forced to kill their own parents.<sup>4</sup> So began their abduction into the “Lord’s Resistance Army” (LRA), a northern Ugandan rebel group fighting the government of Yoweri Museveni.<sup>5</sup> Once abducted, the children were subjected to, and forced to participate in, beatings, rapes, and mutilations of each other and of other civilians in northern Ugandan villages.<sup>6</sup> In 2005, based on a referral by the Ugandan government, five LRA leaders, including the group’s chief, Joseph Kony, were indicted by the International Criminal Court (ICC).<sup>7</sup> According to an ICC-issued arrest warrant, Kony’s sealed indictment contains twelve counts of crimes against humanity, including murder, enslavement, sexual enslavement, and rape.<sup>8</sup> There are also twenty-one counts of war crimes, including murder, cruel treatment of civilians, intentional attacks against a civilian population, pillaging, rape, and forced enlistment of children.<sup>9</sup> Kony has remained a fugitive but has engaged in peace talks with the Ugandan government, nearly resulting in his signing of a peace accord, which, among other things, contemplates the establishment of a truth commission and the institution of *mato oput*—a ritual practice during which a criminal faces relatives of his victim and admits “his crime before both drink a bitter brew made from a tree root mixed with sheep’s blood.”<sup>10</sup>

Although the peace accord did not involve international criminal prosecution of the LRA, Kony refused to sign it unless the ICC

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<sup>3</sup> BrainyQuote.com, Pope Paul VI Quotes, <http://www.brainyquote.com/quotes/quotes/p/popepaulvi159653.html> (last visited Mar. 6, 2010).

<sup>4</sup> See DeNeen L. Brown, *A Child’s Hell in the Lord’s Resistance Army*, WASH. POST, May 10, 2006, at C1.

<sup>5</sup> *Id.*

<sup>6</sup> See *id.*

<sup>7</sup> Chris McGreal, “More Than Anything We Want Our Children Back. They Have Suffered So Much,” GUARDIAN (London), Jan. 9, 2007, at 14, available at <http://www.guardian.co.uk/world/2007/jan/09/uganda.chrismcgreal>.

<sup>8</sup> Prosecutor v. Kony, Case No. ICC-02/04-01/05, Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005, ¶ 42 (Sept. 27, 2005).

<sup>9</sup> *Id.*

<sup>10</sup> Francis Kwera, *Ugandan Rebels Welcome Prospect of Avoiding Jail*, REUTERS, Mar. 12, 2008, available at <http://www.reuters.com/article/latestCrisis/idUSL12379331>.

indictments were dismissed.<sup>11</sup> In 2008, President Museveni indicated that the ICC should dismiss its case against the LRA leaders so they could avoid prison and face traditional justice.<sup>12</sup> Last year, he stated at a press conference that two of the LRA leaders who had indicated a willingness to surrender, Dominic Ongwen and Okot Odhiambo, could be eligible for amnesty.<sup>13</sup> He also suggested that even Kony himself might have been eligible for amnesty had the peace talks been successful and that he “still has a chance to take advantage of the amnesty if he stops fighting.”<sup>14</sup>

Should Kony and his henchmen be handled through traditional/alternative methods of justice at home rather than prosecuted as criminals in The Hague? In large part, the answer pivots on an understanding of the principle of “complementarity,” which awards primacy of jurisdiction to a state’s domestic courts unless the ICC determines the state is “unwilling or unable genuinely to carry out the . . . prosecution.”<sup>15</sup> In his excellent article, *Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice*, Lars Waldorf wonders how traditional, domestic restorative justice should relate to international criminal justice.<sup>16</sup> For Waldorf, this “raises a key concern about the [ICC’s] complementarity regime: should meaningful, local justice be counted as part of a state’s good faith efforts to provide post-conflict accountability, such as would preclude the ICC from asserting jurisdiction?”<sup>17</sup>

Certain commentators have answered Waldorf’s question in the affirmative. They believe that alternative, domestic justice mechanisms, such as *mato oput* or truth commissions, can relieve the ICC of its obligation to prosecute under the complementarity principle.<sup>18</sup> However, this literature provides only general

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> See *Odhiambo Won’t Face World Court*, NEW VISION (Uganda), Feb. 10, 2009, available at <http://www.newvision.co.ug/D/8/12/671013>.

<sup>14</sup> *Id.*; see also *Ugandan Rebel Leader Still Eligible for Amnesty: Museveni*, AGENCE FRANCE-PRESSE (Fr.), Mar. 9, 2009.

<sup>15</sup> Rome Statute of the International Criminal Court, art. 17(1)(a), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

<sup>16</sup> Lars Waldorf, *Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice*, 79 TEMP. L. REV. 1, 5–6 (2006).

<sup>17</sup> *Id.* at 5.

<sup>18</sup> See, e.g., Claudia Cárdenas Aravena, *The Admissibility Test Before the International Criminal Court Under Special Consideration of Amnesties and Truth Commissions*, in COMPLEMENTARY VIEWS ON COMPLEMENTARITY: PROCEEDINGS OF THE

suggestions for how the ICC could determine whether alternative mechanisms render a case inadmissible under the complementarity regime. Linda Keller, for example, advises the Court to focus on more theoretical considerations, such as whether the domestic procedure “further[s] retribution, deterrence, expressivism, and restorative justice to a similar extent as international prosecution.”<sup>19</sup> More recently, Alexander Greenawalt grappled with the issue from a general institutional perspective, opining that the ICC’s duty to handle such cases is a function of its role as either: a “constrained and ministerial body;” a “modern administrative agency” with “broad policymaking discretion;” an “inwardly focused court” concerned more with the maintenance of its docket and prestige than transitional justice; or an “incomplete and unstable institution,” dependent on external actors, such as nongovernmental organizations (NGOs) and the United Nations Security Council, “to imbue it with the efficacy and legitimacy that it does not inherently possess.”<sup>20</sup>

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INTERNATIONAL ROUNDTABLE ON THE COMPLEMENTARY NATURE OF THE INTERNATIONAL CRIMINAL COURT AMSTERDAM, 25/26 JUNE 2004, at 115 (Jann K. Kleffner & Gerben Kor eds., 2006) [hereinafter COMPLEMENTARY VIEWS ON COMPLEMENTARITY] (providing a mechanistic application of complementarity admissibility tests that closely tracks the facial language of the Rome Statute and determining that, in narrow circumstances, use of alternative mechanisms could result in ICC deferral of prosecution); Linda M. Keller, *Achieving Peace with Justice: The International Criminal Court and Ugandan Alternative Justice Mechanisms*, 23 CONN. J. INT’L L. 209, 275–78 (2008) (arguing that use of truth commission and *mato oput* in Uganda would justify deferring ICC prosecution of LRA leaders); Carsten Stahn, *Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court*, 3 J. INT’L CRIM. JUST. 695, 710 (2005) (concluding that “Article 17 could provide room for inadmissibility of cases, where the crimes are investigated by a domestic . . . truth commission”); Thomas Hethe Clark, Note, *The Prosecutor of the International Criminal Court, Amnesties, and the “Interests of Justice”*: *Striking a Delicate Balance*, 4 WASH. U. GLOBAL STUD. L. REV. 389, 414 (2005) (finding that while the ICC appears to require prosecution, ambiguous provisions leave room for alternative justice schemes in limited circumstances).

<sup>19</sup> Keller, *supra* note 18, at 279. Keller’s criteria do implicate some practical considerations, such as the extent of punishment short of incarceration, victim participation, redress, and general societal reconciliation. *Id.* at 266–78.

<sup>20</sup> Alexander K.A. Greenawalt, *Complementarity in Crisis: Uganda, Alternative Justice, and the International Criminal Court*, 50 VA. J. INT’L L. 107, 160–61 (2009); see also Eric Fish, Comment, *Peace Through Complementarity: The Uganda Case and the Over-Deterrence Problem in International Criminal Court Indictments*, YALE L.J. (forthcoming 2010) (manuscript at 7–8, available at <http://ssrn.com/abstract=1498524>) (opining that, in the context of proposed amnesties for the LRA in Uganda, the issue should be decided by the answers to three questions: “[1] How strong a deterrent is the threat of ICC prosecutions to people considering becoming war criminals?; (2) How much of that deterrent value is lost by allowing war criminals to negotiate for amnesty?; and (3) How badly does the fear of a future prison sentence in The Hague disrupt peace negotiations?”).

Unfortunately, this analysis, while providing a good starting point, overlooks a relevant set of more detailed criteria both external to and lying below the surface of the justice mechanism itself.<sup>21</sup> Former ICC External Relations Adviser Darryl Robinson notes that certain difficult, alternative justice admissibility questions require case-by-case analysis based on a set of defined criteria.<sup>22</sup> Although Robinson does not specify the questions he has in mind, a number of them seem apparent. For example, is the target of ICC prosecution a member of the government in the domestic jurisdiction? Is the target a member of a rebel group (such as Kony)? If so, what is his position in the group? Is it contemplated that the target will ultimately be reintegrated into society? If so, what would be his role in society? Is the domestic request for deferral, based on resort to an alternative justice mechanism, made before or after the ICC has been seized of the case? If after, how much time has elapsed since the referral? Does the alternative justice mechanism contain elements of formal judicial procedure? How extensive and detailed is the investigative procedure? Does the alternative mechanism contemplate some form of nonincarcerative sanctioning, such as restitution, community service, reintegrative shaming, or reparations?

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<sup>21</sup> In his article, *Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court*, Carsten Stahn begins to examine some of these criteria, but his analysis is confined almost exclusively to the effect of amnesties and pardons. Stahn, *supra* note 18. Moreover, within these tight parameters, he focuses on a limited set of criteria and gives the set minimal treatment. For example, by looking at Article 17 of the Rome Statute, he arrives at the following general conclusions: (1) the ICC has judicial freedom to determine if an amnesty, a pardon, or any other alternative forms of justice are allowed under the statute; (2) criminal responsibility exemptions for crimes within the ICC's jurisdiction granted through pardons or amnesties are generally incompatible with the statute; and (3) amnesties or pardons should only be permitted in exceptional situations, namely where they are accompanied by alternative kinds of justice and are conditional. *Id.* at 700–16. Stahn does scratch the surface of certain relevant criteria by inquiring generally about: (1) the level of due process afforded by the alternative mechanism, (2) the nature of the state granting an amnesty (looking only at whether it is the state's territory on which the crime occurred), (3) the nature of the crime (noting broadly that the ICC is tasked with prosecuting only the most grave crimes), and (4) the position of the defendant (only briefly considering whether the defendant is high level or not). *Id.* at 706–07, 713; *see also* Darryl Robinson, *Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court*, 14 EUR. J. INT'L L. 481, 498–502 (2003) (providing limited, although helpful, criteria, such as the “quasi-judicial” nature of the mechanism, but doing so only in the context of amnesties and truth commissions).

<sup>22</sup> *See* Darryl Robinson, *Comments on Chapter 4 of Claudia Cárdenas Aravena, in COMPLEMENTARY VIEWS ON COMPLEMENTARITY*, *supra* note 18, at 141, 146.

Based on these questions and others, this Article proposes a set of evaluative criteria the ICC can use to formulate an admissibility test for conducting a complementarity analysis in difficult cases of domestic resort to alternative justice mechanisms. Part II of this Article provides an overview of the statutory framework of the ICC complementarity regime and explains how that regime functions. Part III examines some of the forms of alternative justice that might confront the ICC when applying an admissibility test, including traditional practices such as *mato oput* (and judicial hybrids of such practices), truth commissions, lustration (a mechanism for political vetting), reparations, and amnesties. Part IV then sets out the analytic criteria organized into five general categories: (1) the circumstances surrounding the ICC referral and request for deferral, (2) the political system and infrastructure in the domestic jurisdiction, (3) the alternative justice mechanism itself, (4) the crimes at issue, and (5) the prosecution targets. Part V applies the test to the case of the LRA leaders and the alternative justice mechanisms proposed in the LRA-Uganda peace accord.

The Article demonstrates that, in light of the scale and brutality of the LRA atrocities, the nature of the defendants, and the characteristics of the proposed mechanisms, the contemplated resort to alternative justice in Uganda will not pass complementarity muster. On the other hand, the Article shows that, in certain situations, some forms of alternative justice—especially multiple ones conjoined or tethered to other domestic judicial efforts—could conceivably pass the proposed complementarity admissibility test.

Along the way, this analysis also helps illuminate our increasingly complex understanding of the relationship between international criminal law and domestic justice in atrocity situations. The essentially retributive nature of the former is evolving to make way for restorative goals, and at the same time, certain retributive characteristics are being incorporated into the latter as alternative justice mechanisms adapt to deal with the new and horrible phenomenon of mass atrocity. In the end, the Article shows that effective atrocity justice entails a proper division of labor between local restoration and global retribution. While complementarity could be the ideal medium to achieve that allocation, the proposed analytic criteria must be used to weave both peace and justice more seamlessly into the procedural fabric of international criminal law.

## II

## THE ICC COMPLEMENTARITY REGIME

## A. Introduction

Complementarity, one of the cornerstone principles of the International Criminal Court,<sup>23</sup> defines the relationship between states and the ICC.<sup>24</sup> It signifies that cases are admissible before the ICC if a state either remains wholly inactive or lacks the capacity or will genuinely to investigate and prosecute atrocity cases within the ICC's subject matter jurisdiction.<sup>25</sup> Thus, it embeds an institutional preference for national action that endows domestic courts with the primary task of handling cases of genocide, crimes against humanity, and war crimes.<sup>26</sup>

In contrast to the "primacy" over national courts of the two ad hoc tribunals, the International Criminal Tribunal for Yugoslavia (ICTY)<sup>27</sup> and the International Criminal Tribunal for Rwanda (ICTR),<sup>28</sup> as well as the Special Court for Sierra Leone (SCSL),<sup>29</sup> complementarity empowers states to foreclose ICC adjudication through a good faith application of domestic criminal process.<sup>30</sup>

## B. Rationales for Complementarity

There are three underlying rationales for this approach. The first is practical. Given the ICC's relatively limited resources, infrastructure, and personnel, its framers were loath to confer exclusively on it the potentially broad range and number of future relevant atrocity cases

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<sup>23</sup> See COMPLEMENTARY VIEWS ON COMPLEMENTARITY, *supra* note 18, at v. The preamble of the Rome Statute emphasizes that "the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions." Rome Statute, *supra* note 13, pmb. Article 1 of the document contains identical language.

<sup>24</sup> Rome Statute, *supra* note 15, pmb.

<sup>25</sup> See *id.* art. 17(1)(a).

<sup>26</sup> See *id.* pmb. & art. 17(1)(a).

<sup>27</sup> Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, U.N. Doc. S/25704, annex (1993), 32 I.L.M. 1192 (2003), adopted by S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993).

<sup>28</sup> Statute of the International Criminal Tribunal for Rwanda, 33 I.L.M. 1602 (1994), adopted by S.C. Res. 955, art. 8, U.N. Doc. S/RES/955 (Nov. 8, 1994).

<sup>29</sup> Statute of the Special Court for Sierra Leone art. 8, entered in force Aug. 14, 2000, S.C. Res. 1315, U.N. Doc. S/RES/1315, available at <http://www.sc-sl.org/scsl-statute.html>.

<sup>30</sup> See COMPLEMENTARY VIEWS ON COMPLEMENTARITY, *supra* note 18, at v.

likely to arise on the Court.<sup>31</sup> It made more sense to leave the vast majority of those cases to municipal courts.<sup>32</sup> Besides a resource advantage, the latter would have a strong jurisdictional connection with the case based on territoriality or nationality.<sup>33</sup> Additionally, among other reasons, these domestic courts would likely have more means available to collar the accused and to collect the necessary evidence.<sup>34</sup>

Second, the ICC architects were motivated to respect state sovereignty to the greatest extent possible.<sup>35</sup> Complementarity pays obeisance to such a state-centric worldview and thus best preserves the dominant Westphalian order.<sup>36</sup>

Third, complementarity enlarges the field of battle against the culture of impunity by incentivizing a large number of domestic jurisdictions to become more operational and effective at investigating and prosecuting cases of genocide, crimes against humanity, and war crimes.<sup>37</sup> The expanded number of jurisdictions has the potential to bolster both the deterrence and expressive goals of international criminal justice.

### C. *The Policy Tension in Complementarity*

Two guiding principles on opposite ends of the policy spectrum seem to inform the approach to complementarity: partnership and

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<sup>31</sup> See ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW* 351 (2003).

<sup>32</sup> *Id.*

<sup>33</sup> The “territorial principle” permits the assertion of jurisdiction over a defendant when the crime at issue is committed on the territory of the forum state. See Matthew D. Campbell, Note, *Bombs over Baghdad: Addressing Criminal Liability of a U.S. President for Acts of War*, 5 WASH. U. GLOBAL STUD. L. REV. 235, 253–54 (2006). The “nationality principle” gives rise to jurisdiction when the alleged defendant is a national of the forum state. See *id.* Even if these grounds were not available, jurisdiction could be asserted on grounds of universality. Pursuant to the “universality principle,” states may criminalize atrocity crimes, such as genocide, regardless of the crime’s location or perpetrator. See M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, LAW & CONTEMP. PROBS., Autumn 1996, at 63, 67–69 (1996).

<sup>34</sup> See CASSESE, *supra* note 31, at 351.

<sup>35</sup> *Id.*

<sup>36</sup> See Frédéric Mégret, *In Defense of Hybridity: Towards a Representational Theory of International Criminal Justice*, 38 CORNELL INT’L L.J. 725, 730–32 (2005); Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 385 (2000) (suggesting that the complementarity principle comports with Westphalian notions of state sovereignty).

<sup>37</sup> See CASSESE, *supra* note 31, at 353.

vigilance.<sup>38</sup> “Partnership” represents the more positive side of complementarity that occurs when states are genuinely open to investigating and prosecuting alleged perpetrators.<sup>39</sup> In that situation, the Prosecutor can encourage the domestic jurisdiction to initiate proceedings, develop cooperative anti-impunity strategies, “and possibly provide advice and certain forms of assistance to facilitate national efforts.”<sup>40</sup> In certain cases, this might result in an explicit consensual division of labor—e.g., if “a conflict-torn State is unable to carry out effective proceedings against persons most responsible.”<sup>41</sup>

At the other end of the spectrum, pursuant to the “vigilance” principle, “the ICC must diligently carry out its responsibilities under the [Rome] Statute.”<sup>42</sup> This includes gathering “information in order to verify that national procedures are carried out genuinely.”<sup>43</sup> Where there are indicia that a domestic process is not genuine, the Prosecutor should be prepared to take follow-up steps, resulting, if necessary, in an exercise of jurisdiction.<sup>44</sup> According to a 2003 report on complementarity,

these twin aspects of the complementarity function (partnership and vigilance) are in tension and yet are inseparably related. For example, the advice and guidance of the partnership function may resolve potential short-comings in the national proceedings and thus avoid any need to consider ICC exercise of jurisdiction under the vigilance function. Conversely, the mere existence of complementarity fact-finding activities will often encourage genuine and effective national proceedings.<sup>45</sup>

#### *D. Mechanics of Complementarity*

Complementarity is operationalized in the form of an admissibility examination set forth in Articles 17 to 20 of the Rome Statute of the

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<sup>38</sup> See INT’L CRIMINAL COURT, OFFICE OF THE PROSECUTOR, INFORMAL EXPERT PAPER: THE PRINCIPLE OF COMPLEMENTARITY IN PRACTICE, NO. ICC-01/04-01/07, ¶ 3 (2003) [hereinafter INFORMAL EXPERT PAPER], available at <http://www2.icc-cpi.int/iccdocs/doc/doc656350.pdf>.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

International Criminal Court (Rome Statute).<sup>46</sup> Article 17 sets out the substantive principles of complementarity,<sup>47</sup> while Articles 18 and 19 provide its procedural components.<sup>48</sup> Article 20, titled “*Ne bis in idem*,” provides a kind of retrospective complementarity protection by preventing persons from being tried or punished twice for the same crime<sup>49</sup>—effectively precluding ICC admissibility if a domestic jurisdiction has conducted a legitimate trial of the suspect at issue.<sup>50</sup> The Article 20 “*ne bis in idem*” protection is incorporated into Article 17(1)(c).<sup>51</sup>

### 1. Procedural Operation

From a procedural perspective, Article 18 covers preliminary admissibility rulings and Article 19 covers subsequent admissibility determinations.<sup>52</sup> Pursuant to Article 18, the ICC Office of the Prosecutor (OTP) must notify any state with apparent jurisdiction of a pending investigation and give it an opportunity to supplant the ICC.<sup>53</sup> The state then has one month both to inform the ICC that it is investigating, or has investigated, certain persons related to the OTP’s investigation and to request that the OTP suspend its inquiry.<sup>54</sup>

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<sup>46</sup> See Rome Statute, *supra* note 15, arts. 17–20; see also COMPLEMENTARY VIEWS ON COMPLEMENTARITY, *supra* note 18, at v. Article 53, dealing with prosecutorial discretion, might at first blush be considered another threshold admissibility hurdle. See Rome Statute, *supra* note 15, art. 53. It permits the Office of the Prosecutor (OTP) to decline to initiate an investigation in the interests of justice—even if there is a reasonable basis on the law and facts and the case is admissible. *Id.* art. 53(1). It similarly allows for the decision not to prosecute in the interests of justice after the OTP investigates the otherwise admissible case. *Id.* art. 53(2). Thus, Article 53 does not deal directly with admissibility—it looks at the “interests of justice” beyond the question of admissibility. See *id.* art. 53.

<sup>47</sup> Rome Statute, *supra* note 15, art. 17; see also Keller, *supra* note 18, at 252–53.

<sup>48</sup> Rome Statute, *supra* note 15, arts. 18–19.

<sup>49</sup> *Id.* art. 20; see also Gregory S. Gordon, *Toward an International Criminal Procedure: Due Process Aspirations and Limitations*, 45 COLUM. J. TRANSNAT’L L. 635, 687 (2007) (explaining that the Latin phrase *non bis in idem* roughly translates to “not twice for the same thing”). While this civil law protection is related to the common law double jeopardy protection, it is different because *ne bis in idem* “addresses the possibility of repeated prosecutions for the same conduct in different legal systems, whereas double jeopardy generally refers to repeated prosecutions for the same conduct in the same legal system.” *Id.* (internal quotation marks omitted).

<sup>50</sup> See Keller, *supra* note 18, at 244–45.

<sup>51</sup> Rome Statute, *supra* note 15, art. 17(1)(c).

<sup>52</sup> *Id.* arts. 18–19.

<sup>53</sup> *Id.* art. 18(1).

<sup>54</sup> *Id.* art. 18(2).

Absent special authorization by the ICC, the OTP must defer to the state's investigation under Article 18.<sup>55</sup> The OTP may then ask for updates regarding the state's investigation and prosecution.<sup>56</sup>

Article 19 permits the ICC to consider admissibility on a *sua sponte* basis.<sup>57</sup> Additionally, any arrest warrant target or state with jurisdiction may challenge Article 17 admissibility via Article 19.<sup>58</sup> The state is required to do so at the earliest opportunity.<sup>59</sup> The OTP may also ask the Court to determine admissibility.<sup>60</sup> "Prior to the confirmation of the charges, challenges to the admissibility of a case or challenges to the jurisdiction of the Court shall be referred to the Pre-Trial Chamber. After confirmation of the charges, they [are directed] to the Trial Chamber."<sup>61</sup> While the challenge is pending, the investigation and presumably any prosecution would be suspended,<sup>62</sup> although the validity of any arrest warrant would not be affected.<sup>63</sup> If the Court determines that the case is inadmissible, the OTP does not have to drop the case completely<sup>64</sup> and may ask the Court to review the decision if new facts arise that negate the basis for inadmissibility.<sup>65</sup>

## 2. Substantive Considerations

Of course, these procedural mechanics all hinge on substantive determinations made pursuant to the provisions of Article 17. The first paragraph of Article 17 declares that a case is admissible before the ICC unless:

- (a) The case is being investigated or prosecuted by a State which has jurisdiction over it . . . ;
- (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned . . . ;

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<sup>55</sup> See *id.* art. 18; see also Keller, *supra* note 18, at 252.

<sup>56</sup> Rome Statute, *supra* note 15, art. 18(3), (5).

<sup>57</sup> *Id.* art. 19(1).

<sup>58</sup> *Id.* art. 19(2).

<sup>59</sup> *Id.* art. 19(5).

<sup>60</sup> *Id.* art. 19(3).

<sup>61</sup> *Id.* art. 19(6).

<sup>62</sup> *Id.* art. 19(7).

<sup>63</sup> *Id.* art. 19(9).

<sup>64</sup> See *id.* art. 19(8).

<sup>65</sup> *Id.* art. 19(10).

- (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
- (d) The case is not of sufficient gravity to justify further action by the Court.<sup>66</sup>

On a superficial level, these inadmissibility criteria are relatively straightforward. Claudia Cárdenas Aravena describes an “investigation” as “a systematic inquiry about the facts of a crime and about participation in it.”<sup>67</sup> A prosecution, she opines, consists of a state’s “opening and undertaking of a judicial criminal process.”<sup>68</sup> As previously discussed, subsection (c) of Article 17, which deals with “*ne bis in idem*,” requires a previous domestic trial. Subsection (d) mandates inadmissibility if a case is not of sufficient gravity. Clearly, “this ground for inadmissibility will be rather exceptional, taking into account the inherent gravity” of the Rome Statute’s core crimes.<sup>69</sup>

The rub in Article 17 comes not from these stated grounds of inadmissibility, but rather from their exceptions, as set out in the concluding language of Article 17(1)(a) and (b).<sup>70</sup> That language deems a case admissible before the ICC when the state is “*unwilling or unable genuinely* to carry out the investigation or prosecution.”<sup>71</sup>

The analysis then focuses on what is meant by “unwillingness” or “inability” of a state to prosecute or try a person accused or suspected of international crimes. These two notions are addressed in Article 17(2) and (3). A state may be considered “unwilling” when: (1) the national authorities have undertaken proceedings “for the purpose of shielding the person concerned from criminal responsibility”; (2) there has been an “unjustified delay” in the proceedings showing that, in fact, the authorities do not intend to bring the person concerned to justice; or (3) the proceedings are not being conducted independently, impartially, or in a manner showing the intent to bring the person to justice.<sup>72</sup>

A state is considered “unable” when, chiefly owing to a total or partial collapse of its judicial system, it is not in a position to: (1) detain the accused or to have the person surrendered by the authorities

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<sup>66</sup> *Id.* art. 17(1).

<sup>67</sup> Aravena, *supra* note 18, at 117.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 120.

<sup>70</sup> Rome Statute, *supra* note 15, art. 17(1)(a)–(b).

<sup>71</sup> *Id.* (emphasis added).

<sup>72</sup> *Id.* art. 17(2)(a)–(c).

or bodies that hold him in custody, (2) collect the necessary evidence, or (3) carry out criminal proceedings.<sup>73</sup> Another “inability” situation occurs when “the national court is unable to try a person not because of a collapse or malfunctioning of the judicial system, but [rather] on account of legislative impediments, such as . . . a statute of limitations, making it impossible for the national judge to commence proceedings against the . . . accused.”<sup>74</sup>

As already indicated, Article 20, via Article 17(1)(c), also factors into the substantive admissibility determination. In particular, Article 20(3) prevents the ICC from asserting jurisdiction over a person who has been tried by “another court” for the same conduct, unless the proceedings in the other court:

- (a) [w]ere for the purpose of shielding the person concerned from criminal responsibility . . . or
- (b) [o]therwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.<sup>75</sup>

In extreme cases, such as the total collapse of a country’s infrastructure, a country explicitly thumbing its nose at calls for justice, or the prosecution of an atrocity suspect pursuant to the most rigorous due process standards, the statutory framework yields easy answers regarding admissibility. But is that true of the less black-and-white cases? What if a country processes a matter by deviating from the traditional Western retributive paradigm—i.e., a police or magistrate investigation followed by an adversarial or inquisitorial trial contemplating or resulting in incarceration? Can it be said in such circumstances that the country was “unwilling or unable genuinely” to carry out the investigation or prosecution?<sup>76</sup> Or might

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<sup>73</sup> *Id.* art. 17(3).

<sup>74</sup> CASSESE, *supra* note 31, at 352.

<sup>75</sup> Rome Statute, *supra* note 15, art. 20(3).

<sup>76</sup> See JANN K. KLEFFNER, COMPLEMENTARITY IN THE ROME STATUTE AND NATIONAL CRIMINAL JURISDICTIONS 270–71 (2008) (“While non-criminal accountability processes would accordingly render cases admissible in accordance with Articles 17 (1)(a) and (b) in conjunction with Article 17 (2)(a), they would also arguably do so under the two other forms of ‘unwillingness’ in Article 17 (2)(b) and (c) under certain circumstances.”). *But see* Anja Seibert-Fohr, *The Relevance of the Rome Statute of the International Criminal Court for Amnesties and Truth Commissions*, 7 MAX PLANCK Y.B. U.N. L. 553, 570 (“[I]f criminal punishment is waived by a truth commission in the interest of re-establishing peace[,] the purpose is not to shield individual persons but to serve a greater

it be said that the proceedings “were not conducted independently or impartially in accordance with the norms of due process recognized by international law[.]”<sup>77</sup>

Of course, these questions are implicated when alternative justice mechanisms, emphasizing restorative rather than retributive considerations, are employed in domestic jurisdictions. To understand how these mechanisms diverge from classic penological process, it is necessary to consider their nature and breadth.

### III

#### A TAXONOMY OF ALTERNATIVE JUSTICE MECHANISMS

It would be a mistake to conceive of the various alternative justice mechanisms as a monolithic set. Rather, each has unique characteristics and processes that promote reconciliation and restoration. That said, for analytical purposes it is useful to place them in five broad categories: (1) customary local procedures, (2) truth commissions, (3) lustration, (4) reparations, and (5) amnesties.<sup>78</sup> Each shall be considered in turn.

##### A. Customary Local Procedures

The term “customary local procedures” (CLPs) refers to indigenous methods of dispute resolution that are carried out locally, and according to traditional customs, with varying degrees of connection (sometimes none) to any adjacent, official government adjudication infrastructure.<sup>79</sup> In contrast to Western criminal resolution models, which tend to focus on individualized justice and punishment of specific perpetrators, CLPs seek to foster holistic community healing and reconciliation.<sup>80</sup> In general terms, these

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objective at the expense of criminal justice. . . . This suggests that a state in such cases is not unwilling *genuinely* to carry out the prosecution as required by article 17.”)

<sup>77</sup> MARK A. DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW 141 (2007) (quoting Rome Statute, *supra* note 15, art. 20(3)(b)).

<sup>78</sup> See David Gray, *An Excuse-Centered Approach to Transitional Justice*, 74 FORDHAM L. REV. 2621, 2622 (2006) (identifying amnesties, truth commissions, lustration, and reparations as mechanisms used in transitional contexts); Keller, *supra* note 18, at 275–76 (focusing generally on customary local procedures, such as *mato oput*, truth commissions, and reparations).

<sup>79</sup> See generally Brynna Connolly, *Non-State Justice Systems and the State: Proposals for a Recognition Typology*, 38 CONN. L. REV. 239 (2005) (surveying various characteristics of these systems to determine how each relates to one another and to formal state adjudicatory processes).

<sup>80</sup> See Waldorf, *supra* note 16, at 9–10.

mechanisms are less formal than official government adjudicatory mechanisms and they involve a higher degree of public participation.<sup>81</sup> In the end, they often combine “truth-telling, amnesty, justice, reparations, and apology.”<sup>82</sup>

This section will examine a series of representative customary local procedures: (1) *Shalish* (Bangladesh), (2) *Gacaca* (Rwanda), (3) *Nahe Biti Boot* (East Timor), (4) *Kgotla* (Botswana), (5) *Katarungang Pambarangay* (the Philippines), and (6) *Mato Oput* (Uganda).<sup>83</sup>

### 1. *Shalish*—Bangladesh

In Bangladesh, the “indigenous form of dispute resolution”<sup>84</sup> is known as “*shalish*”—akin to “informal village tribunals.”<sup>85</sup> There are currently three versions of *shalish*: (1) traditional, (2) government-administered, and (3) non-governmental-organization (NGO)-modified.<sup>86</sup>

Traditional *shalish* involves consent-based arbitration or mediation procedures, which may extend through numerous sessions over several months, during which disputants pursue negotiations both within and outside the *shalish* setting.<sup>87</sup> The process has been described as “[‘]a loud and passionate event which is generally open to the whole community but is largely male-dominated.”<sup>88</sup>

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<sup>81</sup> *Id.*

<sup>82</sup> Naomi Roht-Arriaza, *The New Landscape of Transitional Justice*, in TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY: BEYOND TRUTH VERSUS JUSTICE 1, 11 (Naomi Roht-Arriaza & Javier Mariezcurrena eds., 2006).

<sup>83</sup> These CLPs do not by any means represent a comprehensive list. They are included to provide a representative sample that reflects different customs, procedures, and remedies, as well as geographic diversity. That said, there may certainly be other CLPs with different features and from different locales that could have been included. In the interests of space and in line with its scope, this Article is limited to six of these procedures.

<sup>84</sup> Neal Milner, *Illusions and Delusions About Conflict Management—In Africa and Elsewhere*, 27 LAW & SOC. INQUIRY 621, 624 (2002). According to the United Nations Development Program, about sixty to seventy percent of disputes in Bangladesh are resolved through *shalish*. Connolly, *supra* note 79, at 262–63.

<sup>85</sup> Sajeda Amin & Sara Hossain, *Religious & Cultural Rights: Women’s Reproductive Rights and the Politics of Fundamentalism: A View from Bangladesh*, 44 AM. U. L. REV. 1319, 1326 (1995).

<sup>86</sup> Stephen Golub, *Non-State Justice Systems in Bangladesh and the Philippines* (Jan. 2003), <http://www.gsdrc.org/docs/open/DS34.pdf> (unpublished paper prepared for the United Kingdom Department for International Development).

<sup>87</sup> *Id.*

<sup>88</sup> Connolly, *supra* note 79, at 263 (quoting DEP’T FOR INT’L DEV., DFID POLICY STATEMENT ON SAFETY, SECURITY AND ACCESSIBLE JUSTICE 7 (2000)).

Under this traditional system, village elders select five to nine people to act as the arbiters or mediators.<sup>89</sup> “Local villagers consider the decision to be binding even though it lacks legal authority and occurs outside of the formal judicial system.”<sup>90</sup> The subject matter of traditional *shalish* is largely civil in nature (including property and family disputes), although in certain localities it involves nonconsensual criminal adjudication, imposition of punishment, and, in some cases, even *fatwahs*.<sup>91</sup>

Operating simultaneously with, but independently of, traditional *shalish*, government-administered *shalish* is run by the Union Parishad (UP)—the lowest unit of electoral government in Bangladesh.<sup>92</sup> It is charged by the state with arbitrating and settling family and civil disputes and minor criminal offenses.<sup>93</sup> In these *shalish* village courts, the plaintiff and the accused “are represented by two members of the *parishad* and two members from the village.”<sup>94</sup>

NGO-facilitated *shalish*, for its part, is different from the other two forms in that it places greater emphasis on mediation, more involvement by women, and a higher degree of integration with other community development projects.<sup>95</sup> It also includes NGO involvement in the selection and training of panels and the documentation of proceedings.<sup>96</sup> Given these differences, there is a consensus, particularly among women, that NGO-facilitated *shalish* is the most effective and legitimate form of local Bangladeshi dispute resolution.<sup>97</sup>

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<sup>89</sup> Janice H. Lam, Note, *The Rise of the NGO in Bangladesh: Lessons on Improving Access to Justice for Women and Religious Minorities*, 38 GEO. WASH. INT’L L. REV. 101, 124 n.191 (2006).

<sup>90</sup> *Id.*

<sup>91</sup> Golub, *supra* note 86.

<sup>92</sup> Habib Zafarullah & Mohammad Habibur Rahman, *Human Rights, Civil Society and Nongovernmental Organizations: The Nexus in Bangladesh*, 24 HUM. RTS. Q. 1011, 1030 & n.44 (2002).

<sup>93</sup> Golub, *supra* note 86. As Professor Golub explains, the Muslim Family Laws Ordinance of 1961 enables the UP to arbitrate family disputes, and both the Village Court Ordinance of 1976 and Conciliation of Dispute Ordinance of 1979 empower the UP to decide minor criminal offenses and civil disputes. *Id.*

<sup>94</sup> Zafarullah & Rahman, *supra* note 92, at 1030 n.45.

<sup>95</sup> Golub, *supra* note 86. NGO-facilitated *shalish* has grown in recent years, prompted principally by the efforts of the Madaripur Legal Aid Association (MLAA) and affiliated NGOs. *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

## 2. Gacaca—Rwanda

The indigenous traditional dispute resolution method in Rwanda is known as “*gacaca*,” which translates as “justice on the grass” in the Kinyarwanda language.<sup>98</sup> As with most communal restorative mechanisms, it was designed primarily to resolve sundry civil matters such as property, inheritance, and family law disputes.<sup>99</sup> It occasionally dealt with minor criminal offenses, but its sanction resembled a civil settlement, such as compensation, rather than a criminal punishment, such as imprisonment.<sup>100</sup> *Gacaca* was traditionally presided over by community elders known in Kinyarwanda as *inyangamugayo*, which literally means “those who detest disgrace.”<sup>101</sup> These older men dominated *gacaca*—women were not even permitted to speak.<sup>102</sup>

Traditional *gacaca* imposed a wide range of sanctions to achieve restitution and reconciliation.<sup>103</sup> Any such sanctions, though, were not individualized—family members were also responsible for satisfying *gacaca* judgments.<sup>104</sup> Injecting some festivity into the proceedings, the losing party typically had to provide beer, wine, or food as a form of reconciliation to the community.<sup>105</sup> Overall, the principal goal of *gacaca* was to “[restore] social order, after sanctioning the violation of shared values, through the re-integration of offender(s) into the community.”<sup>106</sup>

In 1994, Rwanda was engulfed in massive violence that claimed the lives of close to one million people and has been described as “one of the worst genocides in history.”<sup>107</sup> Some refer to the violence

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<sup>98</sup> DRUMBL, *supra* note 77, at 85.

<sup>99</sup> *Id.* at 93. There is some disagreement as to whether *gacaca* occasionally encompassed adjudication of crimes.

<sup>100</sup> Connolly, *supra* note 79, at 269. Mark Drumbl writes that traditional *gacaca* “exceptionally” handled “violent and serious crimes.” DRUMBL, *supra* note 77, at 93.

<sup>101</sup> Waldorf, *supra* note 16, at 48.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 49; Phil Clark, *Hybridity, Holism, and “Traditional” Justice: The Case of the Gacaca Courts in Post-Genocide Rwanda*, 39 GEO. WASH. INT’L L. REV. 765, 778–79 (2007).

<sup>106</sup> Connolly, *supra* note 79, at 268 (quoting AMNESTY INT’L, *GACACA: A QUESTION OF JUSTICE* 20 (2002)).

<sup>107</sup> Maya Sosnov, *The Adjudication of Genocide: Gacaca and the Road to Reconciliation in Rwanda*, 36 DENV. J. INT’L L. & POL’Y 125, 125 (2008). “More people died [in Rwanda] in three months [April to June 1994] than in over four years of conflict

as “a populist genocide,” since nearly every stratum of society, “including children, participated in killing their neighbors with common farm tools” (most often, machetes).<sup>108</sup> In the immediate aftermath of the genocide, it was estimated that close to 100,000 people were being held in detention on genocide-related charges.<sup>109</sup> “As of 2003, there were approximately 87,000 detainees still in Rwandan prisons.”<sup>110</sup>

Given both the unprecedented scope and number of perpetrators and the limited capacities of international and domestic courts to process them,<sup>111</sup> Rwanda developed a modified version of *gacaca* to dispense mass justice in a relatively compressed time frame.<sup>112</sup> Two legal documents establish the mechanics of *gacaca*: the Organic Law of 1996 (Organic Law) and the *Gacaca* Law of 2001, which was modified three times (to a minimal extent in June 2001 and June 2006 and more substantially in June 2004).<sup>113</sup> The Organic Law is

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in Yugoslavia.” *Id.* In fact, the pace of the killing was five times faster than the Nazi mass murder of Jews in the Holocaust. *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> See José E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT’L L. 365, 393 (1999) (explaining that 90,000 people were being held in Rwandan prisons awaiting trial on charges stemming from the genocide as of September 1996).

<sup>110</sup> Megan M. Carpenter, *Bare Justice: A Feminist Theory of Justice and Its Potential Application to Crimes of Sexual Violence in Post-Genocide Rwanda*, 41 CREIGHTON L. REV. 595, 646 (2008).

<sup>111</sup> See Waldorf, *supra* note 16, at 43–44 (noting that, of the nearly 100,000 detainees in custody from December 1996 through December 2003, Rwandan domestic courts had tried only about 9700). As of 2008, the international court set up to prosecute Rwandan *génocidaires*, the International Criminal Tribunal for Rwanda, had managed a total of only thirty convictions. See Inés Mónica Weinberg de Roca & Christopher M. Rassi, *Sentencing and Incarceration in the Ad Hoc Tribunals*, 44 STAN. J. INT’L L. 1, 11 (2008).

<sup>112</sup> See Waldorf, *supra* note 16, at 48.

<sup>113</sup> See Organization of Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed Since October 1, 1990, Organic Law No. 08/96 (1996) (Rwanda) [hereinafter Organic Law]. The three documents that comprise these modifications are: Organic Law Modifying and Completing the Organic Law Setting Up *Gacaca* Jurisdictions and Organizing Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed Between 1 October 1993 and 31 December 1994, No.22/2001 of June 22, 2001 (Rwanda) [hereinafter *Gacaca* Law (Modified 2001)]; Establishing the Organisation, Competence and Functioning of *Gacaca* Courts Charged with Prosecuting and Trying the Perpetrators of the Crime of Genocide and Other Crimes Against Humanity, Committed Between October 1, 1990 and December 31, 1994, Organic Law No. 16/2004 (2004) (Rwanda) [hereinafter *Gacaca* Law (Modified 2004)]; Modifying and Complementing Organic Law No. 16/2004 of June 19, 2004 Establishing the Organisation, Competence and Functioning of *Gacaca* Courts Charged with Prosecuting and Trying the Perpetrators of the Crime of Genocide and Other Crimes

intended to prosecute “the crime of genocide or crimes against humanity” or “offences . . . committed in connection with the events surrounding the genocide and crimes against humanity.”<sup>114</sup>

This modified version of “*gacaca*,” established, promoted, and operated by the Rwandan government, is comprised of approximately 9000 community-based courts, each overseen by locally elected judges and designed to adjudicate the cases of lower-level perpetrators of the genocide (with higher-level perpetrators facing justice in more formal domestic courts and before the ICTR).<sup>115</sup> In all cases, investigations are carried out by the lowest-level *gacaca* panel, the *cellule*.<sup>116</sup>

Assuming sufficient evidence is collected, there is an adjudication hearing<sup>117</sup> where the accused appears but is not represented by counsel.<sup>118</sup> The evidence against him is heard by seven judges, and members of the public can attend the hearing.<sup>119</sup> The *gacaca* law provides a very detailed punishment schematic, which includes life imprisonment and the death penalty.<sup>120</sup> It also includes a panoply of nonincarcerative options, such as community service (including such chores as tilling the fields and renovating houses destroyed during the genocide), *dégradation civique* (which strips the convict of certain

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Against Humanity, Committed Between October 1, 1990 and December 31, 1994, Organic Law No. 28/2006 (2006) (Rwanda) [hereinafter *Gacaca* Law (Modified 2006)]. *Gacaca* Law (Modified 2004) constitutes a more significant rewriting of parts of the original *Gacaca* Law as compared to *Gacaca* Law (Modified 2001) or *Gacaca* Law (Modified 2006). The 2001 and 2006 revised documents are concerned more with minor changes to the wording of several sections of the *Gacaca* Law, while the 2004 version comprises several important reforms of the *gacaca* process.

<sup>114</sup> Organic Law, *supra* note 113, art. 1. “Article 51 of the 2004 *gacaca* legislation creates three categories of offenders”: (1) Category 1—leaders, planners, torturers, notorious murderers, rapists, and sexual torturers; (2) Category 2—murderers, assaulters who intended to kill, and those who committed offenses against the person without intending to kill; and (3) Category 3—“those who committed property offenses.” DRUMBL, *supra* note 77, at 86–87. Offenders in Category 1 are excluded from local *gacaca* panels and prosecuted more formally. *Id.* at 87.

<sup>115</sup> See DRUMBL, *supra* note 77, at 87.

<sup>116</sup> *Id.*

<sup>117</sup> See Lawrence G. Albrecht et al., *International Human Rights*, 41 INT’L LAW. 643, 648–49 (2007).

<sup>118</sup> Stahn, *supra* note 18, at 713.

<sup>119</sup> Linda E. Carter, *Justice and Reconciliation on Trial: Gacaca Proceedings in Rwanda*, 14 NEW ENG. J. INT’L & COMP. L. 41, 45 (2007) (“Members of the crowd sit on benches out in the open or in a building that serves on other days as a classroom or meeting place.”).

<sup>120</sup> DRUMBL, *supra* note 77, at 87.

civic rights, such as the right to vote or to run for office), and restitution.<sup>121</sup> Defendants have the right to appeal their sentences to a special *gacaca* court of appeals but not to the regular Rwandan court system.<sup>122</sup>

In addition to the fact that it is hierarchical and directed by the state,<sup>123</sup> this newfangled *gacaca* differs from the traditional system in the following respects: (1) it is established by statute and relies on written law, (2) it involves women as official administrators and judges, (3) it is more systematically organized and integrated into administrative divisions of local government, and (4) it imposes prison sentences on those found guilty.<sup>124</sup> According to Jacques Fierens:

Such characteristics are in stark contrast to the present *gacaca* courts and their functioning. The only resemblance lies in the fact that the institutional framework for conflict resolution involves local and non-professional judges, and, even then, they are elected in the reinvented *gacaca* system, whereas traditional judges were appointed by consensus between the concerned parties. The present *gacaca* court arises from a complex written law; is not traditional; rests on a supposedly legal basis; confers no privileges on family members; allegedly respects individual rights; favours confessions; and does not include any references to religion.<sup>125</sup>

### 3. Nahe Biti Boot—*East Timor*

In East Timor, the traditional, local dispute resolution method is known as “*nahe biti boot*,” named for the unfolding of a large woven mat (“*biti boot*”) on which disputants and community notables resolve differences.<sup>126</sup> *Nahe biti boot* is initiated by village elders (“*katua*”) upon the request of an individual with a grievance against people in a different village.<sup>127</sup>

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<sup>121</sup> See *id.* at 75, 88–89.

<sup>122</sup> See Maya Goldstein Bolocan, *Rwandan Gacaca: An Experiment in Transitional Justice*, 2004 J. DISP. RESOL. 355, 389. However, “judgments relating to offenses against property are not subject to appeal.” *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> Clark, *supra* note 105, at 788.

<sup>125</sup> Jacques Fierens, *Gacaca Courts: Between Fantasy and Reality*, 3 J. INT’L CRIM. JUST. 896, 913 (2005) (footnote omitted).

<sup>126</sup> Waldorf, *supra* note 16, at 25.

<sup>127</sup> *Security Man*, MASSEY U. MAG. (N.Z.), Nov. 2002, available at [http://www.massey.ac.nz/~wwpubafs/magazine/2002\\_Nov/stories/security\\_man.html](http://www.massey.ac.nz/~wwpubafs/magazine/2002_Nov/stories/security_man.html).

The katua organises an open meeting with the katua and villagers of the person on the other side of the dispute.

Katua from each group, the disputants and their families and villagers meet to discuss matters until a resolution is reached agreeable to both parties. The katua and the community oversee the process and the administration of penalties. Katua have the authority to get things done and each side monitors the implementation to ensure penalties and corrective actions are carried out.<sup>128</sup>

Traditionally, *nahe biti boot* served as a local forum to resolve minor disputes concerning use of land or resources.<sup>129</sup> Instead of resorting to *nahe biti boot* or other, less formal dispute resolution methods during the five hundred years they were ruled by the Portuguese and Indonesians, the Timorese had always relied on the official courts of their overlords to deal with serious crimes.<sup>130</sup>

Nevertheless, *nahe biti boot* was put to use in East Timor by the United Nations (UN) in the wake of massive violence that occurred there a little over one decade ago.<sup>131</sup> After a sizable majority of East Timorese opted for independence from Indonesia in an August 1999 UN-sponsored referendum, Indonesian-backed militias brutally attacked civilians and property throughout the island, “killing at least 528 people, creating over half a million refugees and internally displaced persons, and destroying much of the country’s infrastructure.”<sup>132</sup>

In response, the UN Transitional Administration in East Timor (UNTAET) used a modified version of *nahe biti boot* as part of a “Community Reconciliation Process (CRP) to hold local truth and reconciliation hearings designed, in part, to encourage the repatriation and reintegration of approximately one hundred thousand East Timorese refugees (including former militia members) then in West Timor.”<sup>133</sup> At the end of the hearings, perpetrators signed a Community Reconciliation Agreement (CRA) detailing the acts of reconciliation that had been agreed on: “community service;

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<sup>128</sup> *Id.* (internal quotation marks omitted) (quoting Harawira Craig Pearless, United Nations District Security Advisor in East Timor).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *See id.*

<sup>132</sup> Waldorf, *supra* note 16, at 24 (footnote omitted).

<sup>133</sup> *Id.* (internal quotation marks omitted). This was part of a truth and reconciliation process that involved the creation of a “Commission for Reception, Truth and Reconciliation or ‘CAVR.’” *Id.*

reparation; public apology; and/or other act[s] of contrition.”<sup>134</sup> In general, CRAs were followed by reconciliation ceremonies attended by local administrative and religious figures and involving various ritual practices, such as sacrificing small animals, chewing betel-nut, and celebratory feasting.<sup>135</sup>

Although the CRP contemplated handling only minor crimes, such as minor assault, theft, and the killing of livestock,<sup>136</sup> the massive volume of cases overwhelmed the formal justice mechanisms, and the traditional process ended up being used for far more serious cases.<sup>137</sup>

According to one UN official:

The militia man who had murdered two people had cut out their tongues and eaten them in front of their families. He returned to his village after his own katua reluctantly agreed to take him back as long as he remained in the village and did not visit public places, while the katua of the victim’s village had flatly refused to be involved and warned he would not be responsible for the militia member’s safety.

My impression is that the UN civilian police involved in reintegration are eager to deal with cases as quickly as possible. There is no protocol for the civilian police or UN Human Rights staff for integrating militiamen. I think the police consider *nahe biti boot* too time-consuming and are not committed to any sort of lasting resolution.<sup>138</sup>

As a result, people were expected to live next door to those who had “committed hideous crimes against them and their fellows as if nothing has happened.”<sup>139</sup> According to the same UN official, the process was

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<sup>134</sup> United Nations Transitional Administration in East Timor [UNTAET], On the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor, § 27.7, UNTAET/REG/2001/10 (July 13, 2001) [hereinafter UNTAET Reg. No. 2001/10]. A mixed national/international tribunal (the Special Panel for Serious Crimes or SPSC) was set up to prosecute “serious crimes,” which included genocide, crimes against humanity, war crimes, murder, torture, and sexual offenses. UNTAET, On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, § 1.3, UNTAET/REG/2000/15 (June 6, 2000). When it closed in May 2005, the SPSC had tried only 87 of 440 indicted suspects because most (339) were located outside the court’s jurisdiction. Press Release, Judicial Sys. Monitoring Programme, The Special Panels for Serious Crimes Hear Their Final Case (May 12, 2005), [http://www.jsmp.minihub.org/JusticeUpdate/2005/May 2005/050520\\_JSMP\\_JUissue12\(e\).pdf](http://www.jsmp.minihub.org/JusticeUpdate/2005/May%2005/050520_JSMP_JUissue12(e).pdf).

<sup>135</sup> Waldorf, *supra* note 16, at 25.

<sup>136</sup> *Id.* at 24.

<sup>137</sup> *Security Man*, *supra* note 127.

<sup>138</sup> *Id.* (emphasis added) (internal quotation marks omitted) (quoting Harawira Craig Pearless, United Nations District Security Advisor in East Timor).

<sup>139</sup> *Id.*

being cosmetically applied, falling short of the aim of stopping the galling burr of perceived injustice forming and growing in this generation and poisoning the next.

“For people to have any hope of putting their worst experiences behind them, they need to see the offenders punished and remorseful. They need to feel they have been dealt with. There needs to be repair of the harm caused, if possible. In East Timor there are not enough resources or serious crimes investigators to deal with all the crime. The prisons and courts are backlogged. They appear to be dealing with the minor offenders and not the big players. Timorese militia leaders are just coming back, setting up and carrying on.

When the UN backs off and the families of the victims see that nothing has happened to this guy, they are going to take the law into their own hands and dish out their own justice, and that comes at the end of a machete from what I’ve seen.

The irony is . . . that the people, helped by their predominantly Catholic beliefs, have a strong will to forgive and put their trauma behind them. Simple processes of justice, if properly applied now, would have much success with a population who genuinely have no wish to be burdened forever by their past.”<sup>140</sup>

#### 4. Kgotla—Botswana

By the seventeenth century, tribes in Botswana had formed the *kgotla*—a formal assembly of male adults that served as both a discussion forum for community issues and a tribal court.<sup>141</sup> From the time Botswana became a British protectorate in 1885 (and developed a formal court system) until its independence in 1966, it retained the *kgotla*.<sup>142</sup> Thus, it had formed a dual court system: tribal courts were competent to apply only customary law in civil cases, and the High Court and subordinate courts were competent to apply the common law.<sup>143</sup>

There are currently four levels of customary courts. At the bottom level, the lower customary courts correspond with the *kgotla* and are often convened by a “headman” in an outlying village.<sup>144</sup> The second level is known as the higher customary court, or “chiefs’ courts,”

<sup>140</sup> *Id.* (internal quotation marks omitted) (quoting Harawira Craig Pearless, United Nations District Security Advisor in East Timor).

<sup>141</sup> NAT’L DEMOCRATIC INST. FOR INT’L AFFAIRS, DEMOCRACIES IN REGIONS OF CRISIS: BOTSWANA, COSTA RICA, ISRAEL 93–95 (1990).

<sup>142</sup> Connolly, *supra* note 79, at 281–82.

<sup>143</sup> T.W. BENNETT, THE APPLICATION OF CUSTOMARY LAW IN SOUTHERN AFRICA: THE CONFLICT OF PERSONAL LAWS 54–55 (1985).

<sup>144</sup> 1 LEGAL SYSTEMS OF THE WORLD: A POLITICAL, SOCIAL, AND CULTURAL ENCYCLOPEDIA 184 (Herbert M. Kritzer ed., 2002).

which generally act as courts of appeal for the lower customary courts.<sup>145</sup> Appeal may be taken from the chiefs' courts to the third level—the customary courts of appeal and the customary courts' commissioner.<sup>146</sup> Finally, appeals from this court may be raised in the High Court.<sup>147</sup>

Although the customary court system in Botswana is relatively independent, it is still linked to the formal state courts.<sup>148</sup> For example, the customary courts “must be granted warrants by the local government, and appeal ultimately may be taken to the formal state courts.”<sup>149</sup>

##### 5. Katarungang Pambarangay—*The Philippines*

Traditionally, the lowest unit of social organization for small communities in the Philippines was the “*barangay*.”<sup>150</sup> Throughout early Filipino history, the *barangay* was used as a forum for dispute resolution with friends and neighbors serving as mediators.<sup>151</sup> This popular justice mechanism was known as *Katarungang Pambarangay*.<sup>152</sup> Although Spanish colonizers later attempted to supplant “*barangay* norms whenever they conflicted with the Spanish Civil Code,” a 1978 decree by the Marcos government incorporated them into the formal state system (through the “*Katarungang Pambarangay* law”).<sup>153</sup>

The *Katarungang Pambarangay* law provides for a nationwide system of dispute processing by means of mediation at the neighborhood and village level.<sup>154</sup> The law accomplishes this by dividing the country into 42,000 *barangays*.<sup>155</sup> Each *barangay* has a ten- to twenty-member *Lupong Tagapamayapa* (*Lupong*), which is a

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<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> Connolly, *supra* note 79, at 282.

<sup>149</sup> *Id.* at 282–83.

<sup>150</sup> *Id.* at 265.

<sup>151</sup> Golub, *supra* note 86.

<sup>152</sup> See Reynaldo L. Suarez, Dean, Univ. of the E. Coll. of Law, Mediation in the Philippine Islands, <http://www.unisa.edu.au/cmrg/apmf/2001/presenters/reynaldo%20suarez.htm> (last visited Mar. 21, 2010).

<sup>153</sup> Connolly, *supra* note 79, at 265.

<sup>154</sup> Golub, *supra* note 86.

<sup>155</sup> *Id.*

council of mediators consisting of village residents.<sup>156</sup> The *Lupong* members, who must possess impartiality, integrity, a sense of fairness, independence of mind, and a reputation for probity, are selected by a “*Punong Barangay*”—the *barangay* captain or “Chairman of the *Lupong*.”<sup>157</sup> The *barangay* captain is “the principal neighborhood/village official whose everyday occupation is normally non-governmental.”<sup>158</sup>

Disputants begin the *Katarungang Pambarangay* process by submitting a case to the *Punong Barangay*, who attempts to mediate.<sup>159</sup> If this initial attempt at mediation fails, the case is referred to a panel of three *Lupong* members (the “*Pangkat*”) for conciliation.<sup>160</sup> “The *Pangkat* members are selected by the parties, or if the parties cannot agree, chosen by lot by the [*Punong Barangay*].”<sup>161</sup> In resolving disputes, the substantive law relied on is comprised of the customs and norms of the particular community. Conflicts must be processed “in an informal manner ‘without regard to technical rules of evidence, and as is best calculated to effect a fair settlement of the dispute and bring about a harmonious relationship of the parties.’”<sup>162</sup> “Lawyers may not participate as counsel.”<sup>163</sup> All mediation proceedings are recorded (both at the *Punong* and *Lupong* levels), and copies of these recordings are provided to the disputants and the municipal government.<sup>164</sup>

The members of the *Lupong* “meet monthly to provide a forum for exchange of ideas among its members and the public on matters relevant to the amicable settlement of disputes, and to enable various conciliation panel members to share with one another their observations and experiences in effecting speedy resolution of disputes.”<sup>165</sup> “The [*Lupong*] submits data on the *barangay* disputes

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<sup>156</sup> *Id.*

<sup>157</sup> Suarez, *supra* note 152.

<sup>158</sup> G. Sidney Silliman, *A Political Analysis of the Philippines' Katarungang Pambarangay System of Informal Justice Through Mediation*, 19 *LAW & SOC'Y REV.* 279, 280 (1985).

<sup>159</sup> Suarez, *supra* note 152.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* (emphasis added).

<sup>162</sup> Silliman, *supra* note 158, at 280.

<sup>163</sup> *Id.*

<sup>164</sup> Suarez, *supra* note 152.

<sup>165</sup> *Id.*

and their disposition to a Municipal Monitoring Unit, which provides feedback regarding the program to the government.”<sup>166</sup>

“In terms of its goals, the *Katarungang Pambarangay* law sets forth as its official objectives the ‘speedy administration of justice’ and the diversion of disputes from the regular courts as a means of reducing the alleged congestion in the national adjudicative institutions.”<sup>167</sup> That said, agreements reached pursuant to this process are binding and ultimately enforceable by the formal state courts.<sup>168</sup> The alternative justice system is linked to the formal state system in another important way: submitting a dispute to the conciliation panel is a prerequisite to filing a case in state court.<sup>169</sup>

*Katarungang Pambarangay* is mostly limited to civil disputes.<sup>170</sup> Where the conflict has criminal implications, *Katarungang Pambarangay* can only handle it “if the penalties do not exceed a year in prison or a fine of 5000 [Filipino] pesos” (equivalent to a misdemeanor in the American court system).<sup>171</sup> Victimless crimes or “[c]rimes committed by government personnel in the course of their official functions cannot be submitted to the [*Katarungang Pambarangay*].”<sup>172</sup>

*Katarungang Pambarangay* has been plagued by certain justice deficits. First, as Stephen Golub explains, problems of personal bias pervade local conciliation proceedings, and the wealthy are often perceived as able to obtain “better” justice.<sup>173</sup> Moreover, in gender-related issues, the male perspective of the dispute normally prevails.<sup>174</sup> In light of this, Brynna Connolly suggests that *Katarungang Pambarangay* may not meet basic human rights standards.<sup>175</sup>

Of course, problems affecting this alternative justice mechanism are not solely a product of underlying societal factors. They also include more technical and financial constraints, including: (1) the administrators’ limited understanding of the system and technical

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<sup>166</sup> *Id.* (emphasis added).

<sup>167</sup> Silliman, *supra* note 158, at 280 (emphasis added).

<sup>168</sup> Connolly, *supra* note 79, at 266.

<sup>169</sup> *Id.*

<sup>170</sup> *See* Golub, *supra* note 86.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *See* Connolly, *supra* note 79, at 266.

capacity for implementing it, (2) the lack of reporting from and oversight of these administrators, (3) the inadequate informational outreach to the public, and (4) the budgetary constraints that stymie government attempts to deal with these other issues.<sup>176</sup>

#### 6. Mato Oput—Uganda

*Mato oput* is a traditional justice mechanism developed and used by the Acholi people of Northern Uganda.<sup>177</sup> “[I]n Acholi, [*mato oput*] means drinking the herb of the Oput tree, a blinding-bitter tree.”<sup>178</sup>

The reconciliation process is called Mato Oput because it ends in a significant ceremony of reconciling the parties in conflict.

. . . The process involves the guilty acknowledging responsibility, repenting, asking for forgiveness, paying compensation and being reconciled with the victim’s family through sharing the bitter drink—Mato Oput. The victim’s clan must accept the plea for forgiveness for the reconciliation to be complete.<sup>179</sup>

The end result may also include restrictions on the movement of the perpetrators.<sup>180</sup>

The entire process is quite involved:

The first step . . . involves a separation of the affected clans which serves as a cooling off period to prevent immediate revenge killings. This separation requires the complete suspension of relations between the families of the perpetrator and the victim, during which time the clans are forbidden to intermarry, trade, socialize, or share food and drink. . . . The second step in *mato oput* involves a mediation process, which allows the affected families to create an account of the facts which emphasizes the perpetrator’s voluntary confession, including the motives, the circumstances of

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<sup>176</sup> Golub, *supra* note 86.

<sup>177</sup> Dieu-Donné Wedi Djamba, *The Ugandan Peace Process in Perspective*, PAMBAZUKA NEWS, Nov. 23, 2006, available at <http://www.pambazuka.org/en/category/comment/38526>.

<sup>178</sup> *Id.* (footnote omitted).

<sup>179</sup> *Id.* (footnote omitted).

*Mato Oput* is to be distinguished from other ceremonies, particularly the nyono tong gweno (stepping of the egg) ceremony which is a cleansing ritual that has been adapted for the reintegration of returnees. The latter is not a reconciliation ceremony that involves any measure of accountability or admission of guilt.

*Id.* (emphasis added).

<sup>180</sup> See Kathleen Ellen MacMillan, Note, *The Practicability of Amnesty as a Non-Prosecutory Alternative in Post-Conflict Uganda*, 6 CARDOZO PUB. L. POL’Y & ETHICS J. 199, 214 (2007).

the crime, and an expression of remorse. . . . Finally, in the last step, the family of the perpetrator pays compensation raised through the contributions of clan members.<sup>181</sup>

Next, the parties engage in the actual, day-long *mato oput* reconciliation ceremony, which is presided over by the local chief (*rwot moo*) and involves “an elaborate set of final, symbolic acts.”<sup>182</sup> Despite certain variations, the ceremony proceeds as follows:

First, the offending party beats a stick to broadly symbolize *mato oput*'s restorative purpose and then runs away to signify acceptance of guilt for the murder. Second, the parties cut in half a sheep and a goat and exchange opposite sides. The offending clan supplies the sheep, which represents the *cen*, or misfortune, haunting the clan of the offender, while the injured clan supplies the goat, which symbolizes unity and a willingness to forgive and reconcile. Third, the clans eat *boo mukwok*, spoiled boo, or local greens, which signifies that tension between the clans persisted long enough for food to spoil, and also symbolizes the clans' readiness to reconcile after this long period of time. Fourth, a representative from each party drinks *oput*, bitter root, from a calabash. The root represents the bitterness between the clans, and drinking it symbolizes washing away the bitterness between them. Fifth, both parties cook and eat the *acwiny*, liver, of the sheep and the goat to show that their blood has been mixed and united and to symbolically wash away the bitterness within the blood of the human liver. One of the last rituals involves consuming *odeyo*, the remains of a saucepan, which is thought to free the parties to eat together again. The ceremony is not complete until the parties have eaten all of the food prepared for the day; finishing the food means that no bitterness remains between the two clans.<sup>183</sup>

As an effective justice mechanism, *mato oput* is not without its problems. In addition to the fact that few Acholis are aware of this old process or even know how it works, experts question its efficaciousness as a reconciliation device based on the Acholis'

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<sup>181</sup> Cecily Rose, *Looking Beyond Amnesty and Traditional Justice and Reconciliation Mechanisms in Northern Uganda: A Proposal for Truth-Telling and Reparations*, 28 B.C. THIRD WORLD L.J. 345, 362 (2008) (footnotes omitted). “The separation is significant because of the communal nature of Acholi culture, wherein families from various clans share food, water, land, and social relations.” *Id.* “In Acholi culture, until the perpetrator confesses and seeks rectification, the spirit of the dead may plague the perpetrator's family through nightmares, sickness, and death.” *Id.* The “compensation must be ‘affordable, so as not to prevent the restoration of relations, and will usually consist of cattle or money.’” *Id.*

<sup>182</sup> *Id.* at 362–63. Communal involvement in the ceremony reflects the Acholi belief that the whole clan is affected by the perpetrator's offense. *Id.* at 363.

<sup>183</sup> *Id.* at 363–64 (emphasis omitted) (footnotes omitted).

seemingly limited capacity to forgive.<sup>184</sup> Moreover, it is not clear that *mato oput* is designed to deal with large-scale crimes, such as mass abduction or killing.<sup>185</sup>

Even if it were, *mato oput* has other limitations. First, it applies only to situations that have come to an end—not to ongoing conflicts between individuals or groups.<sup>186</sup> Also, *mato oput* applies only to Acholis.<sup>187</sup> However, there are numerous ethnic groups in Uganda, and *mato oput* is simply not able to accommodate them.<sup>188</sup> By the same token, these other groups are unlikely to embrace a practice that is alien to them.<sup>189</sup>

### B. Truth Commissions

Truth commissions are generally understood to be “bodies set up to investigate a past history of violations of human rights in a particular country—which can include violations by the military or other government forces or by armed opposition forces.”<sup>190</sup> Some offer amnesty to perpetrators and restitution to victims. In many cases, truth commissions offer perhaps the most “judicialized” approach of alternative justice mechanisms. Although they permit victims and perpetrators to appear in public (at times, together) to describe their experiences during the atrocity period and help achieve individual and community catharsis,<sup>191</sup> truth commissions also possess many features normally associated with the classic penological process: the taking of statements, the use of subpoena powers, the use of powers of search and seizure, the holding of public hearings, and the publication of findings of individual responsibility in a final report.<sup>192</sup>

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<sup>184</sup> *Id.* at 366–67.

<sup>185</sup> *Id.* at 368–69.

<sup>186</sup> *Id.* at 369.

<sup>187</sup> *Id.* at 369–70.

<sup>188</sup> *Id.*

<sup>189</sup> *See id.*

<sup>190</sup> Priscilla B. Hayner, *Fifteen Truth Commissions—1974 to 1994: A Comparative Study*, 16 HUM. RTS. Q. 597, 600 (1994) [hereinafter Hayner, *Comparative Study*].

<sup>191</sup> *See generally* PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY (2001) [hereinafter HAYNER, UNSPEAKABLE TRUTHS] (exploring the work of more than twenty truth commissions worldwide).

<sup>192</sup> *See generally* MARK FREEMAN, TRUTH COMMISSIONS AND PROCEDURAL FAIRNESS (2006) (exploring procedural components of truth commissions largely from the perspective of those who might be adversely affected by them, including perpetrators, witnesses, and victims); Alison Bisset, Book Note, 8 HUM. RTS. L. REV. 401 (2008) (reviewing MARK FREEMAN, TRUTH COMMISSIONS AND PROCEDURAL FAIRNESS (2006)).

To date, more than a couple dozen truth commissions have been established around the world.<sup>193</sup> In many respects, they vary widely. For example, some are established on presidential order; others by parliamentary decision.<sup>194</sup> Some function outside the view of the international community, while others do their work publicly.<sup>195</sup> Certain ones function more like judicial commissions of inquiry<sup>196</sup> when their counterparts employ less formal procedures resembling or incorporating local cultural rites.<sup>197</sup> A number of commissions deal with large patterns of abuses, such as the one formed in South Africa.<sup>198</sup> This contrasts with those handling only selected violations, such as the “disappearances”-focused Argentine commission.<sup>199</sup>

Nevertheless, truth commissions share certain fundamental characteristics.

[(1) T]hey focus on the past. The events may have occurred in the recent past, but a truth commission is not an ongoing body akin to a human rights commission.

[(2) They] investigate a pattern of abuse over a set period of time rather than a specific event. In its mandate, the truth commission is given the parameters of its investigation both in terms of the time period covered as well as the type of human rights violations to be explored.

[(3) They are] temporary bod[ies], usually operating over a period of six months to two years and completing [their] work by

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<sup>193</sup> FREEMAN, *supra* note 192, app. 1 at 318–25.

<sup>194</sup> Makau Mutua, *Beyond Juba: Does Uganda Need a National Truth and Reconciliation Process?*, 13 BUFF. HUM. RTS. L. REV. 19, 31 (2007).

<sup>195</sup> See Theresa Klosterman, *The Feasibility and Propriety of a Truth Commission in Cambodia: Too Little? Too Late?*, 15 ARIZ. J. INT'L & COMP. L. 833, 835 (1998).

<sup>196</sup> See Anurima Bhargava, Note, *Defining Political Crimes: A Case Study of the South African Truth and Reconciliation Commission*, 102 COLUM. L. REV. 1304, 1308–09 (2002) (describing the work of the “Committee” portion of the South African TRC as “quasi-judicial” and aspiring to “meet the expectations that attach to a legal institution”).

<sup>197</sup> See Christopher D. Totten & Nicholas Tyler, *Arguing for an Integrated Approach to Resolving the Crisis in Darfur: The Challenges of Complementarity, Enforcement, and Related Issues in the International Criminal Court*, 98 J. CRIM. L. & CRIMINOLOGY 1069, 1105–06 (2008) (describing a proposed truth commission in Sudan that incorporates traditional dispute resolution methods).

<sup>198</sup> See Michael P. Scharf & Paul R. Williams, *The Functions of Justice and Anti-Justice in the Peace-Building Process*, 35 CASE W. RES. J. INT'L L. 161, 171 (2003) (“The South African Truth and Reconciliation Commission was . . . given the task of documenting the full extent of government involvement in racial killings and incidents of torture . . .”).

<sup>199</sup> See Christopher K. Connolly, *Living on the Past: The Role of Truth Commissions in Post-Conflict Societies and the Case Study of Northern Ireland*, 39 CORNELL INT'L L.J. 401, 407 (2006).

submitting a report. These parameters are established at the time of the commission's formation, but often an extension can be obtained to wrap things up.

[(4) They] are officially sanctioned, authorized, or empowered by the state. [In theory], [this should allow] the commission to have greater access to information, greater security, and increased assurance that its findings will be taken [seriously]. Official sanction from the government is crucial because it represents an acknowledgment of past wrongs and a commitment to address the issues and move on. Furthermore, governments may be more likely to enact recommended reforms if they have established the commission.<sup>200</sup>

Moreover, truth commissions typically have common goals. Margaret Popkin and Naomi Roht-Arriaza describe four of the main ones:

- [(1)] creating an authoritative record of what happened;
- [(2)] providing a platform for the victims to tell their stories and obtain some form of redress;
- [(3)] recommending legislative, structural, or other changes to avoid repetition of past abuses; and
- [(4)] establishing who was responsible and providing a measure of accountability for the perpetrators.<sup>201</sup>

In commenting on the creation of the South African Truth and Reconciliation Commission (TRC), Nobel laureate and TRC Chair Desmond Tutu noted that “[w]hile the Allies could pack up and go home after Nuremberg [the war crime tribunals following WWII], we in South Africa had to live with one another.”<sup>202</sup> Indeed, truth commissions can be a powerful tool in furthering the aims of restorative justice. The process may afford victims a sense of catharsis and restored dignity. It may inspire perpetrators to renounce hatred and violence. Psychologically, if not spiritually, the process can help bring the community together and heal divisive wounds. In Tutu's words: “[I]t was enormously therapeutic and cleansing for victims to tell their stories (and) the perpetrators had to confess in order to get amnesty . . . . This combination of storytelling and

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<sup>200</sup> Eric Brahm, Truth Commissions (June 2004), [http://www.beyondintractability.org/essay/truth\\_commissions/](http://www.beyondintractability.org/essay/truth_commissions/) [hereinafter Brahm, Truth Commissions]; see also HAYNER, UNSPEAKABLE TRUTHS, *supra* note 191, at 14.

<sup>201</sup> Margaret Popkin & Naomi Roht-Arriaza, *Truth as Justice: Investigatory Commissions in Latin America*, 20 LAW & SOC. INQUIRY 79, 80 (1995).

<sup>202</sup> DESMOND TUTU, NO FUTURE WITHOUT FORGIVENESS 21 (1999).

confession put[s] it all out in the open. With full disclosure, people feel they can move on.”<sup>203</sup>

On the other hand, truth commissions can have the opposite effect. “While telling one’s story and hearing details of loved ones’ fates are sometimes beneficial, for other victims, these experiences have quite different effects, bringing back old anger and triggering posttraumatic stress.”<sup>204</sup> The South African TRC revealed that while some victims felt empowered by telling their stories, others felt angry and face posttraumatic stress.<sup>205</sup> In fact, “a survey in South Africa found that the process had made race relations worse and made people angrier.”<sup>206</sup>

And while truth commissions are often a feature of governmental transition, such transition need not be toward democracy. For example, the truth commissions in Uganda (1986) and Chad (1992) were used primarily to discredit the previous regime.<sup>207</sup> Other truth commissions, such as Uganda’s 1974 version, were little more than thinly veiled efforts to placate the international community.<sup>208</sup> Even in the case of ostensibly more legitimate bodies, such as Zimbabwe’s commission (1985) and Haiti’s commission (1996), the actual publication of the commission’s report was hampered,<sup>209</sup> or completely thwarted,<sup>210</sup> because it was too critical of the new government.<sup>211</sup> Some commissions have not even been allowed to

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<sup>203</sup> Stan Winer, South Africa (Feb. 2003), <http://www.zcommunications.org/south-africa-by-stan-winer> (quoting Archbishop Desmond Tutu).

<sup>204</sup> Brahm, Truth Commissions, *supra* note 200.

<sup>205</sup> Adrien Katherine Wing, *A Truth and Reconciliation Commission for Palestine/Israel: Healing Spirit Injuries?*, 17 *TRANSNAT’L L. & CONTEMP. PROBS.* 139, 143 (2008).

<sup>206</sup> *Id.* at 143–44.

<sup>207</sup> See Hayner, *Comparative Study*, *supra* note 190, at 647; see also Trial Watch: Truth Commission in Uganda, <http://www.trial-ch.org/en/truth-commissions/uganda.html> (last visited Mar. 14, 2010) (“In conclusion, the 1986 Commission of Enquiry, is typical of other truth commissions set up with the sole aim of discrediting previous regimes, in this case those preceding Museveni.”).

<sup>208</sup> See Hayner, *Comparative Study*, *supra* note 190, at 612–13.

<sup>209</sup> See Reed Brody, *Justice: The First Casualty of Truth?*, *NATION*, Apr. 30, 2001, at 25, available at <http://www.thenation.com/doc/20010430/brody> (indicating that the report of Haiti’s truth commission was published years after its work ended).

<sup>210</sup> See U.S. Inst. of Peace, Commission on Inquiry: Zimbabwe, <http://www.usip.org/resources/commission-inquiry-zimbabwe> (last visited Mar. 14, 2010). The report of a commission of inquiry established in 1985 to investigate the killing of an estimated 1500 political dissidents and other civilians in the Matabeleland region of Zimbabwe has not been made public to date by the government. *Id.*

<sup>211</sup> See Hayner, *Comparative Study*, *supra* note 190, at 617–18.

complete their work. Commissions in Bolivia (1982–84) and Ecuador (1996–97) were disbanded before fulfilling their mandates because the government in each case found the process had become too politically problematic.<sup>212</sup>

Overall, truth commissions often come up short in achieving their desired results. As explained by Eric Brahm:

First, they may have an impossible mission. The needs of victims may be incompatible with the needs of society. Second, it is argued they do not go far enough to deal with the past or generate reconciliation. They do not have the power to punish and have no authority to implement reforms. Third, wiping the slate clean benefits those who have committed human rights violations. This damages victims' self-esteem and denies them justice. Finally, erasing history is difficult. At minimum, truth commissions pursue different types of truth. They investigate the details of specific events while at the same time attempting to explain the factors and circumstances behind the gross human rights violations the state experienced. In short, truth commissions often seem asked to do too much with too little.<sup>213</sup>

### C. Lustration

Lustration is another quasi-judicial mechanism that entails identifying officials and collaborators of the former criminal government and barring them from serving in or exerting influence over the new regime.<sup>214</sup> Lustration has been used widely in former Soviet Bloc countries that have transitioned from communism to democracy, such as Poland and the Czech Republic.<sup>215</sup> Lustration

<sup>212</sup> Brahm, Truth Commissions, *supra* note 200.

<sup>213</sup> *Id.*

<sup>214</sup> See Roman Boed, *An Evaluation of the Legality and Efficacy of Lustration as a Tool of Transitional Justice*, 37 COLUM. J. TRANSNAT'L L. 357, 358 (1999). "Lustration" is derived from the Latin word "lustratio," which means "purification by sacrifice." *Id.* Traditionally, it was

any of various processes in ancient Greece and Rome whereby individuals or communities [would] rid themselves of ceremonial impurity (e.g., bloodguilt, pollution incurred by contact with childbirth or with a corpse) or simply of the profane or ordinary state, which made it dangerous to come into contact with sacred rites or objects.

*Id.* The purification "methods varied from sprinkling with or washing in water," rubbing one's skin "with various substances, such as blood or clay, to complicated ceremonies, some of which involved confession of sins." *Id.* "Fumigation was also used." *Id.*

<sup>215</sup> *Id.* at 358–59. That said, lustration processes have not been limited to ex-communist countries: in El Salvador, for example, lustration has been used to deal with military

laws tend to cull names from the previous regime's police files.<sup>216</sup> "This information is then used to determine whether suspected individuals collaborated with the former state security service."<sup>217</sup>

Lustration has also been used in postwar Germany to purge former Nazis, in post-Saddam Iraq as part of the "de-baathification process" (Ba'ath was Saddam's party), and in postauthoritarian Latin American societies, such as El Salvador.<sup>218</sup> In Iraq, for example, U.S. administrator L. Paul Bremer "established a Supreme National Debaathification Commission to root out senior Baathists from Iraqi ministries and hear appeals from Baathists who were in the lowest ranks of the party's senior leadership."<sup>219</sup>

Lustration laws generally contain both procedural and substantive parts.<sup>220</sup> The substantive part determines: (1) the positions in the new democratic system that may not be filled by members of the previous government and (2) the posts in the previous regime that would disqualify individuals from or necessitate inquiry for service in the new government.<sup>221</sup> The procedural aspect establishes the body tasked to administer the lustration law and the process by which such law will be carried out.<sup>222</sup> Lustration is typically performed by a commission or similar administrative body.<sup>223</sup>

Certain lustration laws appear more judicial in character. The Polish version, for example, establishes a special lustration prosecutor

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officers from the former regime. See Ivan Simonović, *Dealing with the Legacy of Past War Crimes and Human Rights Abuses*, 2 J. INT'L CRIM. JUST. 701, 704 n.14 (2004).

<sup>216</sup> Dana Michael Hollywood, *The Search for Post-Conflict Justice in Iraq: A Comparative Study of Transitional Justice Mechanisms and Their Applicability to Post-Saddam Iraq*, 33 BROOK. J. INT'L L. 59, 95 (2007).

<sup>217</sup> *Id.* at 96 (internal quotation marks omitted).

<sup>218</sup> See *id.*; Boed, *supra* note 214, at 362; Simonović, *supra* note 215, at 703–04.

<sup>219</sup> Sharon Otterman, Council on Foreign Relations, *Iraq: Debaathification*, Apr. 7, 2005, <http://www.cfr.org/publication/7853/iraq.html>. "The party's foremost leaders—some 5000 to 10,000 individuals—were not permitted to appeal their dismissals." *Id.* "Two months later, Bremer dissolved the Supreme National Debaathification Commission, but the panel, with support from some members of the interim government, continues to operate." *Id.*

<sup>220</sup> Roman David, *Lustration Laws in Action: The Motives and Evaluation of Lustration Policy in the Czech Republic and Poland (1989–2001)*, 28 LAW & SOC. INQUIRY 387, 408 (2003).

<sup>221</sup> *Id.* at 388, 408.

<sup>222</sup> See *id.* at 409.

<sup>223</sup> See Boed, *supra* note 214, at 364. In certain jurisdictions, an appeal process is included. *Id.*

and designates the Warsaw Court of Appeal as its lustration court.<sup>224</sup> The law lays out a special judicial procedure directly linked with Poland's regular criminal law.<sup>225</sup> The prosecutor or a member of Parliament can initiate the process.<sup>226</sup> Nevertheless, as it "only seeks to sanction those individuals in positions to undermine the democratic process, lustration as a tool of transitional justice could be thought of as a midpoint in terms of severity between retributive justice and restorative justice."<sup>227</sup>

Lustration is often justified on the ground that it permits fragile democracies to take root by preventing those who would harm them from assuming positions of power.<sup>228</sup> Consistent with this, lustration is also valued by some for its ability to prevent members of new regimes from being subjected to political "blackmail," e.g., being asked for political favors under threat of having their past service exposed.<sup>229</sup> Lustration's advocates believe it ultimately contributes to establishing "historical truth" and national reconciliation while also establishing a minimum baseline of justice that is only "semiretributive" in nature.<sup>230</sup>

That said, lustration is not without its critics. They fault the procedure for: (1) the anomaly of determining a person's suitability for performing various functions in a democratic state based on information in internal files of a police state; (2) the fact that, in any event, those internal files are often inaccurate or incomplete; (3) the procedural defects implicated by the age of the records (raising statute of limitations or laches concerns), their hearsay quality, and the ex post facto nature of the law giving rise to the accusations;<sup>231</sup> (4) the narrowness of the inquiry into the person's past—focusing on whether the person was associated with a regime—not on whether that specific person was responsible for human rights violations; and (5) the limited or nonexistent rights to judicial review.<sup>232</sup>

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<sup>224</sup> David, *supra* note 220, at 411.

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> Hollywood, *supra* note 216, at 96.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* at 97.

<sup>230</sup> *Id.* at 96–97.

<sup>231</sup> *Id.* at 97–99. Critics also point out that lustration deprives emerging democracies of rare and valuable human resources. *Id.* at 97. It also prevents old apparatchiks from being inculcated in the democratic values of the new regime.

<sup>232</sup> See Boed, *supra* note 214, at 377–78.

In considering the Czech law, Roman Boed thus concludes that lustration “results in legally-impermissible [sic] discrimination which breaches the state’s obligation to guarantee to persons within its jurisdiction the equal protection of the law[,] . . . infringes on the individual’s right to work[,] . . . breaches the state’s obligation to promote this right[,] . . . [and] does not secure an individual’s right to a fair hearing.”<sup>233</sup>

#### D. Reparations

Although they can be a component of other forms of transitional justice, such as truth commissions or traditional rituals, reparations to victims can be a justice mechanism in their own right.<sup>234</sup> The UN’s Basic Principles and Guidelines on the Right to a Remedy and Reparation lists five categories of reparations: (1) restitution or *restitution in integrum*, which seeks to restore the victim to the status quo ante or “original situation” before the violation occurred; (2) compensation, whereby victims receive money for quantifiable harms; (3) rehabilitation, which could include all relevant medical, psychological, social, and legal support services; (4) satisfaction, a fairly broad category that includes varied measures such as public apologies, truth-finding processes, and sanctions for perpetrators; and (5) guarantees of nonrepetition, including both institutional and legal reform and the promotion of mechanisms to prevent and monitor future social conflict.<sup>235</sup>

As noted by Lisa Laplante: “Awarding . . . [reparations] to victims of human rights violations—such as disappearances, extrajudicial killings, unjust detention, torture and rape—is complementary to traditional justice measures, especially as a way to restore human dignity and redress harm caused by human rights violations.”<sup>236</sup> Reparations also possess retributive and deterrent features, holding

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<sup>233</sup> *Id.* at 398.

<sup>234</sup> See Lisa J. Laplante, *On the Indivisibility of Rights: Truth Commissions, Reparations, and the Right to Development*, 10 YALE HUM. RTS. & DEV. L.J. 141, 159 (2007).

<sup>235</sup> Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. RES. 60/147, ¶¶ 19–23, U.N. Doc. A/RES/60/147 (Mar. 21, 2006).

<sup>236</sup> Laplante, *supra* note 234, at 159.

the state accountable for its past acts and omissions, and thus helping fight against potential future impunity.<sup>237</sup>

The administration of reparations, however, can present a significant obstacle. “First, few transitioning states have the funds to compensate all the victims deserving of assistance.”<sup>238</sup> And donations from wealthy foreign donors or even a “reparations tax” are unlikely to take care of the problem.<sup>239</sup> Second, assuming the fledgling government is capable of paying reparations, doing so may “unsettle property rights and interfere with economic reform by creating new claims against existing property holders.”<sup>240</sup> Finally, identifying those individuals deserving of reparations, even with truth commission victim lists, can often pose insurmountable logistical questions for battle-scarred, poor nations transitioning to democracy.<sup>241</sup> One significant issue, in this regard, is proof problems in demonstrating a sufficient nexus between specific criminal activity and particular injuries.<sup>242</sup>

Even if these hurdles could be overcome, reparations dividends may ultimately be minimal. On one hand, reparations in their narrowest form provide benefits to certain victims only for particular, defined losses.<sup>243</sup> Such case-by-case reparations risk “disaggregating the harm suffered by victims and fragmenting various victims groups.”<sup>244</sup> On the other hand, broader reparations for collective harms, if stretched too far, might “begin to resemble a development program” only “remotely directed towards the wrongs suffered by victims.”<sup>245</sup>

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<sup>237</sup> *Id.*

<sup>238</sup> Hollywood, *supra* note 216, at 92.

<sup>239</sup> *See id.* at 92–93.

<sup>240</sup> Eric A. Posner & Adrian Vermeule, *Transitional Justice as Ordinary Justice*, 117 HARV. L. REV. 761, 766 (2004).

<sup>241</sup> Hollywood, *supra* note 216, at 93.

<sup>242</sup> *See* Adrian Di Giovanni, *The Prospect of ICC Reparations in the Case Concerning Northern Uganda: On a Collision Course with Incoherence?*, 2 J. INT’L L. & INT’L REL., Fall 2006, at 25, 54 (noting, in the Ugandan context, that injuries to victims can often be attributable to more than one perpetrator).

<sup>243</sup> *See id.* at 42.

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

*E. Amnesties*

Amnesty, as defined in *Black's Law Dictionary*, addresses "political offenses with respect to which forgiveness is deemed more expedient for the public welfare than prosecution and punishment."<sup>246</sup> Amnesties present a troubling paradox: they are typically unavailable for ordinary domestic crime yet arise frequently in situations of mass atrocity.<sup>247</sup>

In the transitional justice context, there are different kinds of amnesties. Some of them are unqualified.<sup>248</sup> Of these, certain amnesties are granted by existing governments to rebel groups—as was the case in Uganda when the government enacted an Amnesty Act for LRA rebels in 2000.<sup>249</sup> Other amnesties are granted by new regimes vis-à-vis the crimes of their predecessor, e.g., when the new Sandinista government in Nicaragua granted amnesty in 1985 to armed forces that had been opposing the Sandinistas.<sup>250</sup>

In other situations, unqualified amnesty can be self-accorded by outgoing regimes that anticipate the incoming regime may want to prosecute them for human rights abuses.<sup>251</sup> Such was the case in Chile, for example, where the departing Pinochet government pardoned its leaders on the way out.<sup>252</sup>

Qualified amnesty, for its part, is often conditioned on the suspect providing something in return for the pledge not to prosecute. Typically, this consists of a confession or other details regarding crimes committed by the old regime.<sup>253</sup> Often, this is done in the context of a truth commission. This was the case in South Africa.<sup>254</sup> In order to be eligible for amnesty before the South African TRC, a

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<sup>246</sup> BLACK'S LAW DICTIONARY 93 (8th ed. 2004).

<sup>247</sup> See DRUMBL, *supra* note 77, at 154.

<sup>248</sup> *Id.*

<sup>249</sup> See Rose, *supra* note 181, at 353–54. "[T]he government will not prosecute or punish [LRA members] if they report to the nearest local or central government authority, renounce and abandon involvement in the war or armed rebellion, and surrender any weapons in their possession." *Id.* at 353.

<sup>250</sup> See INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, ANNUAL REPORT 1984–1985: NICARAGUA (1985), available at <https://www.cidh.oas.org/annualrep/84.85eng/chap.4d.htm>.

<sup>251</sup> See DRUMBL, *supra* note 77, at 154.

<sup>252</sup> See *id.*

<sup>253</sup> See *id.*

<sup>254</sup> See Eric Brahm, Amnesty (Mar. 2005), <http://crinfo.beyondintractability.org/essay/amnesty/?nid=2371> [hereinafter Brahm, Amnesty].

perpetrator had to make a full disclosure of any involvement in crimes.<sup>255</sup> This had to be corroborated with other evidence and testimony.<sup>256</sup> And the perpetrator had to demonstrate that the crime was committed for a political reason.<sup>257</sup>

Proponents of amnesties claim several advantages: (1) amnesties can serve as a “carrot” to end conflicts where governments offer, or opposition forces demand, amnesty as a precondition for entering into negotiations for peace;<sup>258</sup> (2) “amnesty provisions may be a precondition for a dictatorial regime to give up power”;<sup>259</sup> and (3) when a country’s judicial infrastructure is in shambles, amnesties, in conjunction with truth commissions, may prove necessary to establish the truth regarding past abuses, which carries considerable healing power for individual victims and the transitional society at large.<sup>260</sup>

Opponents of amnesties describe them as a miscarriage of justice that reinforces impunity and undermines the move toward a burgeoning rule of law.<sup>261</sup> In reference to the South African TRC, one observer has noted, “From a retributive point of view, it is not immediately clear why a murderer who kills for political reasons should be entitled to amnesty in return for the truth, while one who kills out of passion or greed should not.”<sup>262</sup> Moreover, as observed by Mark Drumbl, notwithstanding any advantages of amnesties, they “selectivize punishment of extraordinary international criminals at the national level in a manner that hampers retribution as a principled penological goal.”<sup>263</sup>

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<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

<sup>258</sup> See Charles P. Trumbull IV, *Giving Amnesties a Second Chance*, 25 BERKELEY J. INT’L L. 283, 314–16 (2007).

<sup>259</sup> Brahm, *Amnesty*, *supra* note 254.

<sup>260</sup> See Trumbull IV, *supra* note 258, at 313–14.

<sup>261</sup> See DRUMBL, *supra* note 77, at 154. See generally Trumbull IV, *supra* note 258, at 307–08.

<sup>262</sup> Miriam J. Aukerman, *Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice*, 15 HARV. HUM. RTS. J. 39, 62 (2002).

<sup>263</sup> DRUMBL, *supra* note 77, at 154.

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IV  
FORMULATING ANALYTIC CRITERIA FOR COMPLEMENTARITY  
EVALUATION

Can domestic resort to one or more of the categories of alternative justice, either separately or in tandem, satisfy the ICC's complementarity standard? Given the variety and complexity of these mechanisms, as well as the varied scenarios giving rise to the initiation of ICC prosecutions and requests for deferral, this question defies superficial analysis. Instead, digging below the surface, certain aspects of the domestic justice effort and its relationship to the ICC should be considered. This consideration results in the formulation of a set of analytic criteria that eschews a myopic focus on the justice mechanism itself and permits a more fulsome consideration of the complementarity issue. These analytic criteria include: (1) the circumstances surrounding the ICC referral and request for deferral, (2) the state of affairs in the domestic jurisdiction seeking deferral, (3) the alternative justice mechanism itself, (4) the crimes at issue, and (5) the prosecution target. Each of these shall be considered in turn.

*A. Circumstances Surrounding the ICC Referral and the Request for Deferral*

One of the key exogenous considerations turns on ICC procedural mechanics and international relations: to wit, how was the ICC seized of the case in the first place, and what prompted the state to ask for a deferral on complementarity grounds? To examine these factors, the ICC framework for referrals and deferrals must be accounted for.

Cases may be referred to the ICC by one of four methods: (1) pursuant to Articles 13(a) and 14 of the Rome Statute, a member country of the Assembly of States Parties (e.g., a country that has ratified the Rome Statute) may refer a case;<sup>264</sup> (2) per Article 13(b), the Security Council may refer the case—subject, of course, to veto from the five permanent members;<sup>265</sup> (3) under Articles 13(c) and 15, the ICC's three-judge Pre-Trial Chamber may authorize a case initiated by the ICC Prosecutor;<sup>266</sup> or (4) pursuant to Article 12(2)

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<sup>264</sup> Rome Statute, *supra* note 15, arts. 13(a), 14.

<sup>265</sup> *Id.* art. 13(b). To date, the Security Council has made only one such referral—the “Situation in Darfur, Sudan” in March 2005. See William A. Schabas, *Prosecutorial Discretion v. Judicial Activism at the International Criminal Court*, 6 J. INT'L CRIM. JUST. 731, 734 (2008).

<sup>266</sup> Rome Statute, *supra* note 15, arts. 13(c), 15.

and (3), the Rome Statute allows for member country referrals or prosecutor-initiated prosecutions with respect to nonmember countries, provided the nonmember has *chosen to accept* the ICC's jurisdiction.<sup>267</sup>

Moreover, as noted above, a state may request ICC deferral on complementarity grounds either earlier or later on in the case. Pursuant to Article 18, within one month of the ICC Prosecutor's notice to a state of case initiation, the state may inform the ICC that it is handling the matter and request that the Prosecutor suspend the inquiry.<sup>268</sup> Article 19 permits a state to request deferral at later stages of the case.<sup>269</sup>

In terms of deciding whether any such request should be granted, it is useful to inquire about the source, motivation, and timing of the initial referral and the subsequent request for deferral. Concerning the initial referral, the various scenarios bear differently on the complementarity calculus. Referrals clearly bifurcate into self-generated and non-self-generated.

Of the latter, as indicated previously, the case could originate as the result of a Security Council resolution, *a proprio motu* investigation by the ICC Prosecutor, or a third-party, member state referral. The first two of these possible scenarios carry important indicia of institutional sanction. A Security Council resolution benefits from the imprimatur of the world's superpowers and indicates a kind of international consensus.<sup>270</sup> Similarly, prosecutions instituted by the ICC Prosecutor reflect internal checks and balances as they are reviewed and authorized by a Pre-Trial Chamber.<sup>271</sup> Third-party, member state referrals reflect the Westphalian preference of the international community, as reflected in the earliest drafts of the

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<sup>267</sup> *Id.* art. 12(2)–(3).

<sup>268</sup> *Id.* art. 18.

<sup>269</sup> *Id.* art. 19.

<sup>270</sup> See Christine H. Chung, *The Punishment and Prevention of Genocide: The International Criminal Court as a Benchmark of Progress and Need*, 40 CASE W. RES. J. INT'L L. 227, 239 (2008) ("The Security Council's referral of the situation in Darfur to the ICC for investigation in March 2005 was an achievement in expressing an international consensus that the perpetrators of the horrific violence and crimes in Darfur should be held accountable."); Gregory S. Gordon, *From Incitement to Indictment? Prosecuting Iran's President for Advocating Israel's Destruction and Piecing Together Incitement Law's Emerging Analytical Framework*, 98 J. CRIM. L. & CRIMINOLOGY 853, 915 (2008) (opining that Security Council referral to the ICC indicates international acquiescence to prosecution).

<sup>271</sup> See Rome Statute, *supra* note 15, art. 15(3)–(5).

Rome Statute, that state sovereigns should be the primary moving force in triggering international criminal prosecutions.<sup>272</sup>

Self-generated referrals, on the other hand, do not appear to inspire the same kind of confidence. They are the result of a novel interpretation of Article 14 that, although technically permissible, finds no support in the Rome Statute's *travaux préparatoires*.<sup>273</sup> Essentially, self-generated referrals represent a government's request for ICC help in dealing with rebel groups. George Fletcher has warned, "The danger of this approach is that [the] ICC will become embroiled in civil strife and deploy the powers of the criminal law to strengthen one party against the other."<sup>274</sup> William Schabas fears the end result would be "establishing a degree of complicity between the Office of the Prosecutor and the referring state."<sup>275</sup> Kenneth Roth, Executive Director of Human Rights Watch, elaborates:

States, overall, have the capacity to do much greater harm than rebel groups, because they control the machinery of legitimacy and power. So, when a state is acting inappropriately in this way, I think, there is all the more reason to prosecute than if a rebel group is doing even the same thing.<sup>276</sup>

Accordingly, as a threshold matter, self-generated referrals and subsequent requests for deferral must be viewed with a lesser degree of deference in conducting complementarity analysis of alternative justice mechanisms (or of any assertion of domestic jurisdiction, for that matter).<sup>277</sup>

The timing of an Article 18 request for deferral, which takes place after the ICC has initially admitted the case, should also have considerable interpretive value when conducting this analysis. If the request for deferral is made early on, there should be a presumption of

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<sup>272</sup> See Schabas, *supra* note 265, at 734.

<sup>273</sup> *Id.* at 751.

<sup>274</sup> 1 GEORGE P. FLETCHER, *THE GRAMMAR OF CRIMINAL LAW: AMERICAN, COMPARATIVE, AND INTERNATIONAL* 189 (2007). *But see* Giorgio Gaja, *Issues of Admissibility in Case of Self-Referrals*, in *THE INTERNATIONAL CRIMINAL COURT AND NATIONAL JURISDICTIONS* 49, 52 (Mauro Politi & Federica Gioia eds., 2008) [hereinafter *NATIONAL JURISDICTIONS*] ("Self-referrals cannot be distorted so as to provide a form of cooperation which would at the end of the day leave investigation and prosecution in the hands of the State where the alleged crimes occurred.").

<sup>275</sup> Schabas, *supra* note 265, at 751.

<sup>276</sup> *Discussion*, 6 J. INT'L CRIM. JUST. 763, 764 (2008) [hereinafter *Discussion*].

<sup>277</sup> Kenneth Roth notes that "[t]he reason for allowing governments to get away with using self-referral to target only rebels is that it makes the ICC a more attractive mechanism for governments to invoke in the future." *Id.* at 765.

good faith bestowing greater deference to the municipal arrogation of process.<sup>278</sup>

Conversely, an Article 19 application submitted on the eve of trial should raise red flags and preclude deference.<sup>279</sup> This scenario conjures up the image of a rogue state harboring its national malefactors and hedging its bets to see if the ICC is true to its word and follows through with prosecution. If the ICC continues, then a request for deferral and the hasty establishment of an alternative justice mechanism would be pursued. If not, because the ICC lets the case drop due to resource limitations, lack of will, or pressure exerted by other international entities, then the stonewalling would be justified. Of course, the greater the period of delay, the more likely this scenario has a basis in reality. As suggested by Louise Arbour and Morten Bergsmo: “[U]ndue delay in the state-initiated prosecution [raises the question] of a lack of a genuine intention to proceed . . . [consistent with] the State [not] acting in good faith.”<sup>280</sup>

This is especially the case when such a request comes on the heels of several previous ones. If those earlier requests for deferral had been denied because the Pre-Trial Chamber found the domestic mechanism wanting, then the current request should be evaluated with very strict scrutiny.

#### *B. The State of Affairs in the Domestic Jurisdiction Seeking Deferral*

The next area of inquiry narrows the focus from international relations to internal political functioning by asking: What is the state of affairs in the domestic jurisdiction seeking to use the alternative justice mechanism? This question is crucial since decoupling the alternative-justice-complementarity examination from an analysis of the mechanism’s surrounding environment is fatally myopic. This contextual information is essential for understanding the formation of the mechanism, its legitimacy within the system, its parameters for operation, and its likelihood of achieving justice. It is well accepted

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<sup>278</sup> This would appear to be consistent with the presumption of inadmissibility owing to domestic efforts as embodied in Article 17(1). See Rome Statute, *supra* note 15, art. 17(1).

<sup>279</sup> This seems to inevitably implicate consideration of Article 17(2)(b)—“[t]here has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice.” *Id.* art. 17(2)(b).

<sup>280</sup> Louise Arbour & Morten Bergsmo, *Conspicuous Absence of Jurisdictional Overreach*, in REFLECTIONS ON THE INTERNATIONAL CRIMINAL COURT: ESSAYS IN HONOUR OF ADRIAAN BOS 129, 131 (Herman A.M. von Hebel et al. eds., 1999).

that transitional justice cannot accomplish its objectives in a “domestic system that lacks both ‘capacity’ (the physical infrastructure and resources) and ‘legitimacy’ (those factors that ‘tend to make the decisions of a juridical body acceptable to various populations’).”<sup>281</sup>

Moreover, implicit in successful transitional justice is the significant abatement or cessation of hostilities giving rise to the justice initiative. In fact, given “the challenges of integrating transitional justice principles into a *pre*-post-conflict situation[,] . . . ‘mechanisms of transitional justice should only be applied [once armed groups] have previously agreed with the government to demobilize and dismantle.’”<sup>282</sup>

Based on these considerations, three criteria related to the domestic jurisdiction should be considered: (1) legitimacy; (2) capacity; and (3) stability, i.e., the existence of an ongoing conflict that fueled the human rights violations at issue.

### 1. *Legitimacy*

In the area of transitional justice, legitimacy of the domestic system largely depends on the degree to which the system is governed by the rule of law. According to Ruti Teitel, “Post-Cold War transitional justice has been largely concerned with advancing a conception of the rule of law that is associated with the legitimacy of a country’s local juridical and political conditions.”<sup>283</sup>

In order for the rule of law to take root in postconflict societies, however, there must be some modicum of it to begin with.<sup>284</sup> To measure whether there is, it is instructive to consider the types of

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<sup>281</sup> Brady Hall, *Using Hybrid Tribunals as Trivias: Furthering the Goals of Post-Conflict Justice While Transferring Cases from the ICTY to Serbia’s Domestic War Crimes Tribunal*, 13 MICH. ST. J. INT’L L. 39, 42 (2005); see also Laura A. Dickinson, Comment, *The Promise of Hybrid Courts*, 97 AM. J. INT’L L. 295, 300 (2003) (focusing on the problems of legitimacy, capacity building, and norm penetration).

<sup>282</sup> Lisa J. Laplante & Kimberly Theidon, *Transitional Justice in Times of Conflict: Colombia’s Ley de Justicia y Paz*, 28 MICH. J. INT’L L. 49, 78 (2006) (quoting the UN High Commissioner for Human Rights); see also Juan Méndez, *Lou Henkin, Transitional Justice, and the Prevention of Genocide*, 38 COLUM. HUM. RTS. L. REV. 477, 482–83 (2007) (referring to complications when “transitional justice mechanisms have to be applied during ongoing conflict and for ongoing violations”).

<sup>283</sup> Ruti G. Teitel, *Transitional Justice in a New Era*, 26 FORDHAM INT’L L.J. 893, 897 (2003).

<sup>284</sup> See *Panel One: The Rule of Law and Economic Development: An Overview on the Region*, 25 ARIZ. J. INT’L & COMP. L. 267, 277 (2008) (noting that the rule of law is necessary to allow nations to achieve justice).

regimes that tend to accede to power during transitional periods—certain ones are inherently more law based than others. Although transitional justice schemas are protean in nature, two broad paradigms can be discerned.

The first involves new or restored regimes attempting to govern a country emerging from cataclysmic violence perpetrated either recently or in the more distant past. Within this model, there are three main divisions. The first involves a brand new government taking over the reins of power. This transition can be effected through the ballot box or through battle. The former is exemplified by Chile's move to an elected government after Augusto Pinochet stepped down.<sup>285</sup> The latter is illustrated in Rwanda, where the Rwandan Patriotic Front became the governing authority upon defeating Rwandan government forces, while the 1994 genocide was being perpetrated by the same government.<sup>286</sup>

The second scenario within this archetype implicates an ousted government being restored after the country suffered from massive human rights violations postcoup. This is what happened in Sierra Leone when Ahmad Tejan Kabbah's overthrown government returned to power after the commission of crimes against humanity and war crimes by various rebel factions.<sup>287</sup>

The final situation entails the UN forming a provisional authority to govern a country recently engulfed in violence committed by a previous occupying regime. This was the case in East Timor where UNTAET governed the new country after its Indonesian overlords went on a violent rampage before pulling out.<sup>288</sup>

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<sup>285</sup> Evo Popoff, Note, *Inconsistency and Impunity in International Human Rights Law: Can the International Criminal Court Solve the Problems Raised by the Rwanda and Augusto Pinochet Cases*, 33 GEO. WASH. INT'L L. REV. 363, 380 (2001) ("In 1990 Pinochet agreed to step down from power and allowed democratic elections.")

<sup>286</sup> Evelyn Bradley, *In Search for Justice—A Truth and Reconciliation Commission for Rwanda*, 7 J. INT'L L. & PRAC. 129, 129 (1998) ("The largely Tutsi Rwandan Patriotic Front (RPF), which took power following the 1994 civil war and genocide, is the principal political force in the Government of National Unity. The new Government was then confronted with the immense task of restoring law and order and reconstructing public and economic institutions. Most importantly, it had to address the gross human rights violations that had been committed." (footnote omitted)).

<sup>287</sup> See Sarah Williams, *Amnesties in International Law: The Experience of the Special Court for Sierra Leone*, 5 HUM. RTS. L. REV. 271, 274–75 (2005).

<sup>288</sup> Laura A. Dickinson, *Transitional Justice in Afghanistan: The Promise of Mixed Tribunals*, 31 DENV. J. INT'L L. & POL'Y 23, 30–32 (2002). This was also the case in Kosovo, where UNMIK (United Nations Mission in Kosovo) became the governing authority after the commission of Serb atrocities. *Id.* at 27–30.

The second paradigm consists of justice efforts undertaken by an established regime. Within this prototype, there are two different scenarios. The first involves a government fighting against rebels accused by the former of committing gross human rights violations. This is the case in Uganda, where Museveni's government is fighting against the LRA, which committed the human rights violations detailed above.<sup>289</sup> The other scenario is found in Sudan, where the sitting government itself is accused of committing human rights violations in Darfur but seeks to bring its own members to justice.<sup>290</sup>

Of these two paradigms, the first—new regimes emerging after extensive violence—would generally appear to give greater assurance of the rule of law.<sup>291</sup> Perhaps this is because justice goals are embedded in the DNA of such regimes—they typically take over with an express or implied mandate to bring the *ancien régime's* perpetrators to justice.<sup>292</sup> And, of course, this often has positive rule-of-law implications.<sup>293</sup>

On the other hand, there are no guarantees in this regard. First, rogue regimes may simply replace other rogue regimes.<sup>294</sup> Moreover, even if a new regime starts out on the right path, it can often diverge. The Tutsi Rwandan Patriotic Front (RPF), for example, has been increasingly accused of human rights violations in Rwanda over the past decade.<sup>295</sup> In addition, it is quite possible that justice efforts would be initiated long after the regime takes power. That is the case

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<sup>289</sup> Elizabeth C. Minogue, Note, *Increasing the Effectiveness of the Security Council's Chapter VII Authority in the Current Situations Before the International Criminal Court*, 61 VAND. L. REV. 647, 658–62 (2008).

<sup>290</sup> See Rebecca A. Corcoran, Note, *Justice for the Forgotten: Saving the Women of Darfur*, 28 B.C. THIRD WORLD L.J. 203, 223–24 (2008) (describing the atrocities committed by Sudan in Darfur and explaining the Sudanese establishment of the domestic Special Court for Darfur).

<sup>291</sup> See John Dermody, Note, *Beyond Good Intentions: Can Hybrid Tribunals Work After Unilateral Intervention?*, 30 HASTINGS INT'L & COMP. L. REV. 77, 80 (2006) (noting that making “the prior regime accountable presents the [new regime's] first real test for the establishment of the rule of law” (internal quotation marks omitted)).

<sup>292</sup> See *id.*

<sup>293</sup> See Trumbull IV, *supra* note 258, at 307 (noting, *inter alia*, that in postconflict societies, justice efforts are necessary to restore the rule of law).

<sup>294</sup> See Neil Stammers, *Social Movements, Human Rights, and the Challenge to Power*, 97 AM. SOC'Y INT'L L. PROC. 299, 301 (2003) (noting the “potential for one form of oppressive power to be replaced by another”).

<sup>295</sup> See Luc Reydam, *The ICTR Ten Years On: Back to the Nuremberg Paradigm?*, 3 J. INT'L CRIM. JUST. 977, 982 (2005) (“Since becoming the core of the post-genocide government, the RPF and its army have again been guilty of significant human rights abuses.” (internal quotation marks omitted)).

in Cambodia, where justice efforts related to Khmer Rouge atrocities are only now being undertaken.<sup>296</sup> In the meantime, the current Cambodian government has allegedly accumulated a long record of flouting the rule of law.<sup>297</sup>

By the same token, the second paradigm—when an *existing* regime seeks to employ the justice mechanism—does not necessarily entail a government not respecting the rule of law. Although this might be true on the surface in Sudan and Uganda, where the governments have been accused of rigging elections and committing atrocities, it is not as clear in the Democratic Republic of the Congo (DR Congo), where the government was democratically elected pursuant to a constitution passed with eighty-four percent of voters' support and a process blessed by the international community as fair and free.<sup>298</sup>

Thus, although there is value in considering whether the domestic situation falls into the first or second paradigm, the inquiry should not end there. Instead, a series of other criteria should be examined: (1) whether the country only recently had gotten out from under the yoke of a totalitarian, human rights-violating regime;<sup>299</sup> (2) whether the current government has been democratically elected or is credibly seeking to hold elections in the near future; (3) whether the country has a developed degree of civil society; (4) whether the country has a stable economic, governmental, and judicial infrastructure (including an updated or reformed legal code and effective security forces); (5) whether the country has an educational system and free press; and (6) whether the country has a record of commitment to and respect for

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<sup>296</sup> Kathleen Claussen, Recent Development, *Up to the Bar? Designing the Hybrid Khmer Rouge Tribunal in Cambodia*, 33 YALE J. INT'L L. 253, 253–54 (2008) (“After many years of negotiation and political controversy over the feasibility of such a tribunal, the United Nations and the Royal Government of Cambodia created the [Extraordinary Chambers in the Courts of Cambodia] in 2003 to try leaders of the Khmer Rouge regime that caused the deaths of an estimated 1.7 million people from 1975 to 1979.”).

<sup>297</sup> See Michael Maley, *Transplanting Election Regulation*, 2 ELECTION L.J. 479, 491 n.48 (2003) (citing Steve Heder’s written testimony before the U.S. Senate Foreign Relations Committee, which explained that while Cambodian leader Hun Sen and his government pay lip service to principles of democracy and human rights, they “violate them at will and with impunity”).

<sup>298</sup> Elizabeth Powers, *Greed, Guns and Grist: U.S. Military Assistance and Arms Transfers to Developing Countries*, 84 N.D. L. REV. 383, 404 (2008).

<sup>299</sup> This inquiry is premised on the assumption that, as explained earlier, at the very beginning of a new regime following a period of massive violence, there is a greater desire to seek accountability and establish the rule of law. See *supra* notes 283–84 and accompanying text. So it can be instructive, if not dispositive, to know how recently the new regime has risen to power.

human rights.<sup>300</sup> If these inquiries are answered in the affirmative, the country would appear to have a minimum degree of rule of law. This should factor in the domestic jurisdiction's favor in terms of the complementarity analysis of the deferral request.

With regard to the sixth inquiry, perhaps more important individually than the others combined, if there is credible evidence that the regime seeking deferral has committed human rights violations, then it is hard to imagine a scenario where the deferral should be granted. The tougher scenario is when two or more of the first five inquiries are answered in the negative. One could possibly imagine, for example, finding that the rule of law has taken root solely on the finding of a fairly elected government or a well-developed civil society—certainly both findings combined would help compel such a conclusion. But if both of these were absent, then the recency of *ancien régime* violence (the first suggested criterion)—certainly a more collateral factor—would seem highly unlikely, on its own, to compel a finding that there is a sufficient degree of rule of law.

Thus, the ICC should take a supple approach in balancing these factors and consider the totality of circumstances when deciding whether the regime has legitimacy. Moreover, the Court should consider whether the perception of legitimacy is held by both the international and local communities.<sup>301</sup> Of course, even if there is a finding of legitimacy, it will have to be weighed along with the other two factors in this category—capacity and stability.

## 2. *Capacity*

Even if a country seeking deferral satisfies the legitimacy criterion, its physical capacity to dispense justice must also be considered. In

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<sup>300</sup> See Jane Stromseth, *Post-Conflict Rule of Law Building: The Need for a Multi-Layered, Synergistic Approach*, 49 WM. & MARY L. REV. 1443, 1443–44 (2008) (“Increasingly, international and domestic reformers have come to appreciate that long-term solutions to security and humanitarian problems depend crucially on building and strengthening the rule of law: fostering effective, inclusive, and transparent indigenous governance structures; creating fair and independent judicial systems and responsible security forces; reforming and updating legal codes; and creating a widely shared public commitment to human rights and to using the new or reformed civic structures rather than relying on violence or self-help to resolve problems.”).

<sup>301</sup> See Miles M. Jackson, *The Customary International Law Duty to Prosecute Crimes Against Humanity: A New Framework*, 16 TUL. J. INT’L & COMP. L. 117, 123 (2007) (suggesting the importance of establishing both internal and international legitimacy for the new government); Henry H. Perritt, Jr., *Final Status for Kosovo*, 80 CHI.-KENT L. REV. 3, 12 (2005) (discussing the value of local legitimacy).

other words, does it possess the necessary resources and infrastructure? “The physical infrastructure often will have sustained extensive, crippling damage . . . .”<sup>302</sup> Has it been sufficiently restored? Given its connections to the previous regime, judicial personnel may “be severely compromised or lacking in essential skills.”<sup>303</sup> Has there been sufficient vetting and training? Has the country been able to secure funds and assistance from international donors? Negative answers to these questions should lend support to an admissibility finding for complementarity purposes.

### 3. Stability

#### a. Circumstances External to the Government

Are the armed conflict or massive human rights violations that prompted the justice efforts ongoing? Have they abated? Whereas legitimacy and capacity focus on the powers that be, stability focuses on the circumstances and environment surrounding the political establishment. If the surrounding circumstances include full-blown civil war or popular uprising, then a negative inference should be drawn in terms of its effect on complementarity.<sup>304</sup>

#### b. Internal Government Discord

Another relevant consideration in this regard is the internal unity of the government seeking to use the alternative justice mechanism.<sup>305</sup> Party infighting or interbranch skirmishes should set off alarm bells. This is especially true regarding the potential for intragovernmental divergence with respect to the transitional justice project itself. One branch of government—the executive, for example—could be engaged in legitimate efforts to achieve justice through alternative mechanisms. One could imagine, however, that the military might be opposed.<sup>306</sup> If the military were in a position, even indirectly, to

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<sup>302</sup> Dickinson, *supra* note 288, at 301.

<sup>303</sup> *Id.*

<sup>304</sup> See *Peace v. Justice: Contradictory or Complementary*, 100 AM. SOC’Y INT’L L. PROC. 368, 371 (2006) [hereinafter Wierda] (remarks of Marieke Wierda) (indicating that transitional justice mechanisms fare better when there is stability in the society seeking to use them).

<sup>305</sup> See INFORMAL EXPERT PAPER, *supra* note 38, at ¶ 45 (“The OTP should be alert to the possibility of differing degrees of willingness and internal differences within a State.”).

<sup>306</sup> *Id.* (“Investigators may be willing but an ‘unwilling’ military may frustrate and hinder investigative efforts.”).

thwart the success of the justice enterprise, a finding of ICC admissibility would likely be warranted.

### *C. The Justice Mechanism*

As the analytical focus narrows, the centerpiece of the examination comes into view: scrutiny of the justice mechanism itself. Regardless of the alternative mechanism used, there are three criteria to consider for Article 17 complementarity purposes: (1) the circumstances surrounding the body's creation, (2) the degree of its judicialization, and (3) its holistic effect on the transition process.

#### *1. Circumstances Surrounding the Mechanism's Creation*

Before focusing on the specific contours of the justice mechanism itself, it is imperative to examine the circumstances surrounding its creation. For even if the mechanism is well constructed and internally coherent, an illegitimate conception could doom a country's chances for a positive deferral-request outcome. The classic example, in this regard, is the establishment of a truth commission with the evident purpose of delegitimizing the previous regime, as opposed to bringing out truth and fostering reconciliation.<sup>307</sup> Although there may not always be smoking-gun evidence of such intent, various statements by government officials or persons involved in establishing the mechanism, along with a review of the circumstances prevailing in the country and the nature of the new regime, could provide sufficient circumstantial evidence of bad faith motives.

Similarly, if a mechanism is set up by the new regime to demonize one or more groups in society as part of a divide-and-conquer power strategy, the mechanism will have no legitimacy for complementarity purposes (or for restorative justice goals, for that matter). Once again, various statements and contextual evidence would have to be amassed by the ICC to make this determination.

#### *2. Judicialization of the Mechanism*

For complementarity purposes, this second criterion—judicialization of the mechanism—is likely the most crucial. In their purest restorative forms, alternative justice mechanisms in transitional societies are not judicialized at all—they tend to be formed on an ad hoc basis and consist of informal processes aiming to bring a

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<sup>307</sup> See Hayner, *Comparative Study*, *supra* note 190, at 612–13, 619, 625.

community together and healing its wounds.<sup>308</sup> On the other hand, “standard” justice mechanisms in postconflict societies, i.e., criminal trials, tend to have detailed rules and are less specifically geared toward fostering social harmony; these mechanisms are more intent on penological coherence and individual criminal responsibility through the phases of investigation, trial, and punishment.<sup>309</sup> On a surface level, this is the ideal complementarity model for domestic efforts under Article 17 of the Rome Statute.<sup>310</sup> But that does not necessarily preclude consideration of alternative mechanisms under Article 17.<sup>311</sup> Perhaps if the mechanisms possess certain minimum indicia of standard judicial process, they too could qualify.

In this regard, four criteria can be consulted to determine the mechanism’s degree of judicialization: (1) the constituent nature of the body, (2) the substantive and procedural law of the body, (3) the sanctioning power of the body, and (4) the body’s linkage with the country’s standard court system.

*a. Constituent Nature of the Body*

*(i) Type of Body*

As a threshold matter, consideration of the type of mechanism is instructive. Of the alternative justice varieties previously considered, some seem inherently more judicialized than others. For example, as noted above, truth commissions often contain many of the hallmarks typically associated with a judicialized mechanism.<sup>312</sup> They carry out investigations, have subpoena powers, conduct hearings, name individuals, offer amnesty, and refer cases for punishment.<sup>313</sup> Similarly, customary local mechanisms, especially the modernized varieties such as *gacaca*, employ relatively elaborate procedures

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<sup>308</sup> See Allison Morris, *Critiquing the Critics: A Brief Response to Critics of Restorative Justice*, 42 BRIT. J. CRIMINOLOGY 596, 599 (2002) (“Generally, restorative justice offers a more informal and private process over which the parties most directly affected by the offence have more control. . . . Thus the procedures followed, those present and the venue are often chosen by the parties themselves.”).

<sup>309</sup> See DRUMBL, *supra* note 77, at 5.

<sup>310</sup> See David Scheffer & Ashley Cox, *The Constitutionality of the Rome Statute of the International Criminal Court*, 98 J. CRIM. L. & CRIMINOLOGY 983, 1066 (2008) (indicating that criminal trials satisfy the ICC’s complementarity admissibility requirement).

<sup>311</sup> See Keller, *supra* note 18, at 259–60.

<sup>312</sup> See *supra* text accompanying notes 190–92.

<sup>313</sup> See generally FREEMAN, *supra* note 192.

resembling trials and can offer a right of appeal.<sup>314</sup> Some are permanently constituted and designed to handle criminal cases. Some can even impose criminal sanctions.

On the other hand, lustration, reparations, and amnesties, although they can be operationalized through administrative bodies that appear quasi-judicial in nature, are often the result of bureaucratic procedures with minimal process. In other instances, they are the end product of the other two mechanisms—truth commissions and CLPs. As a result, it will be rather rare that lustration, reparations, and amnesties, on their own, will be deemed sufficiently judicialized for purposes of Article 17 complementarity. A greater presumption of judicialization can be expected with truth commissions and CLPs.

Although the type of mechanism provides important information, drawing definitive conclusions from it would be a mistake. Each mechanism should be considered individually on a case-by-case basis according to certain criteria, including: (1) a collateral penological function for the body, (2) a permanent versus temporary operation (including the existence of institutional methods for developing the body), and (3) the nature of the proceeding.

(ii) *Collateral Penological Function*

Notwithstanding the primarily restorative nature of the mechanism, the alternative justice mechanism may be characterized as having a collateral penological function rendering it more compatible with Article 17. For example, the traditional version of *shalish* contemplates retributive sanctions to the point of issuing *fatwahas*.<sup>315</sup> Truth commissions can include the following: investigations that resemble classic criminal inquiries, hearings where witnesses are subpoenaed and cross-examined, decisions to withhold amnesties, and referrals to the court system for punishment.<sup>316</sup> Lustrations can be wide ranging in their preclusion effect, to the point of looking like a retributive tribunal.<sup>317</sup> Mechanisms endowed with these penal features and objectives begin to look rather judicialized and are more attractive candidates for Article 18 or 19 deferral requests.

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<sup>314</sup> See *supra* Part III.A (exploring customary local procedures).

<sup>315</sup> See Golub, *supra* note 86.

<sup>316</sup> See generally FREEMAN, *supra* note 192 (exploring the procedural aspects of truth commissions).

<sup>317</sup> See M. Cherif Bassiouni, *Searching for Peace and Achieving Justice: The Need for Accountability*, LAW & CONTEMP. PROBS., Autumn 1996, at 9, 21–22 (describing lustration mechanisms as “punitive in nature”).

*(iii) Permanent v. Short-Term*

Institutions that are set up for only specific periods tend to look less judicialized.<sup>318</sup> This is largely the case for most alternative justice mechanisms. The exception here would be modernized CLPs that have been institutionalized by the national government. Illustrative of this exception would be the updated versions of *shalish* and *Katarungang Pambarangay*.<sup>319</sup> Given their open-ended mandates, these practices take on the appearance of more judicialized mechanisms.

Similarly, if an institution records and keeps records of its proceedings, it has the appearance of a more permanent body with judicial features.<sup>320</sup> This is true of *Katarungang Pambarangay*, which, to a certain extent, creates precedent and allows the mechanism to be tracked and studied.

Related to this, a greater degree of judicialization is indicated by procedures and practices established by the institution to self-assess its performance and make improvements when necessary.<sup>321</sup> Such is the case once again with *Katarungang Pambarangay*, where *Lupong* members meet monthly to evaluate performance and consider reform and a Municipal Monitoring Unit tracks data and provides feedback regarding the program to the government.<sup>322</sup>

*(iv) Nature of the Proceeding*

The nature of the body's proceedings should also factor into the analysis. For one thing, it is helpful to know if the body will rely on "adjudicators" (as opposed to a wide-open meeting style) to preside over the proceeding, maintain order, and render a decision based on the matters brought up during the session. This would distinguish the

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<sup>318</sup> See Randall T. Coyne, Reply to Noah Feldman: *Escaping Victor's Justice by the Use of Truth and Reconciliation Commissions*, 58 OKLA. L. REV. 11, 17 (2005) (indicating the temporary nature of a truth commission and describing it as "nonjudicial").

<sup>319</sup> See *supra* Parts III.A.1, III.A.5.

<sup>320</sup> See Harold J. Berman & Charles J. Reid, Jr., *The Transformation of English Legal Science: From Hale to Blackstone*, 45 EMORY L.J. 437, 444–45 (1996) (describing this phenomenon within the context of the development of English legal history).

<sup>321</sup> See Robert D. Lipscher, *A Tribute to Chief Justice Wilentz*, 49 RUTGERS L. REV. 683, 687 (1997) (expressing Chief Justice Wilentz's view that reform is a hallmark of the state judiciary).

<sup>322</sup> See Suarez, *supra* note 152.

proceeding as more judicial in nature.<sup>323</sup> The modernized CLPs, such as *gacaca* in Rwanda and *kgotla* in Botswana (where the “headman” of the village presides), tend to have this feature.<sup>324</sup> The truth commissions also have it to the extent they conduct investigations, offer amnesties, or refer matters for criminal prosecution.<sup>325</sup> If special administrative or judicial bodies are set up to make decisions regarding lustration, reparations, and amnesty, they may also rely on adjudicators.

Assuming the proceeding does not rely on adjudicators, perhaps it resembles a type of formal mediation or arbitration (as in the Bangladeshi *shalish*). Although less judicial in appearance, these proceedings may involve methods of facilitation and control, including the use of a conciliation panel (as with *Katarungang Pambarangay*), that are hallmarks of judicial procedure.<sup>326</sup>

A further refinement of this feature could be the use of set procedures, as opposed to a free-flowing discussion among the parties. If the proceedings follow a set order or consist of predetermined statements, presentations, and interactions, then the body will more likely resemble a judicial mechanism. This is especially true if members of the public are allowed to witness and participate in the proceedings. This is the case with respect to the modernized version of *nahe biti boot*, which begins with speeches from community and religious leaders and is followed by alleged perpetrators coming forward to speak about their offenses and apologize to the community.<sup>327</sup> At the end of the ceremony, victims and community members verbally agree to accept the perpetrators’ statements.<sup>328</sup>

The tenor of the proceedings is also a factor. If they are loud, unruly, and emotional, such as in traditional *shalish*, then they may be

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<sup>323</sup> See Eric A. Posner, *Does Political Bias in the Judiciary Matter?: Implications of Judicial Bias Studies for Legal and Constitutional Reform*, 75 U. CHI. L. REV. 853, 857 (2008) (observing, when discussing the relationship between the judicial branch and the electorate, that the judiciary consists of “judges”).

<sup>324</sup> See NAT’L DEMOCRATIC INST. FOR INT’L AFFAIRS, *supra* note 141, at 94–95; see also Waldorf, *supra* note 16, at 48.

<sup>325</sup> See Bassiouni, *supra* note 317, at 21 (describing certain tribunals with investigatory functions as “hybrid” in nature).

<sup>326</sup> See Robert A. Creo, *Mediation 2004: The Art and the Artist*, 108 PENN ST. L. REV. 1017, 1034 (2004) (referring to forms of “mediation resembling judicial settlement models based in an adversary [model]”).

<sup>327</sup> See *Security Man*, *supra* note 127.

<sup>328</sup> *Id.*

considered of a lesser judicial nature. Proceedings that are marked more by solemnity and maintain a sense of decorum and order, such as many truth commission formats, take on much more of a judicial character. Similarly, the length of the proceedings should be considered. Although there are no hard and fast rules here, the more summary and less considered the body's proceeding, the less the body itself appears judicial in essence.

*b. Substantive and Procedural Law*

The extent of the mechanism's reliance on law is another indicium of judicialization. Bodies appear more judicially inclined if they are governed by law or by a set of laws. Such laws could formulate the elements of offenses or civil wrongs. As noted above, the more criminal in nature, the more the laws would seem to be compatible with Article 17 of the Rome Statute.<sup>329</sup>

Such laws could also enshrine the procedural characteristics of the mechanism. In this regard, the level of due process afforded is significant. May the parties be represented at the proceeding—as is the case in *shalish* (where the “accused are represented by two members of the *parishad* and two members from the village”)?<sup>330</sup> Is there a right to appeal to a higher traditional court (as in *gacaca*),<sup>331</sup> or, ultimately, to the national courts (as in Botswana's *kgotla* system)?<sup>332</sup> Certain types of lustration have also provided for the right to appeal.

Truth commissions can contain certain due process safeguards as well. For instance, the South African TRC was obligated to provide persons “‘proper, reasonable and time[ly] notice’ of hearings if evidence detrimentally implicating them [was] to be heard.”<sup>333</sup> Similarly, the statute of the 1986 Uganda Truth Commission contained a provision stating that “‘any one who in the opinion of the Commissioners is adversely affected by the evidence given before the

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<sup>329</sup> See *supra* notes 308–11 and accompanying text.

<sup>330</sup> Zafarullah & Rahman, *supra* note 92, at 1030 n.45.

<sup>331</sup> Bolocan, *supra* note 122, at 398.

<sup>332</sup> Connolly, *supra* note 79, at 282.

<sup>333</sup> Michael P. Scharf, *The Case for a Permanent International Truth Commission*, 7 DUKE J. COMP. & INT'L L. 375, 386 (1997) (first alteration in original) (quoting the South African Supreme Court). This rule emerged from a decision by the South African Supreme Court that was later overruled. *Id.* at 386 n.56. Nevertheless, the South African TRC decided to adopt the recommended procedure. *Id.*

Commission shall be given an opportunity to be heard and to cross-examine the person giving such evidence.”<sup>334</sup>

A further sign of judicial character is the law’s format. Written, as opposed to strictly oral, law further betokens a judicial quality.<sup>335</sup> As indicated previously, modernized versions of CLPs, such as *gacaca*, are often established through written laws.<sup>336</sup> The same is true of the other forms of alternative justice. Moreover, laws more consistent with, or seemingly derivative of, national codes are arguably further proof of a mechanism’s judicial essence.

*c. Sanctioning Power*

While alternative justice mechanisms almost always eschew incarceration, they nonetheless avail themselves of other penal or quasi-penal sanctions. As Mark Drumbl points out, CLPs themselves are established on the premise of fostering community reconciliation through “reintegrative shaming.”<sup>337</sup> According to Australian criminologist John Braithwaite: “Reintegrative shaming means that expressions of community disapproval, which may range from mild rebuke to degradation ceremonies, are followed by gestures of reacceptance into the community of law-abiding citizens.”<sup>338</sup>

Such nonincarcerative sanctions may also include community service, civic exclusion (such as barring someone from voting, running for office, or both), withholding of amnesty, and restitution or reparations. Clearly, any alternative mechanism shorn of such sanctioning power is much less likely to pass muster as an alternative to ICC justice under Article 17 of the Rome Statute, which arguably

<sup>334</sup> *Id.* at 386 (quoting The Commissions of Inquiry Act (Uganda), Legal Notice No. 5 (May 16, 1986)).

<sup>335</sup> See Donna Litman, *Jewish Law: Deciphering the Code by Global Process and Analogy*, 82 U. DET. MERCY L. REV. 563, 574 (2005) (“The written law contains the commandments regarding the *judicial system* with the appointment of judges for the people as well as a provision for resolution of those matters that cannot be resolved by these judges.” (emphasis added)).

<sup>336</sup> See *supra* note 113 and accompanying text.

<sup>337</sup> See Mark A. Drumbl, *Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda*, 75 N.Y.U. L. REV. 1221, 1264–67 (2000) (explaining how restorative justice mechanisms, such as *gacaca*, affect reintegrative shaming and are valuable counterpoints to criminal trials for lower-level perpetrators in mass atrocity situations).

<sup>338</sup> JOHN BRAITHWAITE, *CRIME, SHAME AND REINTEGRATION* 55 (1989). Drumbl posits that “[s]haming sanctions without reintegration may create exclusionary humiliation and an absence of remorse.” Drumbl, *supra* note 337, at 1258 n.167. He concludes that, in fragile post-atrocity societies such as Rwanda, “this may simply prolong ethnic hatred.” *Id.*

contemplates some form of sanctioning consistent with the general penal nature of the ICC and its core purpose of ending impunity.<sup>339</sup>

*d. Linkage with the National Justice System*

Although alternative justice mechanisms can often operate separately from the national systems of which they are a part, the mechanisms are often linked to them. It is submitted that such linkage, which is evidence of a connection with domestic courts, should be another indicium of judicialization. Linkage can occur in three separate ways: (1) the alternative mechanism uses national enforcement powers, (2) the national system depends on the alternative mechanism for exhaustion requirements and serves as an ultimate appeal body for the alternative mechanism, or (3) the alternative mechanism is adopted by and integrated into the national legal system.

*(i) Use of National Enforcement Powers*

The alternative mechanism may have to rely on the domestic courts for realizing various enforcement objectives, such as making good on subpoenas (often used by truth commissions) or issuing and executing warrants (as in Botswana's *kgotla*).<sup>340</sup> This represents the lowest degree of institutional linkage.

*(ii) Exhaustion Prerequisite*

Some states mandate use of traditional mechanisms as part of an exhaustion of remedies requirement. For example, in *Katarungang Pambarangay*, "submission of a dispute to the conciliation panel is a prerequisite to filing" a case in a Filipino state court.<sup>341</sup> This is yet another way that alternative mechanisms can be integrated into the state judicial system.

*(iii) Adoption by and Incorporation into the National Legal System*

A state's adopting the alternative justice mechanism and incorporating it into its national legal system evinces the highest

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<sup>339</sup> See Phakiso Mochochoko, *The Agreement on Privileges and Immunities of the International Criminal Court*, 25 FORDHAM INT'L L.J. 638, 640 (2002) ("It is also worth mentioning that like the two *ad hoc* Tribunals before it, one of the purposes of the ICC is to put an end to impunity by punishing those responsible for the most serious crimes.").

<sup>340</sup> See Connolly, *supra* note 79, at 282–83.

<sup>341</sup> *Id.* at 266.

degree of institutional linkage. Modernized and modified alternative mechanisms are often creatures of the state legislation process. Such bodies tend to model a relatively high degree of judicialization given their integration into the domestic infrastructure. The Rwandan state version of *gacaca* is a prime example: (1) it was established by statute and relies on written law, (2) it is a standing body that employs permanent official administrators and judges that are state employees, (3) it is systematically organized and integrated into administrative divisions of local government, (4) it imposes prison sentences on those found guilty, and (5) it provides a right to appeal.<sup>342</sup> Similarly, although not to the same degree, remedies prescribed through *Katarungang Pambarangay* are enforceable through state courts in the Philippines.<sup>343</sup>

Truth commissions are also typically created by states<sup>344</sup> and enjoy significant institutional linkage with the state's judicial apparatus.<sup>345</sup> Lustration tribunals, particularly in their power to investigate and provide the right of appeal, may also be grafted on to the national judicial framework.

### 3. *Holistic Effect on the Transition Process*

Regardless of its origins and judicial characteristics, the Article 17 complementarity analysis should also include an assessment of the mechanism's likely effect on the country's global transition process. In other words, even if the mechanism can meet the other criteria just considered, it must be scrutinized for the most important consideration: its capacity to bring short- and long-term peace and domestic stability to the region for which it is proposed.<sup>346</sup> To make

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<sup>342</sup> See *supra* note 124 and accompanying text.

<sup>343</sup> See Connolly, *supra* note 79, at 266.

<sup>344</sup> See Tom Syring, *Truth Versus Justice: A Tale of Two Cities?*, 12 INT'L LEGAL THEORY 143, 158 (2006) (referring to truth commissions as generally being state organs). Of course, as opposed to other state-linked institutions, truth commissions are ad hoc in nature. *Id.*

<sup>345</sup> See Makau Mutua, *Republic of Kenya: Report of the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission*, 10 Buff. Hum. Rts. L. Rev. 15, 44–45 (2004) (describing truth commissions as “quasi-judicial” and generally detailing institutional connections between truth commissions and states, including judicial sanctions and establishment of victim compensation funds).

<sup>346</sup> See Jonathan Todres, *Toward Healing and Restoration for All: Reframing Medical Malpractice Reform*, 39 CONN. L. REV. 667, 713 (2006) (“[R]estorative justice focuses on ‘reestablishing the integrated community, rather than exacting retribution for crimes,’ and ‘promoting reconciliation and peace between and among the affected parties is more

this determination, it would be useful to evaluate the scope of the targets contemplated by the mechanism, as well as the potential pitfalls and the likelihood of alienating or excluding important groups in the postconflict society.

First, it would behoove the ICC to consider the scope of targets contemplated by the mechanism. Even if the mechanism is appropriate for bringing to justice those in leadership positions (referred to by Mark Drumbl as “conflict entrepreneurs”<sup>347</sup>), that may not be sufficient for the collective healing purposes of transitional justice in cases of all-pervasive violence. Drumbl writes about “complicity cascades” in mass atrocity—the way culpability can envelop an entire society to its lowest echelons.<sup>348</sup> As a result, in such contexts, restorative justice may call for collective sanction:

The threat of collective sanctions may activate group members to marginalize the conduct of conflict entrepreneurs or, in the best-case scenario, snuff it out. . . .

. . . Citizens should be put on notice that they cannot stand by while hatemongering becomes normalized . . . .

. . . Any structure that incentivizes the masses to root out the conflict entrepreneur before that individual can indoctrinate and brainwash will diminish the depth of perpetrator moral disengagement that is a condition precedent to mass atrocity. Such a structure thereby inhibits early on, when inhibition still remains possible . . . .<sup>349</sup>

In such cases of genocide and crimes against humanity, an effective holistic approach for the alternative justice mechanism would contemplate handling the full spectrum of the culpable, right down to the foot soldiers and bystanders.<sup>350</sup>

Similarly, to satisfy this holistic criterion, the justice mechanism should permit participation from all sectors of society—rich and poor, young and old, male and female. Consistent with this, it should not

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important than vengeance.” (footnotes omitted) (quoting RUTH ANN STRICKLAND, *RESTORATIVE JUSTICE* 19–20 (2004)).

<sup>347</sup> DRUMBL, *supra* note 77, at 202.

<sup>348</sup> *See id.*

<sup>349</sup> *Id.* at 202–03.

<sup>350</sup> Although the ICC targets those most responsible for international crimes, this Article takes the position that the Court should nevertheless consider the overall effectiveness of the proposed alternative mechanism. This may very well entail assessing the mechanism’s capacity to affect the ICC’s overarching goal—“to guarantee lasting respect for and the enforcement of international justice.” Rome Statute, *supra* note 15, pmb.

resonate with only certain ethnic or religious groups in a society and not with others.<sup>351</sup> Certain CLPs, for example, originate in specific cultures that may not be appreciated or understood by other cultures within the same country. This carries the risk of exerting a negative influence on the transition process.

In this regard, to the extent possible, the mechanism ought to take into account the interests and desires of the atrocity victims. The ICC gives atrocity victims “a much more significant role than has any previous international criminal institution.”<sup>352</sup> According to the Rome Statute, the Court must “permit [victims’] views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court.”<sup>353</sup> In fact, the ICC must consider victims’ interests in making a plethora of decisions, including whether to initiate an investigation into particular allegations<sup>354</sup> and whether to bring charges.<sup>355</sup> The complementarity analysis in this area should also take into account victims’ wishes with respect to whether a local alternative justice mechanism should be employed.

Finally, the mechanism should be free of other institutional pitfalls. For example, it should not be subject to corruption or incompetent administration. And it should be able to fill its positions with capable personnel, especially mediators, adjudicators, and administrators. All of these factors should be taken into account in conducting the complementarity analysis. The more they are present, the more deference will be given to the alternative mechanism.

#### *D. The Crimes at Issue*

In conducting the complementarity analysis, two aspects regarding the crimes themselves bear scrutiny: (1) the relationship between the crimes charged by the ICC and the crimes contemplated by the alternative justice mechanism and (2) the gravity of the crimes.

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<sup>351</sup> See Penelope Harley, *The Globalization of ADR: Feeling the Way Forward? (Ruminations of a “Female, Peace-Making Interested, Restorative Justice Oriented Flake!”)*, 27 *HAMLIN J. PUB. L. & POL’Y* 283, 291 (2006) (“Restorative justice practices seek to ensure fair and equal participation of all parties, particularly those more traditionally marginalized in society.”).

<sup>352</sup> Gordon, *supra* note 49, at 696.

<sup>353</sup> Rome Statute, *supra* note 15, art. 68(3).

<sup>354</sup> *Id.* art. 53(1)(c).

<sup>355</sup> *Id.* art. 53(2)(c).

### 1. *Parallel Crimes?*

As a threshold matter, complementarity entails parallel charging at the domestic level.<sup>356</sup> The ICC Pre-Trial Chamber has held that, in the case of a concurrent national proceeding, an ICC inadmissibility finding under the complementarity principle requires that the domestic action “encompass both the person *and the conduct* which is the subject of the case before the Court.”<sup>357</sup> In the case of DR Congo rebel leader Thomas Lubanga Dyilo, the Pre-Trial Chamber noted that the DR Congo’s prosecution of the defendant for atrocity crimes did not encompass conscripting child soldiers—the basis of the ICC charges.<sup>358</sup> As a result, the case was found to be admissible.<sup>359</sup>

Other cases may not be so simple. For example, if the domestic jurisdiction focuses on the same *conduct*—such as killing—but charges it as murder, then is the case admissible because the ICC wishes to charge it as a war crime? In the context of *ne bis in idem*, Professor Schabas has found that “murder is a very serious crime in all justice systems and is generally sanctioned by the most severe penalties.”<sup>360</sup> On the other hand,

for a crime under ordinary criminal law such as murder, rather than for the truly international offences of genocide, crimes against humanity and war crimes[,] [i]t will be argued that trial for an underlying offence tends to trivialise the crime and contribute to revisionism or negationism. Many who violate human rights may be willing to accept the fact that they have committed murder or assault, but will refuse to admit the more grievous crimes of genocide or crimes against humanity.<sup>361</sup>

### 2. *Gravity*

Under Article 17, gravity is an admissibility requirement in its own right—the relative gravity of crimes may be one factor that enters into

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<sup>356</sup> See Totten & Tyler, *supra* note 197, at 1097 (“The national proceedings not only must be charging the same person as the ICC, but also must be pursuing the same charges against that person involving the same criminal conduct.”).

<sup>357</sup> Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-8, Decision on the Prosecutor’s Application for a Warrant of Arrest, ¶ 38–39 (Feb. 10, 2006) (emphasis added).

<sup>358</sup> *Id.*

<sup>359</sup> *Id.*

<sup>360</sup> WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 88 (2d ed. 2004).

<sup>361</sup> *Id.*

the ICC Prosecutor's decision to initiate a case.<sup>362</sup> But it should be a factor in the alternative justice complementarity calculus as well. In general, as a rule of thumb, the more serious the crimes at issue, the more likely the ICC should find the case admissible when a domestic jurisdiction seeks to use an alternative justice mechanism.

*a. Crimes Charged*

Gravity analysis in the complementarity context should be multidimensional. To begin with, it must contemplate the consideration of the crime charged by the ICC. For example, of the offenses listed in Articles 6 through 8 of the Rome Statute, genocide and crimes against humanity are arguably more heinous than war crimes.<sup>363</sup> This is reflected in the jurisprudence of the International Criminal Tribunal for Rwanda, which has frequently referred to genocide as the "crime of crimes"<sup>364</sup> and stated that war crimes "are considered as lesser crimes than genocide or crimes against humanity."<sup>365</sup>

And the Rome Statute itself implies this. For example, states may accept the ICC treaty as a whole but still opt out of the Court's subject matter jurisdiction over war crimes for seven years.<sup>366</sup> Moreover, the defense of superior orders and defense of property are available with respect to war crimes but not genocide and crimes against humanity.<sup>367</sup> Allison Marston Danner offers a compelling explanation for the difference in the gravity calculus:

[W]ar crimes may often be committed by soldiers acting on their own rather than according to a larger policy.

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<sup>362</sup> Rome Statute, *supra* note 15, art. 17(1)(d). Article 17(1)(d) provides that a case is inadmissible where it is "not of sufficient gravity to justify further action by the Court." *Id.*

<sup>363</sup> See, e.g., Allison Marston Danner, *Constructing a Hierarchy of Crimes in International Criminal Law Sentencing*, 87 VA. L. REV. 415, 462–67 (2001) (ranking genocide as the most serious offense, followed by crimes against humanity and then war crimes, based on their respective chapeaux).

<sup>364</sup> See, e.g., Prosecutor v. Musema, Case No. ICTR-96-13-T, Judgment, ¶ 981 (Trial Chamber, Jan. 27, 2000).

<sup>365</sup> Prosecutor v. Kambanda, Case No. ICTR 97-23-S, Judgment and Sentence, ¶ 14 (Trial Chamber, Sept. 4, 1998). The ICTY, on the other hand, has not embraced the distinction. See, e.g., Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment in Sentencing Appeals, ¶ 69 (Jan. 26, 2000) ("[T]here is in law no distinction between the seriousness of a crime against humanity and that of a war crime.").

<sup>366</sup> Rome Statute, *supra* note 15, art. 124.

<sup>367</sup> *Id.* art. 33(1)(c), (2).

Therefore, the chapeaux of . . . war crimes . . . require neither an illegal collective action nor an act targeted at someone because of his affiliation with a group. Unlike bias crime statutes, the chapeau of war crimes has no particular mens rea. Because its chapeau contains no additional indicia of harmful conduct, war crimes constitutes the least harmful category of crimes within the Tribunals' jurisdiction.<sup>368</sup>

As a result, the ICC should treat complementarity deferral requests in cases of war crimes with greater deference than if genocide or crimes against humanity were charged.

By the same token, certain war crimes might be considered less grave than others. For example, if the sole charge against the defendant is recruitment of child soldiers (which is nevertheless a terrible crime), then the Court should lean more toward a finding of inadmissibility versus charges involving the murder of civilians (an even more terrible crime).<sup>369</sup>

With respect to crimes against humanity, there may also be gradations of gravity. Extermination (Article 7(1)(b)), which entails destroying "part of a population," is surely more severe than unlawful imprisonment (Article 7(1)(e)) or deportation (Article 7(1)(d)).<sup>370</sup> Such differences should be factored into the admissibility test.

#### *b. Additional Criteria*

The criminal charge itself, though, cannot be the sole measure of gravity. In this regard, although considered in a different context, criteria used to interpret the Article 17(1)(d) gravity threshold by the ICC Prosecutor and the Pre-Trial Chambers are instructive. For example, statements by the Prosecutor have revealed the following germane criteria in conducting a gravity analysis:

[(1)] the number of persons killed; [(2)] the number of victims, particularly in the case of crimes against "physical integrity," such as willful killing or rape; . . . [(3)] the scale of the crimes; [(4)] the

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<sup>368</sup> Danner, *supra* note 363, at 472–73 (footnotes omitted).

<sup>369</sup> See Schabas, *supra* note 265, at 741–42 (suggesting that recruitment of child soldiers is a less grave offense than charges involving homicide).

<sup>370</sup> Rome Statute, *supra* note 15, art. 7(1)(b), (1)(e) & (2)(b) (stating that "[e]xtermination" includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population"); see also Mirko Bagaric & John Morss, *In Search of Coherent Jurisprudence for International Criminal Law: Correlating Universal Human Responsibilities with Universal Human Rights*, 29 SUFFOLK TRANSNAT'L L. REV. 157, 203 (2006) (observing that deportation or forced transfer of population are "arguably less serious forms of crimes against humanity").

systematicity of the crimes; [(5)] the nature of the crimes; [(6)] the manner in which those crimes were committed; and [(7)] the impact of the crimes.<sup>371</sup>

Moreover, in the *Prosecutor v. Lubanga* matter, Pre-Trial Chamber I (PTC-I) found that “in assessing the gravity of the relevant conduct, due consideration must be given to the *social alarm* such conduct may have caused in the international community.”<sup>372</sup> Applying this criterion, PTC-I found the conduct alleged by the Prosecutor against the defendant—including the enlistment, conscription, and use of hundreds of children under the age of fifteen in hostilities—caused “social alarm” to the international community based on the extent of the relevant policy and practice.<sup>373</sup>

Although they have not been fleshed out given the paucity of ICC jurisprudence, these criteria provide a good basis for evaluating gravity in the complementarity context. Still, a couple of additional points of clarification should be added. With respect to the scale of the crimes, it is helpful to inquire whether the entire geographic area of a country is involved or only a certain region. Geographically circumscribed offenses should be considered less grave. By the same token, it is instructive to inquire about the percentage of the population involved as perpetrators and victims in the country. A smaller percentage, indicating more narrow demographics, tilts the complementarity balance in favor of inadmissibility.

On the other hand, mere numbers are not, of themselves, a sufficient gauge. It is useful as well to examine characteristics of the victim population. If particularly vulnerable segments of the population have been targeted, such as children or the handicapped,

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<sup>371</sup> Susana SáCouto & Katherine Cleary, *The Gravity Threshold of the International Criminal Court*, 23 AM. U. INT'L L. REV. 807, 824–25 (2008).

<sup>372</sup> *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06-8, Decision on the Prosecutor's Application for a Warrant of Arrest, ¶ 46 (Feb. 10, 2006) (emphasis added). PTC-I also noted that the relative senior leadership role of the defendant must be taken into account with respect to assessing gravity. *Id.* ¶ 50. Consideration of the defendant will be the final category of our alternative justice complementarity analysis. *See infra* Part IV.E.

<sup>373</sup> *Id.* ¶ 46.

that should factor in prominently.<sup>374</sup> So should the impact on the victims.<sup>375</sup>

Finally, the “social alarm” criterion distilled by PTC-I in the *Lubanga* case could be expanded.<sup>376</sup> The Pre-Trial Chamber identified “social alarm” in the *international* community caused by the alleged conduct.<sup>377</sup> This criterion should also consider the impact on the *domestic* jurisdiction.<sup>378</sup> Overall, as with the other categories, the gravity analysis should be sufficiently flexible to allow the Court to consider the totality of circumstances and make reasoned decisions based on the particular facts in each case.

### *E. The Defendants*

The final category in the complementarity admissibility test for alternative justice mechanisms should focus on the defendant himself. Within this rubric, three factors ought to be considered: (1) the fairness of the ICC in target selection, (2) the leadership position of the target, and (3) the target’s potential role in the postconflict society.

#### *1. Target Selection*

To begin, it is worthwhile to step back and consider the ICC’s target-selection process. Does the defendant at issue bear a significant measure of responsibility for the crimes charged? Are there other defendants who are equally, if not more, responsible but were not charged? In cases of self-referral, one can imagine, for example, the leader of a small rebel group indicted for child recruitment activities, even though the government forces they were fighting had committed mass atrocities but were not even the subject

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<sup>374</sup> See, e.g., Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment, ¶ 702 (Trial Chamber, Aug. 2, 2001) (“[T]he Trial Chamber agrees with the Prosecutor that the number of victims and their suffering are relevant factors in determining the sentence and that the mistreatment of women or children is especially significant in the present case.” (footnotes omitted)).

<sup>375</sup> See, e.g., Prosecutor v. Krnojelac, Case No. IT-97-25-T, Judgment, ¶ 512 (Trial Chamber, Mar. 15, 2002) (holding that “the extent of the long-term physical, psychological and emotional suffering of the immediate victims is relevant to the gravity of the offences” (footnotes omitted)).

<sup>376</sup> See *Lubanga*, Case No. ICC-01/04-01/06-8, ¶ 46.

<sup>377</sup> *Id.*

<sup>378</sup> See SáCouto & Cleary, *supra* note 371, at 812 (“[T]he impact on the community or nation . . . seems a more meaningful standard, particularly in [light] of the Rome Statute’s broader goals of ending impunity and promoting deterrence.”).

of an investigation. If the evidence marshaled in support of a deferral reveals the defendant bears a disproportionately small share of culpability for the commission of crimes in a situation, then this should militate in favor of an inadmissibility finding.

On the other hand, practical considerations should also inform target selection. If the target is still a fugitive, for example, the chances of apprehension should be taken into account. Moreover, even if the target is in custody, the complementarity calculus should be informed by the ICC Prosecutor's ability to collect evidence and properly develop the case. If logistical issues such as apprehension and evidence collection appear problematic, this should be added to the inadmissibility side of the complementarity ledger.

## 2. *Leadership Position*

In the context of the gravity threshold, the ICC has noted that it is mandated to pursue cases only against "the most senior leaders" in any situation under investigation.<sup>379</sup> This criterion ought to enter into the complementarity analysis as well. In other words, in line with the ICC's overall mandate, complementarity deferral requests involving less senior targets should be given greater deference. The leadership position of the target can be determined with reference to three factors: (1) the official rank of the person in an organization or government (*de jure* status), (2) the role actually played by that person (*de facto* status), and (3) the role played in the commission of the crimes at issue by the organization or government to which the person belonged.<sup>380</sup>

With reference to the third of these factors, it is useful to consider the type of entity. If the entity is a relatively small group, such as a rebel faction fighting in a discrete territory within the country, this should result in heightened deference to the assertion of domestic jurisdiction via the alternative justice mechanism. On the other hand, a showing that the defendant belonged to a government committing mass atrocities against the wider population throughout the country should result in less deference for the referral request.

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<sup>379</sup> See *Lubanga*, Case No. ICC-01/04-01/06-8, ¶ 50.

<sup>380</sup> See *id.* ¶¶ 51–52 (providing criteria to determine leadership position within the gravity threshold context).

### 3. *Potential for Postjustice Reintegration*

The third factor that enters into the equation here is the defendant's potential for reintegration after facing justice.<sup>381</sup> Assuming no life sentence is handed down, the highest-ranking leaders convicted of the worst atrocities would manage only to wreak havoc on their homelands if they were reintroduced into the institutional mix after release from prison.<sup>382</sup> In the case of conducting complementarity analysis for such defendants, assertion of ICC jurisdiction should be the result.

On the other hand, those perpetrators who played lesser roles and will have something to offer society postjustice will likely be the object of reintegration efforts.<sup>383</sup> In that case, the ICC should lean toward an inadmissibility finding. Obviously here, as elsewhere, this is only a guide as certain grey-zone cases may require difficult line drawing.

#### *F. The Analytic Criteria in Broader Perspective*

It is important to situate the analytic criteria within the specific conceptual parameters for complementarity established in Article 17 of the Rome Statute. As previously discussed, Article 17 generally provides for ICC admissibility in cases of volitional or capacity deficits in domestic justice efforts.<sup>384</sup> And it bears noting that various components of each analytic criterion proposed here generally fit into one or both of these admissibility rubrics.

The circumstances surrounding the ICC referral and request for deferral call into question the municipal jurisdiction's genuine desire to achieve justice. The state of affairs in the domestic jurisdiction seeking deferral implicates both volition and capacity, as does the alternative justice mechanism itself.

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<sup>381</sup> See Annie Cossins, *Restorative Justice and Child Sex Offences*, 48 BRIT. J. CRIMINOLOGY 359, 360 (2008) ("The aims of restorative justice in reintegrating offenders into their communities, repairing the harm suffered by victims and restoring the relationship between victim and offender are well documented.").

<sup>382</sup> See Mark A. Drumbl, *Pluralizing International Criminal Justice*, 103 MICH. L. REV. 1295, 1310–11 (2005) (reviewing FROM NUREMBERG TO THE HAGUE: THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE (Philippe Sands ed., 2003)) (suggesting that reintegration of offenders can be problematic in mass atrocity situations); Drumbl, *supra* note 337, at 1235 (noting that genocide leaders and "notorious murderers" should be tried and punished but lesser offenders should ultimately be reintegrated into society).

<sup>383</sup> See Drumbl, *supra* note 337, at 1235.

<sup>384</sup> See *supra* Part II.C.2.

Analysis of the crimes at issue and the prosecution target is somewhat more complex. Although these criteria somewhat entail issues of capacity and volition, such as the target's fugitive status<sup>385</sup> or the seriousness of the crimes charged on the domestic level, certain other important policy considerations, which are central to the ICC's core mission, also come into play. For example, the gravity of the crimes at issue is of a piece with the ICC's constitutional imperative of taking on only "the most serious crimes of concern to the international community as a whole."<sup>386</sup> Similarly, since the ICC is interested primarily in prosecuting the "big fish,"<sup>387</sup> the leadership position of the target is valuable in conducting the complementarity analysis. So is the potential for the target's reintegration, which is in line with the ICC's goals for restorative justice—especially as demonstrated by its concern with the future welfare of victims.<sup>388</sup>

At the same time, it should also be pointed out that the proposed analytic criteria do not limit the complementarity consideration to a superficial examination of the domestic jurisdiction itself. Instead, they oblige the Court to hold a mirror up to itself and review its own impact on the process. Certainly, this is the case with respect to target selection, which forces the Court to analyze its own role in potentially aiding a government that seeks to deflect blame for its atrocities by using The Hague as a leverage mechanism against rebel groups. Similarly, in cases of self-referral, consideration of the "circumstances surrounding referral" criterion should alert the ICC to possible entanglement in internecine squabbles where the Rome Statute is used to strengthen one party at the expense of the other.

Overall, then, the analytic criteria set forth in this Article enrich the complementarity test by both including the wider policy implications of the Rome Statute and considering the important role played by the ICC itself in the delicate balance between respecting state

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<sup>385</sup> See Edoardo Greppi, *Inability to Investigate and Prosecute Under Article 17*, in NATIONAL JURISDICTIONS, *supra* note 274, at 63, 64–65 (noting that one measure of inability is when "the State is unable to obtain the accused[']" (quoting Rome Statute, *supra* note 15, art. 17(3))).

<sup>386</sup> Rome Statute, *supra* note 15, pmb1.

<sup>387</sup> See W. Chadwick Austin & Antony Barone Kolenc, *Who's Afraid of the Big Bad Wolf? The International Criminal Court as a Weapon of Asymmetric Warfare*, 39 VAND. J. TRANSNAT'L L. 291, 341 (2006) (noting the ICC's interest in high-level perpetrators).

<sup>388</sup> See Mary Will, Comment, *A Balancing Act: The Introduction of Restorative Justice in the International Criminal Court's Case of The Prosecutor v. Thomas Lubanga Dyilo*, 17 J. TRANSNAT'L L. & POL'Y 85, 113–15 (discussing the ICC's restorative justice aims in the context of victim participation and restitution).

sovereignty, ensuring justice for massive human rights violations, and promoting the prospects for peace and reconciliation both within the municipal jurisdiction and across the globe.

## V

### APPLYING THE ANALYTIC CRITERIA TO THE LRA-UGANDA CASE

What does all this mean for the ICC-indicted LRA leaders? If Uganda requests Article 19 deferral on the grounds that Joseph Kony and his henchmen will be brought to justice at home through the use of *mato oput* and a truth commission, can the ICC find that Uganda is either “unwilling or unable genuinely” to prosecute?<sup>389</sup> Resolution of this issue is an excellent vehicle for applying the newly formulated test.

#### A. *Circumstances Surrounding the Ugandan Referral and Request for Deferral*

With reference to the circumstances surrounding the referral and deferral request, the analysis is mixed. On one hand, as the case represents a self-generated referral, its legitimacy as an ICC case is inherently suspect—it has the appearance of Uganda merely using the Court as a leverage mechanism in a civil war, as opposed to a legitimate justice tool. This perception is heightened by the fact that it has been over six years since the case was referred to The Hague in the first place.<sup>390</sup> Thus, a significant period has lapsed. On the other hand, not much has happened in the ICC case since indictment—the case has essentially stagnated.<sup>391</sup> It is not as if a deferral request is pending on the eve of trial.

Overall, however, the surrounding circumstances militate in favor of denying any potential deferral request. The ICC should not allow a self-referring government to treat the Court as a conflict-strategy on-off switch.<sup>392</sup> It is, instead, a justice mechanism. Once it is turned on, it should not be turned off until justice is done. Thus, if the Ugandan government wishes to kill the proceedings because ICC

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<sup>389</sup> See Rome Statute, *supra* note 15, art. 17(1).

<sup>390</sup> See Press Release, Int’l Criminal Court, President of Uganda Refers Situation Concerning the Lord’s Resistance Army (LRA) to the ICC (Jan. 29, 2004).

<sup>391</sup> Coal. for the Int’l Criminal Court, *ICC Case Updates*, Feb. 15, 2008, [http://www.ucmk.org.tr/english/index.php?option=com\\_content&task=view&id=54&Itemid=59](http://www.ucmk.org.tr/english/index.php?option=com_content&task=view&id=54&Itemid=59).

<sup>392</sup> See *Discussion*, *supra* note 276, at 765.

prosecutions have suddenly become inconvenient for the LRA negotiations, then that should weigh against the request for deferral.

*B. State of Affairs in Uganda*

With respect to legitimacy, Uganda's "postconflict" situation fits the second paradigm described in Part IV.B.1—justice efforts undertaken by an established regime that has been in power during the abuses at issue.<sup>393</sup> And, more specifically, the government is fighting against rebels accused of committing gross human rights violations.<sup>394</sup> Although this model generally appears to give less assurance of the rule of law in the domestic jurisdiction, the series of legitimacy criteria laid out above should be consulted.<sup>395</sup>

The Museveni regime has been in power for nearly a quarter of a century and in recent years has been accused of flawed elections and human rights abuses both at home and in the neighboring Democratic Republic of the Congo.<sup>396</sup> According to the BBC:

DR Congo . . . brought a case to the International Criminal Court in The Hague accusing Uganda of committing human rights violations and massacring Congolese civilians during its time there.

During this period there were increasing complaints that Mr [sic] Museveni was growing more hard-line and relying increasingly on a kitchen cabinet of hard-line supporters.

His 2001 presidential election victory was marred by an increase in state-sponsored violence—and Dr [sic] Besigye, again his main rival, fled the country claiming his life was in danger.<sup>397</sup>

In fact, Museveni's election victories in 2001 and 2006 have been found by the Ugandan Supreme Court to be tainted by vote-rigging.<sup>398</sup> More importantly, there have been atrocity allegations lodged against the Ugandan government in connection with its war

<sup>393</sup> See *supra* Part IV.B.1 (examining the paradigms of legitimacy).

<sup>394</sup> See source cited *supra* note 289 and accompanying text.

<sup>395</sup> See sources cited *supra* notes 298–99 and accompanying text.

<sup>396</sup> *Profile: Uganda's Yoweri Museveni*, BBC NEWS, Feb. 25, 2006, <http://news.bbc.co.uk/2/hi/africa/4124584.stm>.

<sup>397</sup> *Id.*

<sup>398</sup> See P. Matsiko wa Mucoori & Ongwens Kisangala, *NRM vs UPC: Who Beats the Other in Vote Rigging?*, INDEPENDENT, Feb. 3, 2009, <http://www.independent.co.ug/index.php/news/news-analysis/79-news-analysis/564-nrm-vs-upc-who-beats-the-other-in-vote-rigging>.

against the LRA.<sup>399</sup> According to Human Rights Watch, “[v]iolations committed by the [Ugandan People’s Defense Forces] include extrajudicial killings, rape and sexual assault, forcible displacement of over one million civilians, and the recruitment of children under the age of 15 into government militias.”<sup>400</sup>

Although Uganda appears to have a relatively stable governmental and economic infrastructure, along with a fairly developed degree of both civil society and educational and media institutions,<sup>401</sup> its seemingly poor human rights record and apparent flouting of democratic principles would strip the government of legitimacy in terms of complementarity analysis. This is especially true in light of its alleged atrocities in connection with the LRA conflict, which both provides a direct nexus with the case at issue and should most directly affect admissibility considerations under Article 17 of the Rome Statute.

Finally, it is worth noting that the conflict in Uganda with the LRA is technically not at an end. Although it is relatively localized, Uganda is still involved in military operations to stop the LRA. This factor certainly affects any “stability” analysis when evaluating the proposed complementarity criteria.<sup>402</sup>

### C. The Alternative Justice Mechanisms

The two primary alternative justice mechanisms contemplated for bringing the LRA leaders to justice have been *mato oput* and a truth commission.<sup>403</sup> Although the circumstances behind any potential creation of such bodies do not suggest the Ugandan government seeks to establish them to deflect its own guilt or besmirch a previous regime, the circumstances do reveal that Museveni was probably using the ICC as little more than a leverage mechanism in its dealings

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<sup>399</sup> Hum. Rts. Watch, ICC: Investigate All Sides in Uganda (Feb. 4, 2004), <http://www.iccnw.org/documents/02.04.2003-HRW-Uganda.pdf> [hereinafter Investigate All Sides].

<sup>400</sup> *Id.*

<sup>401</sup> See Jeffrey Gettleman, *A Film Star in Kampala, Conjuring Amin’s Ghost*, N.Y. TIMES, Feb. 18, 2007, at A1.

<sup>402</sup> See *supra* Part IV.B.3.

<sup>403</sup> See Keller, *supra* note 18, at 223 (“The proposed Ugandan Alternative Justice Mechanisms (AJM) apparently include a truth commission and traditional justice, particularly the Acholi *mato oput* process.”).

with the LRA.<sup>404</sup> This fact marginally tilts the complementarity balance in favor of admissibility.

So does the “degree of judicialization” factor—at least with respect to *mato oput*. There is no indication in discussions regarding *mato oput* that it would carry the most prominent badges of judicialization. Although this customary restorative ritual consists of a series of formal stages,<sup>405</sup> there is currently no hint that it will be modified to provide greater formal procedural coherence or uniformity. Nor has the government suggested that it seeks to incorporate the ritual into the domestic judicial infrastructure—a move that would endow it with greater permanence and institutional linkage. And, though this mechanism entails payment of sanctions, expressions of forgiveness, and the possibility of restricted movement, it does not seem to mete out other nonincarcerative sanctions, such as community service or the stripping of various civic rights.<sup>406</sup> Nor is it clear that, in any event, *mato oput* is designed to deal with large-scale crimes such as mass abduction or killing.

Finally, although it could have important restorative effects, *mato oput* could have a net negative holistic effect on the transitional justice project. As mentioned previously, *mato oput* applies only to Acholis.<sup>407</sup> And so it will not be able to accommodate non-Acholi victims of the LRA’s violence.<sup>408</sup> This could alienate large sectors of Ugandan society and ultimately have a detrimental effect on the reconciliation process.<sup>409</sup> By the same token, it is important to consider that most Acholis themselves favor restorative justice mechanisms over the ICC procedure.<sup>410</sup> Eric Blumenson explains, “It appears that a substantial majority of the Acholi people, who comprise both the victims and the perpetrators of the war with the LRA, want reconciliation and favor extending amnesty for all rebels.”<sup>411</sup>

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<sup>404</sup> See *id.* at 211.

<sup>405</sup> See *supra* Part III.A.6.

<sup>406</sup> See Djamba, *supra* note 177.

<sup>407</sup> See Rose, *supra* note 181, at 369–70.

<sup>408</sup> See *id.*

<sup>409</sup> *Id.*

<sup>410</sup> Eric Blumenson, *The Challenge of a Global Standard of Justice: Peace, Pluralism, and Punishment at the International Criminal Court*, 44 COLUM. J. TRANSNAT’L L. 801, 810 (2006).

<sup>411</sup> *Id.*

A truth commission could be more promising depending on its individual characteristics. Notwithstanding its stand-alone nature and lack of permanence, if the commission process entails conducting a rigorous investigation, taking statements, using subpoena and search and seizure powers, holding public hearings, referring criminal cases to the national judicial system, and publishing findings of individual responsibility in a final report, then it will certainly go a long way toward satisfying the judicialization criterion. This would be especially true if the commission provides significant due process protections, such as the rights to proper notice, representation, and cross-examination. And, of course, if it provides for competent commissioners and participation by a large cross-section of society, it could yield important holistic, reconciliation dividends.

Moreover, it is not as if Uganda would be proposing the use of one alternative mechanism alone. The possible use of both *mato oput* and a truth commission in tandem could shore up certain deficiencies in one mechanism that may not be present in the other and vice versa.

#### D. Crimes at Issue

As mentioned previously, the LRA leaders have been charged with having committed horrific atrocities, including war crimes and crimes against humanity.<sup>412</sup> As a threshold matter, the alternative justice mechanisms proposed by Uganda would have to bring the suspects to justice with respect to parallel crimes. As noted above, it is not clear whether *mato oput*, which has never been used with mass atrocity, could be modified for such purposes.<sup>413</sup>

And although the LRA leaders have not been accused of genocide, the most grave of atrocities, the horrendous nature of their crimes is apparent in light of the large number of victims of “physical integrity” crimes, such as willful killing or rape; the scale; and the systematicness, depravity (including macabre amputations), and impact of the crimes, especially with respect to children.<sup>414</sup> As reported by the *Guardian*:

At its peak, the rebels’ brutal insurgency displaced nearly two million people in large areas of northern Uganda. To date, the conflict has seen more than 10,000 people killed in massacres,

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<sup>412</sup> See *supra* Part V.B (examining the state of affairs in Uganda).

<sup>413</sup> See *supra* Part V.C (analyzing alternative justice mechanisms).

<sup>414</sup> See Xan Rice, *Background: The Lord’s Resistance Army*, GUARDIAN (London), Oct. 20, 2007, <http://www.guardian.co.uk/katine/2007/oct/20/about.uganda>.

while twice that number of children have been abducted by the LRA and forced to work as soldiers, porters and sex slaves.

... Civilians suspected of supporting the government or forming self-defence forces had their ears, lips and noses hacked off.<sup>415</sup>

In light of such gravity considerations, prosecution through the International Criminal Court appears preferable.

On the other hand, the crimes charged were committed by a fringe rebel group in a geographically circumscribed portion of the country. Most of the LRA's victims have been Acholi<sup>416</sup> and that group comprises only four percent of the population.<sup>417</sup> Acholiland, the area of Uganda in which the LRA has primarily operated, comprises a mere 11,000 square miles in a country that measures 93,104 square miles.<sup>418</sup> Still, while these facts help support an inadmissibility finding, the recent expansion of LRA operations into the DR Congo, Sudan, and the Central African Republic<sup>419</sup> reveal a more widespread scope of crimes that should be considered in any efforts to bring the LRA leaders to justice.<sup>420</sup>

### *E. The Defendants*

Target selection is one of the most compelling reasons for ICC deferral in the LRA case. Although the LRA leaders bear a significant portion of the responsibility for the atrocities at issue as

<sup>415</sup> *Id.*

<sup>416</sup> See Wierda, *supra* note 304, at 371 (“[T]he Acholi tribe . . . constitutes both the majority of perpetrators and the majority of victims in the conflict with the Lord’s Resistance Army . . .”).

<sup>417</sup> See WorldLanguage.com, Uganda, <http://www.worldlanguage.com/Countries/Uganda.htm> (last visited Mar. 21, 2010).

<sup>418</sup> WILLIAM HAROLD INGRAMS, UGANDA: A CRISIS OF NATIONHOOD 262 (1960); Nat’l Geographic, Uganda Facts, <http://travel.nationalgeographic.com/travel/countries/uganda-facts/> (last visited Mar. 21, 2010).

<sup>419</sup> See *Human Rights Watch Calls for End to Civilian Massacres in Congo*, VOANEWS.COM, Feb. 16, 2009, <http://www.voanews.com/english/2009-02-16-voa39.cfm> (“The Human Rights Watch report describes brutal attacks by the Ugandan Lords Resistance Army rebel group on villages in Northeastern Democratic Republic of Congo, as well as across the border in southern Sudan.”); *Officials: LRA Threat ‘Gravely Reduced’*, VOANEWS.COM, Feb. 15, 2009, <http://www1.voanews.com/english/news/a-13-2009-02-15-voa10-68672292.html> (“In recent years, the group has evolved into a regional threat, carrying out killings and kidnappings in Congo, southern Sudan and the Central African Republic.”).

<sup>420</sup> See Keller, *supra* note 18, at 229 (“Direct victims include not only the Acholi and other Northern Ugandan tribes but also those in neighboring countries who have been victims of LRA attacks.”).

indicated above,<sup>421</sup> Ugandan government forces have also participated in massive human rights violations.<sup>422</sup> And yet their leaders are not the subject of ICC indictments. This skewed charging process translates into a prodeferral factor.

On the other hand, Kony's recent forays into other countries demonstrate how elusive a fugitive he is.<sup>423</sup> Given the increasingly transnational dimension of his crimes and flight, perhaps it makes more sense to let the more internationally oriented ICC retain jurisdiction.

This conclusion is bolstered by the fact that Kony and the other indicted defendants sit at the apex of the LRA leadership. These are the types of targets the ICC is designed to investigate and prosecute. But this factor, in turn, is partially mitigated by the relatively small size of the LRA.<sup>424</sup> "According to the Ugandan government, there are only 500–1,000 soldiers in total, many of the original LRA combatants having been killed in conflict or died of ill health, including HIV/AIDS."<sup>425</sup>

Finally, it is hard to conceive the reintegration into postconflict Ugandan society of Joseph Kony—a mass murderer and self-proclaimed mystic with a "garbled pseudo-Christian ideology," who claims he is a medium for holy spirits and has his followers smear themselves with nut-oil to make them invulnerable to bullets.<sup>426</sup> And given the atrocities that can likely be pinned on his indicted top henchmen (those who are still alive), their eventual reintroduction into society seems equally dubious.<sup>427</sup> To the extent the LRA's less

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<sup>421</sup> See *supra* text accompanying notes 412–14.

<sup>422</sup> See *supra* Part V.B.

<sup>423</sup> Alisha Ryu, *Analyst: Uganda's LRA Leaders Must Be Captured to Stop Killings*, VOANEWS.COM, Feb. 26, 2009, <http://www.voanews.com/english/2009-02-26-voa40.cfm>.

<sup>424</sup> See Integrated Reg'l Info. Networks, U.N. Office for Coordination of Humanitarian Affairs, In-Depth: Living with the LRA: The Juba Peace Initiative, <http://www.irinnews.org/InDepthMain.aspx?InDepthId=58&ReportId=72446> (last visited Mar. 21, 2010).

<sup>425</sup> *Id.* "However, these figures are disputed. Military sources and international observers in Southern Sudan estimate that there could be as many as 3,000 LRA fighters, with about 1,500 women and children in tow." *Id.*

<sup>426</sup> Meera Selva, *The Mystic and His Brutal Army of Child Soldiers*, INDEPENDENT (London), July 30, 2004, <http://www.independent.co.uk/news/world/africa/the-mystic-and-his-brutal-army-of-child-soldiers-554907.html>.

<sup>427</sup> See generally Amnesty Int'l, *Arrest Now! Uganda: Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen* (Nov. 2007), <http://asiapacific.amnesty.org/library/Index/ENGAFR590082007> (setting forth the allegations against the indictees). For

culpable middle management might ultimately be indicted, the prospects for reintegration substantially improve. And they get even better for the LRA's other victims—its unwilling foot soldiers.

#### F. *The End Analysis*

Consideration of each criterion in relation to the others yields some important conclusions. There are certainly cogent reasons for acceding to a Ugandan deferral request. To begin, the case has the veneer of an unholy alliance between the ICC and Uganda as the latter attempts to suppress a local uprising—not the seeming province of the world's sole permanent penal justice institution. More importantly, focusing on Uganda itself, one sees a relatively stable country—apart from the localized LRA rebellion in the north—with a functioning judiciary and developed infrastructure and civil society.

And, to a certain degree, the proposed alternative justice mechanisms also lend support to the deferral request. Neither would be used to discredit a previous regime and both are seemingly meant to foster reconciliation. They are preferred by the public over ICC prosecution, and both mechanisms nevertheless bear significant degrees of potential judicialization. For its part, a truth commission has the promise of a thorough investigation, subpoena and search and seizure powers, public hearings, criminal case referral, and published findings of individual responsibility. And *mato oput* could include various nonincarcerative sanctions, such as fines and restricted movement.

Combined, *mato oput* and a truth commission could serve up a potent cocktail of restorative justice. This is especially true in light of the fact that the defendants belong to a fringe rebel group that

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example, Okot Odiambo, one of the indicted men, is “blamed for leading the LRA’s massacre at Barlonya camp in February 2004, when more than 300 people were burnt, shot and hacked to death.” Trial Watch: Okot Odiambo, [http://www.trial-ch.org/en/trial-watch/profile/db/facts/okot\\_odiambo\\_398.html](http://www.trial-ch.org/en/trial-watch/profile/db/facts/okot_odiambo_398.html) (last visited Mar. 21, 2010). Dominic Ongwen, an indicted LRA brigade commander, “is accused of participating in a violent campaign targeted against the civilian population . . . [in which] about 2,200 people were allegedly murdered and 3,000 abducted . . . [while] enforced recruitment of child soldiers and sexual violence against girls” took place. Trial Watch: Dominic Ongwen, [http://www.trial-ch.org/en/trial-watch/profile/db/facts/dominic\\_ongwen\\_574.html](http://www.trial-ch.org/en/trial-watch/profile/db/facts/dominic_ongwen_574.html) (last visited Mar. 21, 2010). The Human Rights Watch reports that Dominic Ongwen and Okot Odhiambo remain at large. Hum. Rts. Watch, *Trail of Death: Introduction*, Mar. 28, 2010, <http://www.hrw.org/en/node/89320/section/6>. Two indictees, Vincent Otti and Raska Lukwiya, are reported to have been killed. See TAUMOHA GHOSH, BERKELEY MODEL U.N., INTERNATIONAL CRIMINAL COURT (ICC) 4 (2009), <http://www.bmun.net/documents/bmun57/topic%20synopses/ICC%20BMUN57.pdf>.

operates in a hemmed-in portion of the country, ostensibly a matter of less international concern for the ICC. The ICC's apparently skewed target selection only adds to the deferral appeal.

But these factors are ultimately outweighed by countervailing considerations. First, the circumstances surrounding the referral and request for deferral strongly suggest Uganda has been using the Court to gain an advantage in its fight against the LRA—not as part of a genuine effort to chronicle and punish decades of nightmarish atrocities. And this point is underscored by Uganda's own "dirty hands" in committing atrocities and compromising democratic institutions within its own polity.<sup>428</sup>

The ultimate restrictions of *mato oput* and a truth commission in terms of limited potential sanctions and linkage with Ugandan courts are exacerbated by *mato oput*'s confined cultural and temporal reach (given that the conflict is ongoing) and its questionable atrocity-crime adaptability. And the atrocities at issue are widespread, long term, and particularly brutal. The accused appear patently liable for them and, as of this writing, have continued their killing spree in other parts of the region. All this, combined with their violent religious fanaticism, augurs ill for their reintegration prospects. In short, notwithstanding the important factors considered above, this case does not appear to be a credible candidate for ICC deferral to alternative justice mechanisms on complementarity grounds.

#### CONCLUSION

In many ways, the relationship between complementarity and alternative justice mechanisms provides the most effective vehicle for understanding the interplay between international retributive and local restorative approaches to postconflict policy. In certain respects, both forms of justice share important goals.

As this Article has demonstrated, local restorative justice often incorporates certain penal characteristics, including investigations, subpoena and search and seizure powers, public hearings with fixed procedural rules and due process rights, criminal referral, and limited forms of incarceration, such as restrictions on movement. It also features a plethora of nonincarcerative sanctions, including restitution or reparations, community service, reintegrative shaming, and the stripping of various civic privileges, such as the right to vote and to

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<sup>428</sup> See Investigate All Sides, *supra* note 399.

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run for public office.<sup>429</sup> By the same token, international retributive justice contemplates certain global restorative outcomes with its emphasis on reestablishing peace and security. Moreover, it has evolved to emphasize even local restorative concerns with the ICC's emphasis on victim participation, reparation, and healing.

For purposes of complementarity, these areas of overlap are instructive—especially concerning the judicialization of alternative justice mechanisms. This Article has illustrated that, in certain situations, domestic resort to these mechanisms could justify the ICC's ceding of jurisdiction on complementarity grounds. In these cases, knee-jerk determinations regarding municipal desire and ability to investigate and prosecute, within the meaning of Article 17 of the Rome Statute, are not in order. Instead, reference to five germane categories—circumstances of the referral or deferral request, the state of affairs in the domestic jurisdiction, the nature of the alternative mechanism, the crimes that are the object of the alternative mechanism, and the accused themselves—should be consulted.<sup>430</sup> Exploration of these categories reveals deeper veins of analytic criteria relevant to determining the domestic jurisdiction's capacity and volition to investigate and prosecute. At the same time, these criteria implicate larger Rome Statute policy concerns—such as gravity of the conduct and the impact on the local jurisdiction. This analysis provides for a more rigorous and meaningful test.

The question remains how often municipal appeals for use of alternative mechanisms, as filtered through the proposed complementarity test, will actually result in deferrals. The case of Uganda, the LRA, and the mato oput/truth commission project is, in this regard, enlightening. Although this Article concludes that the use of these alternative mechanisms with respect to the LRA leaders will not pass complementarity muster,<sup>431</sup> one can easily conceive of slightly modified situations with a different result.

For example, this might be so in cases other than self-referral, if the requests for deferral were more timely and the crimes at issue less serious, such as child soldier recruitment. It would also help if the country requesting deferral did not have a recent history of human rights abuses or disrespecting democratic institutions. The case

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<sup>429</sup> See *supra* Part III.A (analyzing customary local procedures).

<sup>430</sup> See *supra* Part IV (formulating a set of analytic criteria to evaluate complementarity).

<sup>431</sup> See *supra* Part V.F.

would be even stronger if the defendants were not at the very top of the command chain and their criminal activity had ceased for a sizable period before issuance of the indictment.

Of course, much depends on the nature of the alternative mechanism itself. Those mechanisms adapted to handle the special needs of mass atrocity, such as Rwanda's *gacaca*, should fare much better in the complementarity calculus than untouched traditional models better suited for social counseling and civil mediation. Restorative justice pursues noble goals but it cannot help a society heal itself in the complete absence of some written standards, procedural regularity, and meaningful individual punishment.

In this regard, countries should be warned against a one-size-fits-all approach<sup>432</sup> or exclusive reliance on one mechanism to the exclusion of others. Uganda seems to have the right idea in proposing two mechanisms, a CLP and a truth commission, rather than just one.<sup>433</sup> But one can easily imagine the use of several at once. A CLP and a truth commission complemented by lustration and reparations, for example, present a more compelling case for deferral than just one or two mechanisms standing alone would.

Even amnesties, if used sparingly in response to relatively less egregious crimes and for clearly salutary purposes, such as achieving national reconciliation and preventing violence, compelling testimony, or incriminating higher-level players, could factor positively into the mix. As Sharon Williams and William Schabas note in the case of amnesties by South Africa's TRC:

For example, all States seem prepared to respect the amnesty for the crime against humanity of apartheid that has provided the underpinning for the democratic transition in South Africa. Although theoretically many States are in a position to prosecute former South African officials, on the basis of universal jurisdiction, there is simply no political willingness to upset the political compromises made by Nelson Mandela and others.<sup>434</sup>

In fact, one can easily envision a well-designed package of multiple, contemporaneous alternative justice mechanisms working

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<sup>432</sup> See JO STIGEN, *THE RELATIONSHIP BETWEEN THE INTERNATIONAL CRIMINAL COURT AND NATIONAL JURISDICTIONS: THE PRINCIPLE OF COMPLEMENTARITY* 420 (2008) (noting that a one-size-fits-all approach should be avoided in this area of the law).

<sup>433</sup> See Keller, *supra* note 18, at 212, 223.

<sup>434</sup> Sharon A. Williams & William A. Schabas, *Article 17 Issues of Admissibility*, in *COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* 605, 619 (Otto Triffterer ed., 2d ed. 2008).

smoothly and efficiently alongside one another. Each could conceivably complement the other in terms of individual and combined effects on truth-telling, victim satisfaction, and social reconstruction. Conversely, although perhaps not impossible, it is hard to imagine that the use of any one of the alternative justice mechanisms, on its own, would be enough to sway the complementarity decision in favor of deferral.<sup>435</sup>

Perhaps then the ideal role for alternative justice mechanisms in this context could be as a supplement to domestic criminal proceedings. In other words, retributive and restorative justice models should not compete with one another in a zero-sum game. Working toward a fair determination of individual criminal responsibility can go hand in hand with the restorative goals of providing catharsis for victims, a record for posterity, reintegration for the offenders, and global healing for the community.

Uganda may have the right idea in this regard as well. Pursuant to an agreement with the LRA, the country is in the process of setting up a special domestic war crimes court seemingly for the purpose of prosecuting high-level LRA perpetrators, such as Kony.<sup>436</sup> If this tribunal is used properly and in conjunction with the proposed alternative mechanisms to handle LRA “small fish” (including the legions of child soldiers),<sup>437</sup> such a package could ultimately persuade the ICC to defer prosecution of Kony and his immediate surviving subordinates in favor of Uganda.

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<sup>435</sup> Although one can imagine that one or more mechanisms could persuade the ICC not to prosecute under Article 53 “in the interests of justice.” See Rome Statute, *supra* note 15, art. 53(2)(c) (“A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime.”); see also STIGEN, *supra* note 432, at 431–41.

<sup>436</sup> See Anthony Dworkin, *The Uganda-LRA War Crimes Agreement*, GLOBAL POL’Y F., Feb. 25, 2008, <http://www.globalpolicy.org/intljustice/icc/investigations/uganda/2008/0225dworkin.htm> (“Under the agreement [between the Ugandan government and the LRA], the government will set up a special division of the High Court of Uganda to try ‘individuals who are alleged to have committed serious crimes during the conflict.’”).

<sup>437</sup> And that seems to be the plan. According to Dworkin:

At the same time, alongside the special war crimes division of the High Court, the agreement also gives a prominent place to traditional justice. . . . [T]he traditional justice system [will] deal with ‘small crimes’ but the precise division between crimes that will be handled by the war crimes court and by traditional justice is not explicitly spelled out in the accord.

*Id.*

The point is that alternative justice mechanisms and complementarity are not necessarily at loggerheads with one another. And calibrating one to satisfy the other does not have to result in either, or both, losing its essential traits. That said, whatever is uniquely local and traditional in alternative justice mechanisms should never be bred out of existence through domestic co-option. Whatever is truly authentic and unifying in these mechanisms must be preserved if they are to be properly retrofitted for handling atrocity.

At the same time, having a victim sit down to drink a bitter animal gore concoction with the butcher of thousands of innocent children cannot be made to replace prosecution and punishment before a global citizenry. So perhaps effective atrocity justice is more about striking the proper degree of a consensual labor division between local restoration and global retribution.<sup>438</sup> Complementarity may be the ideal medium through which to achieve that balance.

And when it is not, other Rome Statute mechanisms may certainly effect local transfer. As noted previously, Article 53(1)(c) authorizes the ICC Prosecutor to kill a case upon a finding of “substantial reasons to believe that an investigation would not serve the interests of justice.”<sup>439</sup> As observed by Jo Stigen:

Because article 53 presupposes that prosecuting in a given situation might, nevertheless, not be in the “interests of justice,” it seems imperative to explore whether there are alternative reactions which might lessen the need for criminal justice. To the extent that alternative mechanisms address the concerns that criminal justice is meant to address, there is less reason to interfere. *A fortiori* this will be true if an alternative mechanism addresses the concerns even better than criminal justice.<sup>440</sup>

Article 16, which authorizes the UN Security Council to effectuate a twelve-month suspension of ICC cases upon issuance of a Chapter VII resolution,<sup>441</sup> could be another important means of activating local alternative justice mechanisms during post-atrocity peace negotiations or in otherwise delicate transitions. Gareth Evans, former President of the International Crisis Group, has noted:

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<sup>438</sup> See STIGEN, *supra* note 432, at 464 (“A labour sharing in which the major criminals are prosecuted at the ICC and the minor criminals are brought before a national TRC is not inconceivable.”).

<sup>439</sup> Rome Statute, *supra* note 15, art. 53(1)(c).

<sup>440</sup> STIGEN, *supra* note 432, at 434.

<sup>441</sup> Rome Statute, *supra* note 15, art. 16.

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“I have no doubt that dealing with impunity and pursuing peace can work in tandem even in an ongoing conflict situation: these are not necessarily incompatible objectives. The prosecutor’s job is to prosecute and he should get on with it with bulldog intensity. If a policy decision needs to be made, in a particular case, to give primacy to peace, it should be made not by those with the justice mandate, but with the political and conflict resolution mandate, and that is the Security Council. The Statute allows for this in Article 16, and this is the way the international community should be thinking about it.”<sup>442</sup>

At the same time, however, justice and peace are often indispensable components of transitional success. In fact, many believe that one is not possible without the other.<sup>443</sup> And in the case of alternative justice mechanisms, complementarity seems to be a place where they will often intersect. If the ICC uses the criteria formulated in this Article to take a broader view of complementarity in relation to postconflict restorative options, it will go a long way toward weaving peace and justice more seamlessly into the procedural fabric of international criminal law.

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<sup>442</sup> *OTP’s Second Public Hearing: Looking Ahead*, NEWSLETTER (Int’l Criminal Court, Neth.), Oct. 2006, at 5.

<sup>443</sup> Former U.N. Secretary-General Kofi Annan has noted that “there can be no healing without peace; there can be no peace without justice; there can be no justice without respect for human rights and rule of law.” Press Release, Kofi Annan, U.N. Secretary-General, Secretary-General Welcomes Rwanda Tribunal’s Genocide Judgment as Landmark in International Criminal Law, U.N. Doc. SG/SM/6687L/2896 (Sept. 2, 1998).