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Complementarity and alternative forms of justice

A new test for ICC admissibility

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Abstract

Certain commentators believe that domestic resort to alternative resolution (justice) mechanisms ('ARMs'), such as Uganda's *mato oput* (a local tribal rite) or truth commissions, can relieve the International Criminal Court ('ICC') of its obligation to prosecute under the complementarity principle. However, this literature provides only general suggestions for how the ICC could determine whether alternative mechanisms render a case inadmissible under the complementarity regime. This chapter proposes a concrete set of analytic criteria the ICC can use to formulate an admissibility test for conducting complementarity analysis in difficult cases of municipal reliance on ARMs.

The admissibility test entails consideration and parsing of five categories: (1) the circumstances surrounding the ICC referral and request for deferral; (2) the political system and infrastructure in the domestic jurisdiction; (3) the ARM itself; (4) the crimes at issue; and (5) the prosecution target. The chapter demonstrates that, although it would be rare, some alternative justice proposals – especially those that mix and match ARMs and combine them with domestic criminal trials – might pass the proposed complementarity admissibility test. In the end, this analysis helps illuminate our increasingly complex understanding of the relationship between international criminal law and local initiatives in situations of gross human rights violations. Effective atrocity justice, the chapter contends, entails a proper division of labor between local restoration and global retribution. While complementarity could be the ideal medium through which to achieve that allocation, the proposed analytic criteria should be used to weave both peace and justice more seamlessly into the procedural fabric of international criminal law.

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1 Introduction

Given the growing emphasis on restorative justice in post-conflict societies, should perpetrators of gross human rights violations in such situations be handled through traditional/alternative justice methods at home rather than be criminally prosecuted at the international level in The Hague? In any given case, the answer will typically pivot on an understanding of the principle of 'complementarity', which awards primacy of jurisdiction to a state's domestic courts unless the International Criminal Court ('ICC') determines the state 'unwilling or unable genuinely to prosecute'.[1]

Certain commentators believe that alternative domestic justice mechanisms, such as Uganda's *mato oput* (a customary tribal ritual) or truth commissions, can relieve the ICC of its obligation to prosecute under the complementarity principle.[2] However, this literature provides only general 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 furthers retribution, deterrence, expressivism and restorative justice to a similar extent as international prosecution.[3] 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 ministerial body', a 'modern administrative agency' with 'broad policymaking discretion', an 'inwardly focused court' concerned more with docket and prestige maintenance than transitional justice, or an 'incomplete and unstable institution', dependent on external actors, such as NGOs and the Security Council, 'to imbue it with the efficacy and legitimacy that it does not inherently possess'.[4]

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[1] Rome Statute of the International Criminal Court, July 17, 1998, 2187 UNTS 90 ('Rome Statute'), Art. 17(2).

[2] See, e.g., Linda M. Keller, 'Achieving Peace with Justice: The International Criminal Court and Ugandan Alternative Justice Mechanisms', (2008) 23 *Conn. J. Int'l L*. 209, 275–8 (arguing that use in Uganda of alternative justice mechanisms such as a truth commission and a local ritual known as *mato oput* would justify deferring ICC prosecution of indicted Lord's Resistance Army ('LRA') leaders in Uganda); C. Stahn, 'Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretive Guidelines for the International Criminal Court', (2005) 3 *JICJ*. 695, 710 (concluding that Art. 17 could provide room for inadmissibility of cases where crimes are investigated by domestic truth commissions); T. H. Clark, 'The Prosecutor of the International Criminal Court, Amnesties, and the "Interests of Justice": Striking a Delicate Balance', (2005) 4 *Wash. U. Global Stud. L. Rev*. 389, 414 (finding that while the ICC appears to require prosecution, ambiguous provisions leave room for alternative justice schemes in limited circumstances); C. Cardenas Aravena, 'The Admissibility Test before the International Criminal Court under Special Consideration of Amnesties and Truth Commissions', in J. K. Kleffner and G. Kor, *Complementary ViewsonComplementarity* (2004) (providing a mechanistic application of complementarity admissibility tests that closely tracks the language of the Rome Statute and determining that, in narrow circumstances, use of alternative mechanisms could result in ICC deferral of prosecution).

[3] Keller, *supra* note 2, 279. Keller's criteria do involve some practical considerations such as the extent of punishment short of incarceration, victim participation, redress and general societal reconciliation.

[4] A. K. A. Greenawalt, 'Complementarity in Crisis: Uganda, Alternative Justice, and the International Criminal Court', (2009) 50 *Va. J. Int'l L*. 107, 160–1. See also E. Fish, 'Comment, Peace through Complementarity: The Uganda Case and the Ex Post Problem in International Criminal Court

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Unfortunately, this kind of 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 and the ICC itself.[5]Former ICC External Relations Adviser Darryl Robinson notes that certain difficult alternative justice admissibility questions require case-by-case analysis based on certain defined criteria.[6] Although Robinson does not specify the questions he has in mind, certain ones seem apparent. For example, is the prosecution target a member of the government in the domestic jurisdiction? Is he a member of a rebel group? 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 alternative justice 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 non-incarcerative sanctioning, such as restitution, community service, re-integrative shaming or reparations?

Based on these questions and others, this chapter proposes a set of evaluative criteria the ICC can use to formulate an admissibility test for conducting complementarity analysis in difficult cases of domestic resort to alternative justice mechanisms. Section 2 provides an overview of the statutory framework of the ICC complementarity regime and explains how it functions. Section 3 examines some of the forms of alternative justice that might confront the ICC in applying an admissibility test, including traditional practices (and judicially hybridized forms thereof) such as Uganda's *mato oput* (wherein the parties ritually consume sheep's blood and bitter root), truth commissions, lustration (a political

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Indictments', (2010) 119 *Yale L.J.* 1703 (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?).

[5] In his article 'Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretive Guidelines for the International Criminal Court', *supra* note 2, CarstenStahn begins to examine some of these criteria but his analysis is confined almost exclusively to the effect of amnesties and pardons. Moreover, within these tight parameters, he focuses on a limited set of criteria and he gives them 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 autonomy to decide whether an amnesty, a pardon or other alternative forms of justice are permissible under the Statute; (2) exemptions from criminal responsibility for the crimes within the jurisdiction of the ICC by amnesties or pardons are generally incompatible with the Statute; and (3) amnesties or pardons should, if at all, only be permitted in exceptional cases, namely where they are conditional and accompanied by alternative forms of justice (700–16). Stahn does scratch the surface of certain relevant criteria such as 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 on whose territory the crime occurred or another state); (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) (706–7, 713). See also D. Robinson, 'Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court', (2003) 14 *Eur. J. Int'l L.* 481, 498–502 (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).

[6] See D. Robinson, 'Comments on Chapter 4 of Claudia Cardenas Arevena', in Kleffner and Kor, *supra* note 2, 146.

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vetting mechanism), reparations and amnesties. Section 4 then sets out the analytic criteria as 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 target. Section 5 then offers some concluding thoughts about the significance of this test and how it might be applied in the future.

In the end, this analysis should help 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. At the same time, certain retributive characteristics are being incorporated into the latter as alternative mechanisms adapt themselves to deal with the new and horrible phenomenon of mass atrocity. In the end, the chapter will show that effective atrocity justice entails a proper division of labor between local restoration and global retribution. While complementarity could be the ideal medium through which to achieve that allocation, the proposed analytic criteria should be used to weave both peace and justice more seamlessly into the procedural fabric of international criminal law.

2 Situating alternative justice mechanisms within the surface framework of complementarity

Complementarity, one of the cornerstone principles of the International Criminal Court,[7] defines the relationship between states and the ICC.[8] It signifies that cases are admissible before the ICC if a state remains wholly inactive or lacks the capacity or will genuinely to investigate and prosecute atrocity cases within the ICC's subject matter jurisdiction.[9] 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.[10]

In contrast to the 'primacy' over national courts of the two ad hoc tribunals, the International Criminal Tribunal for Yugoslavia ('ICTY')[11] and the International Criminal Tribunal for Rwanda ('ICTR'),[12] as well as the Special Court for Sierra Leone

[7] See J. K. Kleffner and G. Kor, 'Preface', in Kleffner and Kor, *supra* note 2, V. Paragraph 10 of the Preamble to the Rome Statute emphasizes that 'the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions'. Rome Statute, *supra* note 1, Preamble, para. 10. Article 1 contains identical language.

[8] *Ibid*., see Arts. 1 and 17.

[9] *Ibid*., see Art. 17.

[10] *Ibid*., see also Preamble, para. 6.

[11] 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, SC Res. 827, UN Doc. S/RES/827 (25 May 1993), Art. 9.

[12] Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States, Between 1 January 1994 and 31 December 1994, SC Res. 955, UN Doc. S/RES/955 (6 November 1994), Art. 8.

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('SCSL'),[13] complementarity empowers states to foreclose ICC adjudication through good faith application of domestic criminal process.[14] 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 . . . ;

(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.[15]

On a superficial level, these inadmissibility criteria are relatively straightforward. Claudia Cardenas Arevena describes an 'investigation' as 'a systematic inquiry about the facts of a crime and about participation in it'.[16] A prosecution, she opines, consists of a state's 'opening and undertaking of a judicial criminal process'.[17] Subsection (c), dealing with '*ne bis in idem*', entails 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.[18]

The rub in Article 17 comes not from these stated grounds of inadmissibility but from their exceptions, as set out in the concluding language of Article 17(1)(a) and (b).[19] That language deems a case admissible before the ICC when the state is 'unwilling' or 'unable''genuinely' to carry out the investigation or prosecution.[20]

The question then arises 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) in fact, the national authorities have undertaken proceedings for the purpose of shielding the person concerned from criminal responsibility; or (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

[13] Statute of the Special Court for Sierra Leone, SC Res. 1315, UN Doc. S/RES/1315 (14 August 2000), Art. 8.
[14] See Kleffner and Kor, *supra* note 7, V.
[15] Rome Statute, *supra* note 1, Art. 17(1).
[16] Cardenas Aravena, *supra* note 2, 117.
[17] *Ibid*.
[18] *Ibid*., 120.
[19] Rome Statute, *supra* note 1, Art. 17(1)(a) and (b).
[20] *Ibid*.

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or impartially or, in any case, in a manner showing the intent to bring the person to justice.[21]

A state is 'unable' when, chiefly owing to a total or partial collapse of its judicial system, it is not in a position: (1) to detain the accused or to have him surrendered to the ICC by the authorities or bodies that hold him in custody; or (2) to collect the necessary evidence; or (3) to carry out criminal proceedings.[22] Another 'inability' situation occurs where the national court is unable to try a person not because of collapse or malfunctioning of the judicial system, but on account of legislative impediments, such as a statute of limitations, making it impossible for the national judge to commence proceedings against the accused.[23]

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: (1) were for the purpose of shielding the person concerned from criminal responsibility; or (2) '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'.[24]

In extreme cases, such as total collapse of a country's infrastructure, a country's explicitly thumbing its nose at calls for justice, on the one hand, or prosecution of an atrocity suspect pursuant to the most rigorous due process standards, on the other, the statutory framework yields easy answers regarding admissibility. But is that true of the less black-and-white cases? What if a country's processing of a matter deviates from the traditional Western retributive paradigm – a police/magistrate investigation followed by an adversarial or inquisitorial trial contemplating or resulting in incarceration? Can it then be said in such circumstances that the country was 'unwilling or unable genuinely' to carry out the investigation or prosecution?[25] Or might it be said that the proceeding was 'not conducted independently or impartially in accordance with the norms of due process recognized by international law'?[26]

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[21] *Ibid*., Art. 17(2)(a), (b) and (c).
[22] *Ibid*., Art. 17(3).
[23] See A. Cassese, *International Criminal Law* (2003), 352.
[24] Rome Statute, *supra* note 1, Art. 20(3).
[25] See J. K. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (2008), 270–1 ('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 other forms of 'unwillingness' in Article 17(2)(b) and (c) under certain circumstances.'). But see A. Seibert-Fohr, 'The Relevance of the Rome Statute of the International Criminal Court for Amnesties and Truth Commissions', (2003) 7 *Max Planck UNYB* 553, 570 note 16 ('[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 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').
[26] See M. A. Drumbl, *Atrocity, Punishment and International Law* (2007), 141–2.

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

3 A taxonomy of alternative justice mechanisms

As a threshold matter, one should avoid perceiving the toolkit of alternative justice mechanisms as a monolithic set, as each has unique characteristics and processes that promote reconciliation and restoration. Nevertheless, for conceptual purposes, it is helpful to place them in five broad categories: (1) customary local procedures; (2) truth commissions; (3) lustration; (4) reparations; and (5) amnesties.[27] Each of these shall be considered in turn.

3.1 Customary local procedures

'Customary local procedures', or 'CLPs' as used in this chapter, refer to indigenous methods of dispute resolution that are carried out locally, according to traditional customs, with varying degrees of connection (sometimes none) to any adjacent official government adjudication infrastructure.[28] These procedures tend to focus on outcomes designed to foster holistic community healing and reconciliation, as opposed to the Western criminal resolution model of individualized justice and punishment of specific perpetrators.[29] In general terms, these mechanisms are less formal than official government adjudicatory mechanisms and they involve a higher degree of public participation.[30] In the end, they often combine 'truth-telling, amnesty, justice, reparations and apology'.[31]

This section will consider a set of six 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).[32]

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[27] See D. Gray, 'An Excuse-Centered Approach to Transitional Justice', (2006) 74 *Fordham L. Rev*. 2621, 2622 (identifying amnesties, truth commissions, lustration and reparations as mechanisms used in transitional contexts); Keller, *supra* note 2, 275–6 (focusing generally on customary local procedures, such as *mato oput*, truth commissions and reparations).

[28] See generally B. Connolly, 'Non-State Justice Systems and the State: Proposals for a Recognition Typology', (2005) 38 *Conn. L. Rev*. 239 (surveying various characteristics of these systems to determine how each relates to the others and formal state adjudicatory processes).

[29] See L. Waldorf, 'Mass Justice for Mass Atrocity: Rethinking Local Justice as Traditional Justice', (2006) 79 *Temp. L. Rev*. 1, 9–10.

[30] *Ibid*.

[31] N. Roht-Ariazza, 'Introduction', in N. Roht-Arriaza and J. Mariezcurrena, *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice* (2006), 11.

[32] These CLPs do not by any means represent a comprehensive list. They are included to provide a representative sample of CLPs that reflect different customs, procedures and remedies as well as geographic diversity. That said, there may certainly be other CLPs with different features and from

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3.1.1 Shalish – *Bangladesh*

In Bangladesh, the 'indigenous form of dispute resolution'[33] is called '*shalish*' – akin to an 'informal village tribunal'.[34] There are currently three versions of *shalish*: (1) traditional; (2) government-administered; and (3) NGO-(non-governmental organization) modified.[35]

Traditional *shalish* entails consent-based arbitration or mediation procedures that may consist of numerous sessions, spread out over several months, during which opposing parties engage in negotiations both within and outside the *shalish* setting.[36] The process has been described as 'a loud and passionate event which is generally open to the whole community but is largely male-dominated'.[37]

Under this traditional system, village elders select five to nine people to act as the arbiters or mediators.[38] Local villagers treat their decisions as binding even though they lack state legal sanction and take place outside of the formal judicial system.[39] Disputes adjudicated pursuant to traditional *shalish* are primarily civil in nature (such as property and family disputes), although in certain localities they may involve non-consensual criminal adjudications with imposition of punishment,[40] in some cases even *fatwahs*.[41]

Government-administered *shalish*, which functions simultaneously with, but independently of, traditional *shalish*, is run by the *union parishad* ('UP') – the lowest unit of electoral government in Bangladesh.[42] The state empowers it to arbitrate and settle family and civil disputes as well as minor criminal offenses.[43] The plaintiff and the

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different locales that could have been included. In the interests of space and in line with its scope, this chapter will focus on only six of these procedures.

[33] N. Milner, 'Illusions and Delusions about Conflict Management – in Africa and Elsewhere', (2002) 27 *Law & Soc. Inquiry* 621, 624. According to the United Nations Development Program (UNDP), 60 to 70 per cent of disputes in Bangladesh are resolved through *shalish*. Connolly, *supra* note 28, 262–3.

[34] S. Amin and S. Hossain, 'Religious & Cultural Rights, Women's Reproductive Rights, and the Politics of Fundamentalism: A View from Bangladesh', (1995) 44 *Am. U. L. Rev.* 1319, 1326.

[35] S. Golub, 'Non-state Justice Systems in Bangladesh and the Philippines', Paper Presented for the UK Department for International Development (Jan. 2003), 4–12, http://siteresources.worldbank.org/INTJUSFORPOOR/Resources/GolubNonState JusticeSystems.pdf.

[36] *Ibid*.

[37] UK Department for International Development, DFID Policy Statement on Safety, Security and Accessible Justice 7 (10 December 2000), available at www.dfid.gov.uk/ pubs/files/policy-safety.pdf.

[38] Janice H. Lam, 'The Rise of the NGO in Bangladesh: Lessons on Improving Access to Justice for Women and Religious Minorities', (2006) *Geo. Wash. Int'l L. Rev.* 101, 124 note 191.

[39] *Ibid*.

[40] Golub, *supra* note 35, 4–7.

[41] *Ibid*.

[42] H. Zafarullah and M. HabiburRahman, 'Human Rights, Civil Society and Nongovernmental Organizations: The Nexus in Bangladesh', (2002) 24 *Hum. Rts. Q*. 1011, 1030.

[43] Golub, *supra* note 35, 6. As Golub goes on to explain, the Muslim Family Laws Ordinance of 1961 enables the UP to arbitrate family disputes, and the Village Court Ordinance of 1976 and Conciliation of Dispute Ordinance of 1979 empowers the UP to settle civil disputes and minor criminal offenses.

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accused are afforded representation in these *shalish* village courts – each is represented by two members of the *parishad* and two members from the village.[44]

In contrast to its traditional and governmental forms, NGO-facilitated *shalish* appears more mediation-oriented, more inclusive of women and more integrated with other community development projects.[45]It is further distinguished by NGO involvement in the selection and training of panels and the documentation of proceedings.[46] In light of these differences, many Bangladeshis, particularly women, view NGO-facilitated *shalish* as the most effective and legitimate form of local dispute resolution.[47]

3.1.2 Gacaca – *Rwanda*

Gacaca, which translates as 'justice on the grass' in the Kinyarwanda language, is the Rwandan indigenous traditional dispute resolution method.[48] Like most communal restorative mechanisms, it had its origins in efforts to resolve civil matters including property, inheritance and family law disputes.[49] While occasionally dealing with minor criminal offenses, *gacaca*'s monetary compensation was much more suggestive of a civil settlement as opposed to a penal sanction, such as incarceration.[50] Community elders, known in Kinyarwanda as '*inyangamugayo*' (literally 'those who detest disgrace'), traditionally presided over *gacaca*.[51] Until recently, this was the exclusive province of men – women were not even allowed to speak.[52] Within this system, a wide range of remedies were imposed to achieve restitution and reconciliation.[53] Any such sanctions, though, were not individualized – family members also had to satisfy *gacaca* judgments.[54] And it was not entirely a dour affair – the losing party typically had to provide spirits or food to the community as a form of reconciliation.[55] In general, the chief aim of traditional *gacaca* was to 'restore social order, after sanctioning the violation of shared values, through the reintegration of offender(s) into the community'.[56]

Mass violence on an unimaginable scale engulfed Rwanda in 1994. The murder of approximately 800,000 within less than four months has been described as 'one of the

[44] Zafarullah and Habibur Rahman, *supra* note 42, 1030 note 45.
[45] Golub, *supra* note 35, 10. NGO-facilitated *shalish* has grown in recent years, prompted principally by the efforts of the Madripur Legal Aid Association (MLAA) and affiliated NGOs. *Ibid.*
[46] *Ibid*.
[47] *Ibid*.
[48] Drumbl, *supra* note 26, 85.
[49] *Ibid.*, 93. There is some disagreement as to whether *gacaca* occasionally encompassed adjudication of crimes.
[50] Connolly, *supra* note 28, 269. Mark Drumbl writes that *gacaca* 'exceptionally' handled 'violent and serious crime.' Drumbl, *supra* note 26, 85.
[51] Waldorf, *supra* note 29, 48.
[52] *Ibid*.
[53] *Ibid*.
[54] *Ibid*.
[55] *Ibid.*, 49; P. Clark, 'Hybridity, Holism, and "Traditional" Justice: The Case of the Gacaca Courts in Post-Genocide Rwanda', (2007) 39 *Geo. Wash. Int'l L. Rev*. 765, 778–9.
[56] Connolly, *supra* note 28, at 268.

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worst genocides in history'[57] and 'a populist genocide', as nearly every stratum of society, including children, participated in killing their neighbors with common farm tools (most often, machetes).[58] In the wake of this frenzied violence, close to 100,000 people were detained on genocide-related charges.[59] As of 2003, approximately 87,000 detainees still languished in Rwandan prisons.[60] Given the limited capacity of conventional courts to process this sea of implicated humanity,[61] the Rwandan government modified *gacaca* to dispense mass justice in a relatively compressed time frame.[62]

Two legal documents established the mechanics of *gacaca*: the Organic Law of 1996 and the Gacaca Law of 2001, with the latter modified three times (to a minimal extent in June 2001 and June 2006 and more substantially in June 2004).[63] The Organic Law was designed to prosecute 'the crime of genocide or crimes against humanity' or 'offences . . . committed in connection with the events surrounding genocide and crimes against

[57] M. Sosnov, 'The Adjudication of Genocide: Gacaca and the Road to Reconciliation in Rwanda', (2008) 36 *Denv. J. Int'l L. & Pol'y* 125. More people died in Rwanda in three months (April to June 1994) than in over four years of conflict in Yugoslavia. In fact, the pace of the killing was five times faster than the Nazi mass murder of Jews in the Holocaust.

[58] *Ibid*.

[59] See J. E. Alvarez, 'Crimes of States/Crimes of Hate: Lessons from Rwanda', (1999) 24 *Yale J. Int'l L*. 365, 393 (explaining that, as of September 1996, 90,000 were being held in Rwandan prisons awaiting trial on charges stemming from the genocide).

[60] M. M. Carpenter, 'Bare Justice: A Feminist Theory of Justice and Its Potential Application to Crimes of Sexual Violence in Post-Genocide Rwanda', (2008) 41 *Creighton L. Rev*. 595, 64

[61] See Waldorf, *supra* note 29, 44 (noting that, of the nearly 100,000 detainees, from December 1996 through December 2003, Rwandan domestic courts had tried only about 9,700). As of 2008, the international court set up to prosecute Rwandan *génocidaires*, the ICTR had managed a total of only thirty convictions. See I. M. Weinberg de Roca and C. M. Rassi, 'Sentencing and Incarceration in the Ad Hoc Tribunals', (2008) 44 *Stan. J. Int'l L*. 1, 11.

[62] SeeWaldorf, *supra* note 29, at 48.

[63] Organic Law on the Organization of Prosecutions for Offenses Constituting the Crime of Genocide or Crimes Against Humanity Committed Since October 1, 1990, No. 08/96 of 30 August 1996 (Rwanda), in Official Gazette of the Republic of Rwanda, 1 September 1996 ('Organic Law'), Art. 1. The Organic Law has been modified three times. 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 22 June 2001 (Rwanda), in Official Gazette of the Republic of Rwanda, June 2001 ('Gacaca Law (Modified 2001)'); Organic Law Establishing the Organization, 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 1 October 1990 and 31 December 1994, No. 16/2004 of 19 June 2004 (Rwanda), in Official Gazette of the Republic of Rwanda, 19 June 2004 ('Gacaca Law (Modified 2004)'); Organic Law Modifying and Complementing Organic Law No. 16/2004 of 19/06/2004 Establishing the Organisation, Competence and Functioning of *Gacaca* Courts Charged with Prosecuting and Trying the Perpetrators of the Crime of Genocide and Other Crimes against Humanity, Committed between 1 October 1990 and 31 December 1994, No. 28/2006 of 27 June 2006 (Rwanda), in Official Gazette of the Republic of Rwanda, June 2006 ('Gacaca Law (Modified 2006)'). Gacaca Law (Modified 2004) constitutes a more significant re-writing of parts of the original Organic Law than do 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 Organic Law, while the 2004 version comprises several important reforms of the *gacaca* process.

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humanity'.[64] This government-modified and controlled version of *gacaca* consists of approximately 9,000 community-based courts, each overseen by locally-elected judges and designed to process lower-level genocide perpetrators (with higher level suspects facing justice in conventional domestic courts and before the ICTR).[65]

The lowest-level *gacaca* panel, the '*cellule*', conducts the factual investigation.[66] Assuming sufficient evidence is collected, there is an adjudication hearing[67] where the accused appears but is not represented by counsel.[68] The evidence against him is heard by seven judges and members of the public can attend the hearing.[69] The *gacaca* law provides a very detailed punishment schematic, which includes life imprisonment and the death penalty.[70] It also includes a panoply of non-incarcerative options such as community service (including such chores as tilling the fields and renovating houses destroyed during the genocide), *dégradation physique* (which strips the convict of certain civic rights, such as the right to vote or run for office) and restitution.[71] Defendants may challenge their sentences in special *gacaca* courts of appeal but not in the regular Rwandan court system.[72]

In addition to being hierarchical and state-directed,[73] this newfangled *gacaca* can be distinguished from the traditional system in several 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.[74] 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

[64] Organic Law, *supra* note 63. Article 51 of the Gacaca Law (Modified 2004) legislation creates three categories of offenders: (1) Category 1 – planners, leaders, notorious murderers, torturers, rapists and sexual torturers; (2) Category 2 – murderers, assaulters who intended to kill, those who committed offenses against the person without intention to kill; and (3) those who committed property offenses. Category 1 offenders are excluded from local *gacaca* panels – they are prosecuted more formally. See Drumbl, *supra* note 26, 86–7.

[65] *Ibid*.

[66] *Ibid*.

[67] L. G. Albrecht, B. L. Apt, E.-M. Condon, G. J. Garland, A. D. Giampolo, M. Hansel, R. S. Kerr, V. Mascarenhas and L. J. Shields, 'International Human Rights', (2007) 41 *Int'l Law*. 643, 648–9.

[68] Stahn, *supra* note 2, 713.

[69] Connolly, *supra* note 28, 270; Linda E. Carter, 'Justice and Reconciliation on Trial: Gacaca Proceedings in Rwanda', (2007) 14 *New Eng. J. Int'l & Comp. L*. 41, 45 ('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').

[70] Drumbl, *supra* note 26, 87.

[71] *Ibid.*, 75, 88–9.

[72] See M. Goldstein-Bolocan, 'Rwandan Gacaca: An Experiment in Transitional Justice', (2005) 2004 *J. Disp. Resol.*355, 389. However, as the article mentions, judgments relating to offences against property are not subject to appeal.

[73] *Ibid*.

[74] Clark, *supra* note 55, 788.

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> 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.[75]

3.1.3 Nahe Biti Boot – *East Timor*

East Timor traditionally resolved disputes through a process known as '*nahe biti boot*', which took place on a large woven mat ('*biti boot*').[76] The process was initiated by village '*katua*' (elders) at the request of a person with a grievance against people in another village.[77] The *katua* would then organize an open meeting with the opposing party's *katua* and other fellow villagers.[78] At the resultant gathering, the disputants, their respective *katua* and families would discuss matters until a mutually agreeable resolution was reached.[79] The *katua* and the community would oversee the process and the administration of penalties.[80] *Katua* were empowered to monitor and enforce implementation of penalties and other corrective actions.[81]

Traditionally, villagers availed themselves of *nahe biti boot* to resolve minor land or resource disputes.[82] But during five hundred years of Portuguese and Indonesian rule, the Timorese had always relied on the official law courts of their imperial overlords to deal with serious crimes.[83]

Still, the United Nations used *nahe biti boot* to deal with a 1999 eruption of massive violence after a sizable majority of East Timorese voted for independence from Indonesia.[84] 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.[85]

In particular, the UN Transitional Administration in East Timor ('UNTAET') modified *nahe biti boot* and integrated it as part of a 'Community Reconciliation Process' ('CRP'). This involved holding truth and reconciliation hearings designed, in part, to encourage the repatriation and reintegration of approximately one hundred thousand East Timorese

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[75] J. Fierens, 'Gacaca Courts: Between Fantasy and Reality', (2005) 3 *JICJ* 896, 913.
[76] Waldorf, *supra* note 29, 25.
[77] *Security Man*, Massey University Magazine, November 2002, www.massey.ac.nz/~wwpubafs/magazine/2002_Nov/stories/security_man.html.
[78] *Ibid*.
[79] *Ibid*.
[80] *Ibid*.
[81] *Ibid*.
[82] *Ibid*.
[83] *Ibid*.
[84] *Ibid*.
[85] Waldorf, *supra* note 29, 24.

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refugees (including former militia members) then in West Timor.[86] 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; reparation; public apology; and/or other act[s] of contrition'.[87] In general, agreements were followed by reconciliation ceremonies attended by local administrative and religious figures and involving various ritual practices, such as chewing betel-nut, sacrificing small animals and celebratory feasting.[88]

Although the CRP contemplated handling only minor crimes, such as theft, minor assault and the killing of livestock,[89] the massive volume of cases overwhelmed the formal justice mechanisms and the traditional process ended up being used for far more serious cases.[90] 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.[91]

As a result, people were expected to live next door to people who had 'committed hideous crimes against them and their fellows as if nothing has happened'.[92] According to the same UN official, the process was:

> [b]eing 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

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[86] *Ibid*. This was part of a truth and reconciliation process that involved the creation of a 'Commission for Reception, Truth and Reconciliation', or 'CAVR.'

[87] UNTAET, Reg. No. 2001/10 on the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor, Sched.1, UNTAET/REG/2001/10, (13 July 2001) ('UNTAET Reg. No. 2001/10') § 27. 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, attempted murder, torture and sexual offences. UNTAET Reg. No 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, UNTAET/REG/2000/15 (6 June 2000), § 1.3. 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, 'The Special Panels for Serious Crimes Hear their Final Case', (May 12, 2005) Judicial System Monitoring Programme.

[88] Waldorf, *supra* note 29, 25.

[89] *Ibid.*, 24.

[90] *Security Man*, *supra* note 77.

[91] *Ibid*.

[92] *Ibid*.

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> 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.[93]

3.1.4 Kgotla – *Botswana*

In Botswana, local tribal justice was traditionally administered through the *kgotla* – a formal gathering of adult men constituting a discussion forum for community issues cum tribal court.[94] During the time of its being a British protectorate – starting in 1885 (after which it developed a formal court system) – until its independence in 1966, Botswana retained the *kgotla*.[95] Thus, it had formed a dual court system: tribal courts only had jurisdiction to apply customary law in civil cases; the High Court and subordinate courts were competent to apply the common law.[96]

In today's Botswana, there are 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.[97] The second level is known as the higher customary courts, or 'chiefs' courts,' which generally act as courts of appeal from the lower customary courts.[98] Appeal may be taken from the chiefs' courts to the third level – the customary courts' commissioner and the customary courts of appeal.[99] Finally, appeals from here may be raised in the High Court.[100]

Although the customary court system in Botswana is relatively independent, it is still linked to the formal state courts.[101] For example, the customary courts must be granted

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[93] *Ibid*.
[94] Nat'l Inst. Int'l Affairs, *Democracies in Regions of Crisis: Botswana, Costa Rica, Israel* (1990), 93–5.
[95] Connolly, *supra* note 28, 281–2.
[96] T. W. Bennett, *The Application of Customary Law in Southern Africa: The Conflict of Personal Laws* (1985), 54–5.
[97] H. Critzer (ed.), *Legal Systems of the World: A Political, Social, and Cultural Encyclopedia* 184 (2002) Vol. 1, ('Legal Systems').
[98] *Ibid*.
[99] *Ibid*.
[100] *Ibid*.
[101] Connolly, *supra* note 28, 282.

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warrants by the local government, and appeal ultimately may be taken to the formal state courts.[102]

3.1.5 Katarungang Pambarangay – *The Philippines*

Traditionally, the lowest unit of social organization for small communities in the Philippines was the '*barangay*'.[103] Throughout early Philippine history, the *barangay* was used as a forum for dispute resolution with friends and neighbors serving as mediators.[104] This popular justice mechanism was known as *Katarungang Pambarangay*.[105] Although Spanish colonizers later attempted to supplant *barangay* norms whenever they conflicted with the Spanish Civil Code, a 1978 Marcos government decree incorporated them into the formal state system (through the Katarungang Pambarangay Law).[106]

The Katarungang Pambarangay Law provides for a nationwide system of dispute processing by means of mediation at the neighborhood and village level.[107] It does this by dividing the country into 42,000 *barangays*.[108] Each *barangay* has a ten- to twenty-member *Lupong Tagapamayapa* (council of mediators), consisting of village residents.[109] The *Lupong* members, who must possess integrity, impartiality, independence of mind, a sense of fairness and a reputation for probity, are selected by a '*Punong Barangay*'–the *barangay* captain or 'Chairman of the *Lupong*'.[110] The *barangay* captain is the principal neighborhood/village official whose everyday occupation is normally non-governmental.[111]

Disputants begin the *Katarungang Pambarangay* process by submitting a case to the *Punong Barangay*, who attempts to mediate.[112] If this initial attempt at mediation fails, the case is referred to a panel of three *Lupong* members (the '*Pangkat*') for conciliation.[113] The *Pangkat* members are selected by the parties, or if the parties cannot agree, chosen by lot by the *Punong Barangay*.[114] 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'.[115] Lawyers may not participate as

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[102] *Ibid*.
[103] *Ibid*., 265.
[104] Golub, *supra* note 35, 12.
[105] See R. L. Suarez, *Mediation in the Philippines*, www.unisa.edu.au/cmrg/apmf/2001/presenters/reynaldo%20suarez.htm.
[106] Connolly, *supra* note 28, 265.
[107] Golub, *supra* note 35, 12.
[108] *Ibid*.
[109] *Ibid*.
[110] Suarez, *supra* note 105.
[111] G. S. Silliman, 'A Political Analysis of the Philippines' Katarungang Pambarangay System of Informal Justice through Mediation', (1985) 19 *Law & Soc'y Rev*. 279, 280.
[112] Suarez, *supra* note 105.
[113] *Ibid*.
[114] *Ibid*.
[115] Silliman, *supra* note 111, 280.

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counsel.[116] All mediation proceedings are recorded (both at the *Punong* and *Lupong* levels) and copies provided to the disputants and municipal government.[117]

The *Lupong* members 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.[118] The *Lupong* submits data on the *barangay* disputes and their disposition to a Municipal Monitoring Unit, which provides feedback regarding the program to the government.[119]

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.[120] That said, agreements reached pursuant to this process are binding and ultimately enforceable by the formal state courts.[121] The *Katarungang Pambarangay* is linked to the formal state system in another important way: submission of a dispute to the conciliation panel is a prerequisite to filing a case in state court.[122]

Katarungang Pambarangay is mostly limited to civil disputes.[123] Wherethe conflict has criminal implications, *Katarungang Pambarangay* can only handle it if the penalties do not exceed a year in prison or a fine of 5,000 Filipino pesos (equivalent to a misdemeanor in the American system).[124] Victimless crimes or crimes committed by government personnel in the course of their official functions cannot be submitted to the *Katarungang Pambarangay*.[125]

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.[126] Moreover, in gender-related issues, the male perspective of the dispute prevails.[127] In light of this, Brynna Connolly suggests that *Katarungang Pambarangay* may not meet basic human rights standards.[128]

Of course, problems affecting the *Katarungang Pambarangay* 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

[116] *Ibid*.
[117] Suarez, *supra* note 105.
[118] *Ibid*.
[119] *Ibid*.
[120] Silliman, *supra* note 111, 280.
[121] Connolly, *supra* note 28, 266.
[122] *Ibid*.
[123] See Golub, *supra* note 35, 13.
[124] *Ibid*.
[125] *Ibid*.
[126] *Ibid*., 14.
[127] *Ibid*.
[128] Connolly, *supra* note 28, 266.

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capacity for implementing it; (2) lack of reporting from and oversight of these administrators; (3) inadequate informational outreach to the public; and (4) budgetary constraints that stymie government attempts to deal with these other issues.[129]

3.1.6 Mato Oput – *Uganda*

Mato oput is a traditional justice mechanism developed and used by the Acholi people of northern Uganda.[130] In Acholi, *mato oput* means drinking the herb of the *oput* tree, a blinding-bitter tree.[131] The reconciliation process is called *mato oput* because it ends in a significant ceremony reconciling the parties in conflict.[132] 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*.[133] The victim's clan must accept the plea for forgiveness for the reconciliation to be complete.[134] The end result may also include restrictions on the movement of the perpetrators.[135]

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.[136] 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.[137] Thesecondstepin *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 the crime and an expression of remorse.[138] Finally, in the last step, the family of the perpetrator pays compensation raised through the contributions of clan members.[139]

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[129] Golub, *supra* note 35.

[130] D.-D. W. Djamba, 'The Ugandan Peace Process in Perspective', *Pambazuka News*, 23 November 2006, www.pambazuka.org/en/category/comment/38526.

[131] *Ibid*.

[132] *Ibid*. *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.

[133] *Ibid*.

[134] *Ibid*.

[135] See K. E. MacMillan, 'The Practicability of Amnesty as a Non-Prosecutory Alternative in Post-Conflict Uganda', (2007) 6 *Cardozo Pub. L. Pol'y & Ethics J*. 199, 214.

[136] C. Rose, 'Looking Beyond Amnesty and Traditional Justice and Reconciliation Mechanisms in Northern Uganda: A Proposal for Truth-Telling and Reparations', (2008) 28 *B. C. Third World L.J*. 345, 362.

[137] *Ibid*. Such separation is significant because of the communal nature of Acholi culture, wherein families from various clans share food, water, land, and social relations.

[138] *Ibid*. 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.

[139] *Ibid*. Such compensation must be 'affordable, so as not to prevent the restoration of relations, and will usually consist of cattle or money.'

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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.[140] Despite certain variations, the ceremony proceeds as follows:

> First, the offending party beats a stick to broadly symbolize *mato oput'*sr estorative 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.[141]

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 know how it works, experts question its efficaciousness as a reconciliation device based on the Acholis' seemingly limited capacity to forgive.[142]Moreover, it is not clear that *mato oput* is designed to deal with large-scale crimes such as mass abduction or killing.[143]

Even if it were, *mato oput* has other limitations. In the first place, it applies only to situations that have come to an end – not to ongoing conflicts between individuals or groups.[144] Finally, *mato oput* applies only to Acholis.[145] However, there are numerous ethnic groups in Uganda and *mato oput* is simply not able to accommodate them.[146] By the same token, these other groups are not likely to embrace a practice that is alien to them.[147]

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[140] *Ibid*., 362–3. Communal involvement in the ceremony reflects the Acholi belief that the perpetrator's offense affects the whole clan.
[141] *Ibid*., 363–4.
[142] *Ibid*., 366–7.
[143] *Ibid*., 368–9
[144] *Ibid*., 369.
[145] *Ibid*., 369–70.
[146] *Ibid*.
[147] *Ibid*.

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3.2 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 armed opposition forces'.[148] Some offer amnesty to perpetrators and restitution to victims. In many cases, truth commissions offer perhaps the most 'judicialized' approach to 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,[149] they also possess many features we might associate with the classic peno-logical 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.[150]

To date, more than a couple dozen truth commissions have been established around the world.[151] In many respects, they vary widely. For example, some are established on presidential order;[152] others by parliamentary decision.[153] Some function outside the view of the international community while others do their work publicly.[154] Certain ones function more like judicial commissions of inquiry[155] while their counterparts employ less formal procedures resembling or incorporating local cultural rites.[156] A number of commissions deal with large patterns of abuses, such as the South African one.[157] This

[148] P. B. Hayner, 'Fifteen Truth Commissions – 1974–1994: A Comparative Study', (1994) 16 *Hum. Rts. Q.* 597, 600.

[149] See generally P. B. Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* (2001) (exploring the work of more than twenty truth commissions worldwide).

[150] See generally M. 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); A. Bisset, 'Mark Freeman, Truth Commissions and Procedural Fairness', (2008) 8 *Hum. Rts. L. Rev*. 401 (book review).

[151] Freeman, *supra* note 150, Appendix 1.

[152] See M. Mutua, 'Beyond Juba: Does Uganda Need a National Truth and Reconciliation Process?', 13 *Buff. Hum. Rts. L. Rev*. (2007) 19, 31.

[153] *Ibid*.

[154] See T. Klosterman, 'The Feasibility and Propriety of a Truth Commission in Cambodia: Too Little? Too Late?', (1998) 15 *Ariz. J. Int'l & Comp. L*. 833, 835.

[155] See A. Bhargava, 'Defining Political Crimes: A Case Study of the South African Truth and Reconciliation Commission', (2002) 102 *Colum. L. Rev*. 1304, 1398 (describing the work of the 'Committee' portion of the South African Truth and Reconciliation Commission ('TRC') as 'quasi-judicial' and aspiring to 'meet the expectations that attach to a legal institution').

[156] See C. Totten and N. 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', (2008) 98 *J. Crim. L. & Criminology* 1069, 1106 (describing a proposed truth commission in Sudan that incorporates traditional dispute resolution methods).

[157] See M. P. Scharf and P. R. Williams, 'The Functions of Justice and Anti-Justice in the Peace-Building Process', (2003) 35 *Case W. Res. J. Int'l L*. 161, 171 ('The South African Truth and Reconciliation Commission was ... given the task of documenting the full extent of government involvement in racial killing and incidents of torture').

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contrasts with those handling only selected violations, such as the 'disappearances'-focused Argentine commission.[158]

Nevertheless, truth commissions share certain fundamental characteristics. Priscilla Hayner discerns four of them:

(1) They focus on the past. Although the events may have occurred in the recent past, truth commissions are not ongoing bodies akin to human rights commissions.

(2) They investigate a pattern of abuse over a fixed period of time rather than one particular event. In their mandates, truth commissions are given their investigation parameters both in terms of the specific chronology covered as well as the kind of human rights violations to be explored.

(3) They are temporary bodies. Most operate over a period of six months to two years and complete their work by submitting a report. Their life spans are established at the time of their formation, but extensions are often obtained so their work can be properly finalized.

(4) They are officially sanctioned, authorized or empowered by the state. In theory, this should allow the commissions better access to information, better security and increased assurance that their findings will be taken seriously. The government's official blessing is critical because it betokens an admission of past wrongs and a pledge to deal with those wrongs and move on. Additionally, governments may be more apt to institute recommended reforms if they have had a hand in creating and assisting the commission.[159]

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

(1) contributing to transitional peace by 'creating an authoritative record of what happened';

(2) providing a platform for victims to tell their stories and obtain some form of redress;

(3) recommending legislative, structural or other changes to avoid a repetition of past abuses; and

[158] See C. K. Connolly, 'Living on the Past: The Role of Truth Commissions in Post-Conflict Societies and the Case Study of Northern Ireland', (2006) 39 *Cornell Int'l L. J.* 401, 407.

[159] Hayner, *supra* note 149, 14. See also E. Brahm, *Truth Commissions*, June 2004, Beyond Intractability.org, www.beyondintractability.org/essay/truth commissions/.

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(4) establishing who was responsible and providing a measure of accountability for the perpetrators.'[160]

In commenting on the creation of the South African Truth and Reconciliation Commission ('TRC'), Nobel Laureate and TRC Chair Desmond Tutu noted that 'while the Allies could pack up and go home after Nuremberg, we in South Africa had to live with one another'.[161] Indeed, truth commissions can be a powerful tool in furthering the aims of restorative justice. The process may well afford victims a sense of catharsis and restored dignity. It may inspire perpetrators to renounce hatred and violence. Psychologically, if not spiritually, it can help bring the community together and heal divisive wounds. In Tutu's words regarding the South African TRC: 'It 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 confession put[s] it all out in the open. With full disclosure, people feel they can move on.'[162]

On the other hand, truth commissions can have the opposite effect. While telling one's story and hearing details of loved ones' fates is sometimes beneficial, for other victims, these experiences have quite different effects.[163] For example, the South African TRC revealed that while some victims felt profoundly empowered by telling their stories, others felt angry and faced post-traumatic stress.[164] In fact, a survey in South Africa found that the process had made race relations worse and made people angrier.[165]

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.[166] Other truth commissions, such as Uganda's 1974 version, were little more than thinly veiled efforts to placate the international community.[167] Even in the case of ostensibly more legitimate bodies, such as Zimbabwe's (1985) and Haiti's (1996), the publication of the commission's report was hampered[168] or completely thwarted[169] because it was too

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[160] M. Popkin and N. Roht-Arriaza, 'Truth as Justice: Investigatory Commissions in Latin America', (1995) 20 *Law & Soc. Inquiry* 79, 80.

[161] D. Tutu, *No Future without Forgiveness* (2000), 21.

[162] S. Winer, 'South Africa: The High Price of Appeasement', 6 February 2003, ZMag.org, www.zmag.org/content/showarticle.cfm? ItemID=2984.

[163] Brahm, *supra* note 159.

[164] See A. K. Wing, 'A Truth and Reconciliation Commission for Palestine/Israel: Healing Spirit Injuries', (2008) 17 *Transnat'l L. & Contemp. Probs*. 139, 143.

[165] *Ibid*.

[166] See Hayner, *supra* note 148, 619, 625. See also Trial Watch, 'Truth Commission in Uganda', www.trial-ch.org/en/international/truth-commissions/uganda.html ('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').

[167] See Hayner, *supra* note 148, 612–13.

[168] See R. Brody, 'Justice: The First Casualty of Truth? The Global Movement to End Impunity for Human Rights Abuses Faces a Daunting Question', The Nation, 30 April 2001, at 25 (indicating that the report of Haiti's truth commission was published years after its work ended).

[169] See US Institute of Peace, *Truth Commissions Digital Collection*, www.usip.org/ library/truth.html ('The report of a commission of inquiry established in 1985 to investigate the killing of an estimated

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critical of the new government.[170] Some commissions have not even been allowed to complete their work. Those in Bolivia (1982–4) and Ecuador (1996–7) were disbanded before fulfilling their mandates because the government in each case found the process had become too politically problematic.[171]

Overall, truth commissions often fall short of 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 see masked to do toomuchwithtoo little.[172]

3.3 Lustration

Lustration is another quasi-judicial mechanism that entails identifying officials and collaborators of the former criminal government and barring them from participating in government positions and positions of influence in the new regime.[173] Lustration has been used widely in former Soviet bloc countries, such as Poland and the Czech Republic, which have transitioned from communism to democracy.[174] Lustration laws tend to cull names from the previous regime's police files.[175] This information is then

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1,500 political dissidents and other civilians in the Matabeleland region has not been made public to date by the government').

[170] See Hayner, *supra* note 149, 617.

[171] See Brahm, *supra* note 159.

[172] *Ibid*.

[173] See R. Boed, 'An Evaluation of the Legality and Efficacy of Lustration as a Tool of Transitional Justice', (1999) 37 *Colum. J. Transnat'l L*. 357, 358. Boed goes on to explain that 'Lustration' is derived from the Latin word 'lustratio,' which means 'purification by sacrifice'. 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. 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. Fumigation was also used.

[174] *Ibid*. 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 officers from the former regime. See I. Simonovic, 'Dealing with the Legacy of Past War Crimes and Human Rights Abuses', (2004) 2 *JICJ* 701, 704 note 14.

[175] See D. M. Hollywood, 'The Search for Post-Conflict Justice in Iraq: A Comparative Study of Alternative Justice Mechanisms and Their Applicability to Post-Saddam Iraq', (2007) 33 *Brook. J. Int'l L*. 59, 95.

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used to determine whether suspected individuals collaborated with the former state security service.[176]

Lustration has also been used in post-war Germany to purge former Nazis, in post-Saddam Hussein Iraq as part of the 'deba'athification process' (Ba'ath was Saddam's party) and in post-authoritarian Latin American societies, such as El Salvador.[177] In Iraq, for example, US administrator L. Paul Bremer established a Supreme National Deba'athification Commission to root out senior Ba'athists from Iraqi ministries and hear appeals from Ba'athists who were in the lowest ranks of the party's senior leadership.[178]

Lustration laws generally contain both substantive and procedural parts.[179] The substantive part determines: (1) what positions in the new democratic system may not be filled by members of the previous totalitarian government; and (2) what posts in the previous regime would disqualify individuals (or necessitate inquiry) for service in the new government.[180] The procedural aspect establishes the authority tasked to administer the lustration law and the process by which such law will be carried out.[181] Lustration is typically performed by a 'commission' or similar administrative body.[182]

Certain lustration laws appear more judicial in character. The Polish version, for example, establishes a special lustration prosecutor, and designates the Warsaw Court of Appeal as its lustration court.[183] It lays out a special judicial procedure that is directly linked with Poland's regular criminal law.[184] The process can be initiated by the prosecutor or a Member of Parliament.[185] 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'.[186]

Lustration is often justified on the ground that it permits fragile democracies to take root by preventing those who would harm them from serving in positions of power.[187] Consistent with this, lustration is also valued by some for its ability to prevent members of new regimes from being subjected to political 'blackmail' (they would be asked for

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[176] *Ibid*.
[177] *Ibid*.; Boed, *supra* note 173, 358; Simonovic, *supra* note 174, 701.
[178] See S. Otterman, 'Iraq: Debaathification', Council on Foreign Relations, 7 April 2005, www.cfr.org/publication/7853/iraq.html. The author adds that the party's foremost leaders – some 5,000 to 10,000 individuals – were not permitted to appeal their dismissals. 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.
[179] See R. David, 'Lustration Laws in Action: The Motives and Evaluation of Lustration Policy in the Czech Republic and Poland', (2003) 28 *Law & Soc. Inquiry* 387, 408.
[180] *Ibid*.
[181] *Ibid*.
[182] See Boed, *supra* note 173, 364. In certain jurisdictions, an appeal process is included.
[183] See David, *supra* note 179, 411.
[184] *Ibid*.
[185] *Ibid*.
[186] Hollywood, *supra* note 175, 96.
[187] *Ibid*.

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political favors under threat of having their past service exposed).[188] Lustration's advocates believe it ultimately contributes to establishing 'historical truth' and national reconciliation while establishing a minimum baseline of justice that is only 'semi-retributive' in nature.[189]

That said, lustration is not without its critics. They fault it for: (1) the anomaly of determining a person's suitability for performing certain functions in a democratic state based on internal files of a police state; (2) the fact that, in any event, those files are often inaccurate or incomplete; (3) the procedural defects implied 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;[190] (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 person was responsible for human rights violations; and (5) the limited or nonexistent rights to judicial review.[191] In considering the Czech law, Roman Boed thus concludes that lustration:

> results in legally-impermissible 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.[192]

3.4 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.[193] The UN's Basic Principles on the Right to a Remedy and Reparation lists five categories of reparations: (1) restitution or *restitutio 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 sanctioning perpetrators; and (5) guarantees of non-repetition, including institutional and legal reform, and promoting mechanisms to prevent and monitor future social conflict.[194]

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[188] *Ibid*.

[189] *Ibid*.

[190] *Ibid.*, 97–9. Hollywood notes critics' concerns that lustration deprives emerging democracies of rare and valuable human resources. It also prevents old apparatchiks from being inculcated in the democratic values of the new regime.

[191] See Boed, *supra* note 173, 377–8.

[192] *Ibid*., 398–9.

[193] See L. J. LaPlante, 'On the Indivisibility of Rights: Truth Commissions, Reparations and the Right to Development', (2007) 10 *Yale Hum. Rts. & Dev. L.J*. 141, 159.

[194] 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

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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.'[195] Reparations also possess retributive and deterrent features – holding the state accountable for its past acts and omissions and thus helping fight against potential future impunity.[196]

Administration of reparations, however, can present a significant obstacle. First, few transitioning states have the funds to compensate all the victims deserving of assistance.[197] And donations from wealthy foreign donors or even a 'reparations tax' are unlikely to take care of the problem.[198] 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'.[199] 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.[200] Among the issues, in this regard, are proof problems in demonstrating a sufficient nexus between specific criminal activity and particular injuries.[201]

Even if these hurdles could be overcome, reparations dividends may ultimately be minimal. On one hand, in their narrowest form, reparations provide benefits to certain victims only for particular defined losses.[202] Such case-by-case reparations, though, risk 'disaggregating the harm suffered by victims and fragmenting various victims groups'.[203] 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'.[204]

3.5 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

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Law, GA Res., 60/147, paras. 19–23, UNGAOR, 60th Sess., UN Doc. A/Res/60/147 (16 December 2005).

[195] LaPlante, *supra* note 193.

[196] *Ibid*.

[197] See Hollywood, *supra* note 175, 92.

[198] *Ibid*., 92–3.

[199] E. A. Posner and A. Vermeule, 'Transitional Justice as Ordinary Justice', (2004) 117 *Harv. L. Rev*. 761, 766.

[200] Hollywood, *supra* note 175, 93–4.

[201] See A. Di Giovanni, 'The Prospect of ICC Reparations in the Case Concerning Northern Uganda: On a Collision Course with Incoherence?', (2006) 2 *J. Int'l L. & Rel*. 25, 54 (noting, in the Ugandan context, that injuries to victims can often be attributable to more than one perpetrator).

[202] *Ibid*., 42.

[203] *Ibid*.

[204] *Ibid*.

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and punishment'.[205] Amnesties present a troubling paradox: they are typically unavailable for ordinary domestic crime; yet they arise frequently in situations of mass atrocity.[206]

In the transitional justice context, there are different kinds of amnesties. Some of them are unqualified.[207] Of these, certain amnesties are granted by existing governments to rebel groups – as was the case in Uganda where the government enacted an Amnesty Act for Lord's Resistance Army ('LRA') rebels in 2000.[208] Other amnesties are granted by new regimes vis-à-vis the crimes of their predecessors – such as when the new Sandinista government in Nicaragua granted amnesty in 1985 to armed forces that had been opposing the Sandinistas.[209]

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.[210] Such was the case in Chile, for example, where the departing Pinochet government pardoned its leaders on the way out.[211]

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.[212] Often, this is done in the context of a truth commission.[213] This was the case in South Africa.[214] In order to be eligible for amnesty before its Truth and Reconciliation Commission, a perpetrator had to make a full disclosure of the crimes in which he was involved.[215] This had to be corroborated with other testimony and evidence;[216] and the perpetrator had to demonstrate that the crime was committed for a political purpose.[217]

Proponents of amnesties claim several advantages: (1) they can serve as a 'carrot' to bring conflict to a close where governments have offered, or opposition forces have demanded, amnesty as a precondition for entering into peace negotiations;[218] (2) amnesty provisions may be a precondition for dictatorial regimes to give up power;[219] and (3)

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[205] *Black's Law Dictionary* (2004), 93.
[206] See Drumbl, *supra* note 26, 154.
[207] *Ibid*.
[208] See Rose, *supra* note 136, 353–4. The 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.
[209] See Inter-American Commission on Human Rights, 1984–1985 Annual Report on Nicaragua (1985), www.cidh.oas.org/annualrep/84.85eng/chap.4d.htm.
[210] Drumbl, *supra* note 26, 154.
[211] *Ibid*.
[212] *Ibid*.
[213] *Ibid*.
[214] See E. Brahm, 'Amnesty', The Conflict Resolution Information Source, March 2005, http://crinfo.beyondintractability.org/essay/amnesty/?nid=2371.
[215] *Ibid*.
[216] *Ibid*.
[217] *Ibid*.
[218] See C. P. Trumbull IV, 'Giving Amnesties a Second Chance', (2007) 25 *Berkeley J. Int'l L*. 283, 312–14.
[219] Brahm, *supra* note 59.

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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.[220]

Opponents of amnesties describe them as a miscarriage of justice that reinforces impunity and undermines the move toward a burgeoning rule of law.[221] In reference to the South African Truth and Reconciliation Commission, one observer has noted: '[F]rom 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.'[222] Moreover, as noted 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'.[223]

4 Formulating analytic criteria for complementarity evaluation

May domestic resort to one or more of the categories of alternative justice just considered, 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 surrounding the domestic justice effort and its relationship to the ICC should be considered. This 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.

4.1 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.

[220] Trumbull, *supra* note 218, 314–16.
[221] Drumbl, *supra* note 26, 154.
[222] M. J. Aukerman, 'Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice', (2002) 15 *Harv. Hum. Rts. J*. 39, 62.
[223] Drumbl, *supra* note 26, 154.

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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 (i.e., a country that has ratified the Rome Statute) may refer a case;[224] (2) the Security Council may refer the case (subject, of course, to veto from the permanent five members) per Article 13(b);[225] (3) under Articles 13(c) and 15, the ICC's three-judgePretrial Chamber panel may authorize a case initiated by the ICC Prosecutor; or (4) Articles 12(2) and (3) allow for member country referrals or Prosecutor-initiated prosecutions with respect to non-member countries provided the non-member has *chosen to accept* the ICC's jurisdiction.

Moreover, a state may request ICC deferral on complementarity grounds either earlier or later on in the case. Pursuant to Article 18 of the Rome Statute, within one month of the ICC Prosecutor's case initiation notice to a state, the state may inform the ICC that it is handling the matter and request that the Prosecutor suspend the inquiry. On the other hand, Article 19 permits a state to request deferral at later stages of the case.

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 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.[226] Similarly, prosecutions instituted by the ICC Prosecutor reflect internal checks and balances as they are reviewed and authorized by a Pre-trial Chamber.[227] Third-party member state referrals, for their part, reflect the Westphalian preference of the international community, as embodied in the earliest drafts of the Rome Statute, that state sovereigns should be the primary moving force in triggering international criminal prosecutions.[228]

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[224] Rome Statute, *supra* note 1, Arts. 13(a) and 14.

[225] *Ibid*., Art. 13(b). To date, the Security Council has made only one such referral – the 'Situation in Darfur, Sudan' in March 2005. See W. A. Schabas, 'Prosecutorial Discretion v. Judicial Activism at the International Criminal Court', (2008) 6 *JICJ* 731, 758.

[226] See G. S. Gordon, 'From Incitement to Indictment? Prosecuting Iran's President for Advocating Israel's Destruction and Piecing Together Incitement Law's Emerging Analytical Framework', (2008) 98 *J. Crim. L. & Criminology* 853, 915 (opining that Security Council referral to the ICC indicates international acquiescence to prosecution); C. H. Chung, 'The Punishment and Prevention of Genocide: The International Criminal Court as a Benchmark of Progress and Need', (2007–2008) 40 *Case W. Res. J. Int'l L*. 227, 239 ('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').

[227] See Rome Statute, *supra* note 1, Arts. 15(3)–(5).

[228] See Schabas, *supra* note 225, 734.

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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 which, although technically permissible, finds no support in the Rome Statute's *travaux préparatoires*.[229] 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.'[230] William Schabas thus fears the end result would be 'establishing a degree of complicity between the Office of the Prosecutor and the referring state'.[231]

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.[232]

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).[233]

The timing of a Rule 19 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 ought to be a presumption of good faith bestowing greater deference to the municipal arrogation of process.[234]

Conversely, a Rule 19 application submitted on the eve of trial should raise red flags and preclude deference.[235] 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 so, then a request for deferral and the hasty establishment of

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[229] *Ibid*., 751.

[230] G. P. Fletcher, *The Grammar of Criminal Law, American, Comparative, and International. Volume One: Foundations* (2007), 189. But see G. Gaja, 'Issues of Admissibility in Case of Self-Referrals', in M. Politi and F. Gioia (eds.), *The International Criminal Court and National Jurisdictions* (2007) ('Self-referrals cannot be distorted so as to provide a form of cooperation which would at the end of the day leave investigations and prosecution in the hands of the State where the alleged crime occurred').

[231] Schabas, *supra* note 225, 751.

[232] K. Roth, 'Workshop – The International Criminal Court Five Years On: Progress or Stagnation?' (2008) 6 *JICJ* 763, 764.

[233] Kenneth Roth notes: 'The 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.'*Ibid.*, 765.

[234] This would appear to be consistent with the presumption of inadmissibility owing to domestic efforts as embodied in Article 17(1). Rome Statute, *supra* note 1, Art. 17(1).

[235] This seems inevitably to implicate consideration of Article 17(2)(b) – there has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice. Rome Statute, *supra* note 1, Art. 17(2)(b).

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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 . . .'[236]

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, the current request should be evaluated with very strict scrutiny.

4.2 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: 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 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 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" . . .').[237] Moreover, implicit in successful transitional justice is the significant abatement or cessation of hostilities giving rise to the justice initiative. In fact, based on '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'.[238]

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 or not of an ongoing conflict that fueled the human rights violations at issue).

4.2.1 Legitimacy

[236] L. Arbour and M. Bergsmo, 'Conspicuous Absence of Jurisdictional Overreach', in H. von Hebel (ed.), *Reflections on the International Criminal Court* (1999), 129, 131.

[237] B. Hall, 'Using Hybrid Tribunals as Trivias: Furthering the Goal of Post-Conflict Justice While Transferring Cases from the ICTY to Serbia's Domestic War Crimes Tribunal', (2005) 13 *Mich. St. J. Int'l L.* 39, 42. See also L. A. Dickinson, 'The Promise of Hybrid Courts', (2003) 97 *Am. J. Int'l L.* 295, 301 (focusing on the importance of legitimacy, capacity building and norm penetration).

[238] L. J. Laplante and K. Theidon, 'Transitional Justice in Times of Conflict: Columbia's Ley de Justicia y Paz', (2006) 28 *Mich. J. Int'l L.* 49, 78. See also J. Mendez and L. Henkin, 'Transitional Justice, and the Prevention of Genocide', (2007) 38 *Colum. Hum. Rts. L. Rev.* 477, 483 (referring to complications when transitional justice mechanisms have to be applied during ongoing conflict and for ongoing violations).

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In the area of transitional justice, legitimacy of the domestic system depends in large part on the degree to which it is governed by the rule of law. According to RutiTeitel: '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.'[239]

In order for the rule of law to take root in post-conflict societies, however, there must be some modicum of it to begin with.[240] To measure whether there is, it is instructive to consider the types of 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 recently or in the more distant past. Within this model, there are three main divisions. The first among these 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.[241] 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 Rwandan government.[242]

The second scenario within this archetype implicates an ousted government being restored after the country suffered from massive human rights violations post-coup. This is what happened in Sierra Leone when Ahmad TejanKabbah's overthrown government returned to power after the commission of crimes against humanity and war crimes by various rebel factions.[243]

The final situation entails the United Nations forming a provisional authority to govern a country recently engulfed in violence committed by a previous occupying regime. This

[239] R. Teitel, 'Transitional Justice in a New Era', (2003) 26 *Fordham Int'l L. J*. 893, 897.

[240] See 'Panel #1: The Rule of Law and Economic Development: An Overview on the Region', (2008) 25 *Ariz. J. Int'l & Comp. L*. 267, 277 (noting that the rule of law is necessary to allow nations to achieve justice).

[241] See E. Popoff, 'Inconsistency and Impunity in International Human Rights Law: Can the International Criminal Court Solve the Problems Raised by the Rwanda and Augusto Pinochet Cases', (2001) 33 *Geo. Wash. Int'l L. Rev*. 363, 380 ('In 1990 Pinochet agreed to step down from power and allowed democratic elections').

[242] E. Bradley, 'In Search for Justice – A Truth and Reconciliation Commission for Rwanda', (1998) 7 *J. Int'l L. &Prac*. 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').

[243] See S. Williams, 'Amnesties in International Law: The Experience of the Special Court for Sierra Leone', (2005) 5 *Hum. Rts. L. Rev*. 271, 274–5.

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was the case in East Timor where UNTAET governed the new country after its Indonesian overlords went on a violent rampage before pulling out.[244]

The second paradigm consists of justice efforts undertaken by an established regime that has been in power. 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 President Yoweri Museveni's government is fighting against the Lord's Resistance Army, whose human rights violations have been noted above.[245] The other scenario is found in Sudan, where the existing government itself is accused of committing human rights violations in Darfur but supposedly seeks to bring its own members to justice.[246]

Of these two paradigms, the first – new regimes emerging after extensive violence – would generally appear to give greater assurance of the rule of law.[247] 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* perpetrators to justice.[248] And, of course, this often has positive rule of law implications.[249]

On the other hand, there are no guarantees in this regard. In the first place, rogue regimes may simply replace other rogue regimes.[250] Moreover, even if a new regime starts out on the right path, it can often diverge. The Rwandan Patriotic Front ('RPF'), for example, has been increasingly accused of human rights violations in Rwanda over the past decade (as was illustrated by the recent detention in Rwanda of US defense attorney Peter Erlinder on charges of genocide denial).[251] In addition, it is quite possible that justice efforts are initiated long after the regime takes power. That is the case in Cambodia,

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[244] See L. A. Dickinson, 'Transitional Justice in Afghanistan: The Promise of Mixed Tribunals', (2002) 31 *Denv. J. Int'l L. & Pol'y* 23, 30–2. This was also the case in Kosovo, where UNMIK (United Nations Mission in Kosovo) became the governing authority after the commission of Serb atrocities. *Ibid.*, 27–30.

[245] E. C. Minogue, 'Increasing the Effectiveness of the Security Council's Chapter VII Authority in the Current Situations before the International Criminal Court', (2008) 61 *V and. L. Rev.* 647, 658–62.

[246] See generally Rebecca A. Corcoran, 'Justice for the Forgotten: Saving the Women of Darfur', (2008) 28 *B.C. Third World L.J*. 203, 223 (describing the atrocities committed by Sudan in Darfur and explaining Sudanese establishment of the domestic Special Court for Darfur).

[247] See J. Dermody, 'Beyond Good Intentions: Can Hybrid Tribunals Work after Unilateral Intervention?' (2006) 30 *Hastings Int'l & Comp. L. Rev*. 77, 80 (noting that holding the prior regime accountable presents the new regime's first real test for the establishment of the rule of law).

[248] *Ibid*.

[249] See Trumbull, *supra* note 218, 305 (noting, *inter alia*, that in post-conflict societies, justice efforts are necessary to restore the rule of law).

[250] See N. Stammers, 'Social Movements, Human Rights, and the Challenge to Power', (2003) 97 *Am. Soc'y Int'l L. Proc*. 299, 301 (noting the potential for one form of oppressive power to be replaced by another).

[251] See L. Reydams, 'The ICTR Ten Years On: Back to the Nuremberg Paradigm?', (2005) 3 *JICJ* 977, 982 (observing that since becoming the core of the post-genocide government, the RPF and its army have again been guilty of significant human rights abuses). See also J. Kron, 'American Lawyer Denied Bail in Rwanda', *NY Times*, 7 June 2010, www.nytimes.com/2010/06/08/world /africa/08rwanda.html.

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where justice efforts related to Khmer Rouge atrocities are only now being undertaken.[252] In the meantime, the current Cambodian government has allegedly accumulated a long record of flouting the rule of law.[253]

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 government has been accused of rigging elections and committing atrocities), it is not as clear in the DRC, where the government was democratically elected pursuant to a constitution passed with 84 per cent of voters' support and a process blessed by the international community as free and fair.[254]

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) has the country only recently gotten out from under the yoke of a totalitarian human rights-violating regime?[255] (2) has it been democratically elected or is it credibly seeking to hold elections in the near future? (3) does it have a developed degree of civil society? (4) does it have a stable economic, governmental, and judicial infrastructure (including an updated/reformed legal code and effective security forces)? (5) does it have an educational system and free press? (6) does it have a record of commitment to and respect for human rights?[256] If these questions are answered in the affirmative, the country would appear to have a minimum degree of rule of law. This should factor into the domestic jurisdiction's favor in the complementarity analysis.

With regard to the sixth question, 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

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[252] See K. Claussen, 'Up to the Bar? Designing the Hybrid Khmer Rouge Tribunal in Cambodia', (2008) 33 *Yale J. Int'l L*. 253 (pointing out that 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).

[253] See M. Maley, 'Transplanting Election Regulation', (2003) 2 *Election L.J*. 479, 491 note 48 (explaining 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).

[254] See E. Powers, 'Greed, Guns and Grist: U.S. Military Assistance and Arms Transfers to Developing Countries', (2008) 84 *N.D. L. Rev*. 383, 404.

[255] This inquiry is premised on the assumption that, as explained *supra*, 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 247–9 and accompanying text. So it can be instructive, if not dispositive, to know how long the new regime has been in power.

[256] See J. Stromseth, 'Post-Conflict Rule of Law Building: The Need for a Multi-Layered, Synergistic Approach', (2008) 49 *Wm. & Mary L. Rev*. 1443,1443–4 ('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').

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granted. The tougher scenario is when two or more of the first five questions are answered in the negative. One could possibly imagine, for example, finding the rule of law has taken root solely on thefindingofa fairly electedgovernment or a well-developed civil society (certainly both of them combined would help compel such a conclusion). But if both of these were absent, the recency of *ancien régime* violence (the first question posed) – 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 in deciding whether the regime has legitimacy. Moreover, it should consider whether the perception of legitimacy is held by both the international and local communities.[257] 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.

4.2.2 Capacity

Even if a country seeking deferral satisfies the legitimacy criterion, its physical capacity to dispense justice must also be considered. In other words, does it possess the necessary resources and infrastructure? The physical infrastructure often will have sustained extensive, crippling damage.[258] Has it been sufficiently restored? Given its connections to the previous regime, judicial personnel may be severely compromised or lacking in essential skills.[259] 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.

4.2.3 Stability

Circumstances external to the government Are the armed conflict or massive human rights violations that prompted the justice effortsongoing? 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, a negative inference should be drawn in terms of its effect on complementarity.[260]

Internal government discord Another relevant consideration in this regard is the internal unity of the government seeking to use the alternative justice mechanism.[261]

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[257] See Miles M. Jackson, 'The Customary International Law Duty to Prosecute Crimes against Humanity: A New Framework', (2007) 16 *Tul. J. Int'l & Comp. L.* 117, 123 (suggesting the importance of a new post-atrocity government's establishing both internal and international legitimacy); H. H. Perritt, Jr., 'Final Status for Kosovo', (2005) 80 *Chi.-Kent L. Rev.* 3, 12 (discussing the value of local legitimacy).

[258] Dickinson, *supra* note 237, 301.

[259] *Ibid*.

[260] See M. Wierda, 'Peace v. Justice: Contradictory or Complementary', (2006) 100 *Am. Soc'y Int'l L. Proc.* 368, 371 (indicating that transitional justice mechanisms fare better when there is stability in the society seeking to use them).

[261] See ICC-OTP, 'Informal Expert Paper: The Principle of Complementarity in Practice', 2003, (manuscript at 14, www2.icc-cpi.int/iccdocs/doc/doc656350.pdf.) ('Informal Expert Paper') ('The OTP

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Party in-fighting or inter-branch skirmishes should set off alarm bells. This is especially true regarding the potential for intra-governmental 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.[262] If the military were in a position, even indirectly, to thwart the success of the justice enterprise, a finding of ICC admissibility would likely be warranted.

4.3 The justice mechanism

As the analytical focus narrows, we come to the centerpiece of the examination – scrutiny of the justice mechanism itself. Although they vary – traditional local procedures, truth commissions, lustration, reparations and amnesties – 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.

4.3.1 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 its chances for a positive deferral request outcome. The classic example, in this regard, is the establishment of a truth commission whose evident purpose is to delegitimize the previous regime – as opposed to bringing out truth and fostering reconciliation.[263] 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 'conquer and divide' 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.

4.3.2 Judicialization of the mechanism

For complementarity purposes, this second criterion – judicialization of the mechanism – is likely to be the most crucial. In their purest restorative forms, alternative justice

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should be alert to the possibility of differing degrees of willingness and internal differences within a State').

[262] *Ibid*., ('Investigators may be willing but an "unwilling" military may frustrate and hinder investigative efforts').

[263] See Hayner, *supra* note 148, 612–13, 619, 625.

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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 community together and heal its wounds.[264] On the other hand, 'standard' justice mechanisms in post-conflict societies, i.e. criminal trials, tend to have detailed rules and are less specifically geared toward fostering social harmony and more intent on penological coherence and individual criminal responsibility through the phases of investigation, trial and punishment.[265] On a surface level, this is the ideal complementarity model for domestic efforts under Article 17 of the Rome Statute.[266] But that does not necessarily preclude consideration of alternative mechanisms under Article 17.[267] Perhaps if the mechanisms possess certain minimum indicia of standard judicial process, they too could qualify under Article 17.

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 body's sanctioning power; and (4) its linkage with the country's standard court system.

Constituent nature of the body

Type of body As a threshold matter, consideration of the type of mechanism is instructive. Of the alternative justice varieties previously considered, certain of them 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.[268] They carry out investigations, they have subpoena powers, they conduct hearings, they name individuals, they can offer amnesty and they can refer cases for punishment.[269] Similarly, customary local mechanisms, especially the modernized varieties, such as *gacaca*, employ relatively elaborate procedures resembling trials and they can offer a right of appeal.[270] Some of them 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

[264] See A. Morris, 'Critiquing the Critics: A Brief Response to Critics of Restorative Justice', (2002) 42 *Brit. J. Criminology* 596, 599 ('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').

[265] See Drumbl, *supra* note 26, 5.

[266] See D. Scheffer and A. Cox, 'The Constitutionality of the Rome Statute of the International Criminal Court', (2008) 98 *J. Crim. L. & Criminology* 983, 1066 (indicating that criminal trials satisfy the ICC's complementarity admissibility requirement).

[267] See Keller, *supra* note 2, 259–60.

[268] See *supra* notes 149–50 and accompanying text.

[269] See Freeman, *supra* note 150, at Part II.

[270] See *supra* Section 3.1 (exploring customary local procedures).

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be deemed sufficiently judicialized for purposes of Article 17 complementarity. We would expect a greater presumption of judicialization 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. Those criteria include: (1) a collateral penological function for the body; (2) permanent versus temporary operation (including the existence of institutional methods of developing the body); and (3) the nature of the proceeding.

Collateral penological function Notwithstanding the primarily restorative nature of the mechanism, it could be characterized as having a collateral penological function that would render it more compatible with Article 17. For example, the traditional version of *shalish* contemplates retributive sanctions to the point of issuing *fatwahs*.[271] Truth commissions can include investigations that resemble classic criminal inquiries, hearings where witnesses are subpoenaed and cross-examined, decisions to withhold amnesties and referral to the court system for punishment.[272] Lustrations can be wide ranging in their preclusion effect – to the point of looking like a retributive tribunal.[273] Mechanisms endowed with these penal features and objectives begin to look rather judicialized and are more attractive candidates for Article 18/19 deferral requests.

Permanent v. short-term Institutions that are set up for only specific periods tend to look less judicialized.[274] 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 would be the updated versions of *shalish* and *Katarungang Pambarangay*.[275] 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.[276]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 analyze its performance and make improvements when

[271] See Golub, *supra* note 35, 5.
[272] See generally Freeman, *supra* note 150 (exploring procedural aspects of truth commissions).
[273] See M. C. Bassiouni, 'Searching for Peace and Achieving Justice: The Need for Account-ability', 59(4) *Law & Contemp. Probs*. 9, 22–3 (1996) (describing lustration mechanisms as 'punitive in nature').
[274] See R. T. Coyne,' Reply to Noah Feldman: Escaping Victor's Justice by the Use of Truth and Reconciliation Commissions', (2005) 58 *Okla. L. Rev*. 11, 17 (indicating the temporary nature of truth commission and describing it as 'nonjudicial').
[275] See *supra* Section 3.1.1 and 3.1.5.
[276] See H. J. Berman and C. J. Reid, Jr., 'The Transformation of English Legal Science: From Hale to Blackstone', (1996) 45 *Emory L.J*. 437, 444–5 (describing this phenomenon within the context of the development of English legal history).

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necessary.[277] Such is the case once again with *Katarungang Pambarangay*, where *Lupong* members meet monthly to assess performance and consider reform and a Municipal Monitoring Unit tracks data and provides feedback regarding the program to the government.[278]

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 proceeding as more judicial in nature.[279] The modernized CLPs, such as *gacaca* in Rwanda and *kgotla* in Botswana (where the 'headman' of the village presides), tend to have this feature.[280] The truth commissions also have it – to the extent they conduct investigations, offer amnesties or refer matters for criminal prosecution.[281] If special administrative/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 Bangladeshi *shalish*). Although less judicial in appearance, these proceedings may involve methods of facilitation and control, including use of a conciliation panel (as with *Katarungang Pambarangay*), that are hallmarks of judicial procedure.[282]

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 pre-determined statements, presentations and interactions, then the body more likely resembles 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*, whose ceremony begins with speeches from community and religious leaders and is followed by 'deponents' (alleged perpetrators) coming forward to speak about their offences and to apologize to the community.[283] At the end of the ceremony, victims and community members verbally agree to accept the deponents' statements.[284]

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 considered of a lesser judicial nature.

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[277] See R. D. Lipscher, 'A Tribute to Chief Justice Wilentz', (1997) 49 *Rutgers L. Rev*. 683, 687 (expressing view that reform is a hallmark of state judiciary).
[278] See Suarez, *supra* note 105.
[279] See E. A. Posner, 'Does Political Bias in the Judiciary Matter?: Implications of Judicial Bias Studies for Legal and Constitutional Reform', (2008) 75 *U. Chi. L. Rev*. 853, 857 (observing that the judiciary consists of 'judges' in discussing the relationship between the judicial branch and the electorate).
[280] See Waldorf, *supra* note 29, 48; Nat'l Inst. Int'l Affairs, *supra* note 94, 93–5.
[281] See Bassiouni, *supra* note 273, 21 (describing certain tribunals with investigatory functions as 'hybrid' in nature).
[282] See R. A. Creo, 'Mediation 2004: The Art and the Artist', (2004) 108 *Penn St. L. Rev*. 1017, 1034 (referring to forms of mediation resembling judicial settlement models based on an adversary model).
[283] *Security Man*, *supra* note 77.
[284] *Ibid*.

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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 character.

Substantive and procedural law The extent of the mechanism's reliance on law is another indicium of judicialization. Bodies appear more judicial in nature if they are governed by law or by a set of laws. Such laws could set out 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.[285]

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 of the village)?[286] Is there a right to appeal to a higher traditional court (as in *gacaca*),[287] or, ultimately, to the national courts (as in Botswana's *kgotla* system)?[288] Certain systems of lustration have also provided for the right to appeal.

Truth commissions have also contained certain due process safeguards. For instance, the South African Truth and Reconciliation Commission was obligated to provide persons 'proper, reasonable and timely notice of hearings if evidence detrimentally implicating them was to be heard'.[289] 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 Commission shall be given an opportunity to be heard and to cross-examine the person giving such evidence'.[290]

A further sign of judicial character is the law's format. Written, as opposed to strictly oral, law further betokens a judicial nature.[291] As indicated previously, modernized versions of CLPs, such as *gacaca*, are often established through written laws.[292] 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.

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[285] See *supra* notes 264–7 and accompanying text.
[286] Zafarullah and HabiburRahman, *supra* note 42, 1030 note 45.
[287] Goldstein-Bolocan, *supra* note 72, 398.
[288] Connolly, *supra* note 28, 282.
[289] M. P. Scharf, 'The Case for a Permanent International Truth Commission', (1997) 7 *DukeJ. Comp. & Int'l L.* 375, 386. Scharf comments, at note 56, that this rule was initially pursuant to a decision by the South African Supreme Court that was later overruled. Nevertheless, the South African TRC decided to adopt the recommended procedure.
[290] The Commissions of Inquiry Act, Legal Notice No. 5 (16 May 1986) (Cap. 56).
[291] See D. Litman, 'Jewish Law: Deciphering the Code by Global Process and Analogy', (2005) 82 *U. Det. Mercy L. Rev.* 563, 574 ('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)).
[292] See *supra* note 61 and accompanying text.

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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'.[293] 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.'[294]

Such non-incarcerative sanctions may also include community service, civic exclusion (such as barring someone from voting and/or running for office – equivalent to or an extension of lustration), withholding of amnesty and restitution/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 contemplates some form of sanctioning consistent with the general penal nature of the ICC and its core purpose of ending impunity.[295]

Linkage with the national justice system Although alternative mechanisms can often operate separately from the national systems of which they are a part, they 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 system 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. Each of these shall be considered.

Use of national system 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* CLP).[296] This represents the lowest degree of institutional linkage.

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

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[293] See generally M. Drumbl, 'Punishment, Post-Genocide: From Guilt to Shame to Civis in Rwanda', (2000) 75 *N.Y.U. L. Rev*. 1221 (explaining how restorative justice mechanisms, such as *gacaca*, effect reintegrative shaming and are valuable counterpoints to criminal trials for lower-level perpetrators in mass atrocity situations).

[294] J. Braithwaite, *Crime, Shame and Reintegration* (1989), 55. Drumbl posits that shaming sanctions, without reintegration, may create exclusionary humiliation and an absence of remorse. Drumbl, *supra* note 293, note 167. He concludes that, in fragile post-atrocity societies such as Rwanda, this may simply prolong ethnic hatred.

[295] See P. Mochochoko, 'The Agreement on Privileges and Immunities of the International Criminal Court', (2002) 25 *Fordham Int'l L.J.* 638, 640 ('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').

[296] See Connolly, *supra* note 28, 282.

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Philippine state court.[297] This is yet another way that alternative mechanisms can be integrated into the state judicial system.

Adoption by and incorporation into the national system This situation evinces the highest degree of institutional linkage. Modernized and modified alternative mechanisms are often creatures of the state legislation process. Such bodies tend to evince a relatively high degree of judicialization given their integration into the domestic infrastructure. The Rwandan state's 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.[298] Similarly, although not to the same degree, in the Philippines remedies prescribed through *Katarungang Pambarangay* are enforceable through state courts.[299]

Truth commissions are also typically created by states[300] and enjoy significant institutional linkage with the state's judicial apparatus.[301] Lustration tribunals, particularly in their power to investigate and provide the right of appeal, may also be grafted on to the national judicial framework.

4.3.3 Holistic effect on the transition process

Regardless of its origins and judicial characteristics, the Rule 17 complementarity analysis should also include an assessment of the mechanism's likely effect on the global transition process in the country. 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.[302] To make this determination, it would be useful to evaluate the scope of the targets contemplated by the mechanism as well as its potential pitfalls and likelihood of alienating and/or excluding important groups in the post-conflict society.

In the first place, 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

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[297] *Ibid.*, 266.

[298] See Clark, *supra* note 55, 788.

[299] See Connolly, *supra* note 28, 266.

[300] See T. Syring, 'Truth versus Justice: A Tale of Two Cities?', (2006) 12 *Int'l Legal Theory* 143, 158 (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.

[301] See M. Mutua, 'Republic of Kenya Report of the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission', (2004) 10 *Buff. Hum. Rts. L. Rev*. 15, 44–5 (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).

[302] See J. Todres, 'Toward Healing and Restoration for All: Reframing Medical Malpractice Reform', (2006) 39 *Conn. L. Rev*. 667, 713 ('[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 important than vengeance').

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leadership positions (referred to by Mark Drumbl as 'conflict entrepreneurs'),[303] 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.[304] 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 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 . . .[305]

In such cases of genocide and crimes against humanity, an effective holistic approach for the justice mechanism would contemplate handling the full spectrum of the culpable, right down to the foot soldiers and bystanders.[306]

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 resonate with only certain ethnic or religious groups in a society and not with others.[307] Certain CLPs, for example, originate in specific cultures that may not be appreciated or understood by other cultures within the same state. 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.[308] 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'.[309] In fact, the ICC must consider victims' interests in making a plethora of decisions,

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[303] Drumbl, *supra* note 26, 8.

[304] *Ibid*.

[305] *Ibid*., 202–3.

[306] Although the ICC targets those most responsible for international crimes, this chapter takes the position that it should nevertheless consider the overall effectiveness of the proposed alternative mechanism. This may very well entail assessing the mechanism's capacity to effect the ICC's overarching goal – 'to guarantee lasting respect for and the enforcement of international justice.' Rome Statute, *supra* note 1, Preamble.

[307] See P. Harley, 'The Globalization of ADR: Feeling the Way Forward? (Ruminations of a "Female, Peace-Making Interested, Restorative Justice Oriented Flake!")', (2006) 27 *Hamline J. Pub. L. & Pol'y* 283, 290–1 ('Restorative justice practices seek to ensure fair and equal participation of all parties, particularly those more traditionally marginalized in society').

[308] See G. S. Gordon, 'Toward an International Criminal Procedure: Due Process Aspirations and Limitations', (2007) 45 *Colum. J. Transnat'l L*. 635, 696.

[309] Rome Statute, *supra* note 1, Art. 68(3).

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including whether to initiate an investigation into particular allegations[310] and whether to bring charges.[311] The complementarity analysis in this area should also take into account victim 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 – mediators, adjudicators and administrators. All 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.

4.4 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.

4.4.1 Parallel crimes?

As a threshold matter, complementarity entails parallel charging at the domestic level.[312] ICC Pre-trial Chamber I 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'.[313] In the case of DRC rebel leader Thomas Lubanga Dyilo, the Pre-trial Chamber noted that the DRC's prosecution of the defendant for atrocity crimes did not encompass conscripting child soldiers – the basis of the ICC charges.[314] As a result, the case was found to be admissible.[315]

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, 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'.[316]On the other hand:

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[310] *Ibid*., Art. 53(1)(c).
[311] *Ibid*., Art. 53(2)(c).
[312] See C. Totten, 'Arguing for an Integrated Approach to Resolving the Crisis in Darfur: The Challenges of Complementarity, Enforcement and Related Issues in the International Criminal Court', (2008) 98 *J. Crim. L. & Criminology* 1069, 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').
[313] *Prosecutor* v. *Lubanga*, Decision on the Prosecutor's Application for a Warrant for Arrest, ICC-01/04–01/06–8, 10 February 2006, para. 38–9 (emphasis added).
[314] *Ibid*.
[315] *Ibid*.
[316] W. A. Schabas, *An Introduction to the International Criminal Court* (2001), 70.

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> [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 . . . it will be argued that trial for an underlying offence tends to trivialize 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.[317]

4.4.2 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 the Prosecutor's decision to initiate a case.[318] But it should bea 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.

Crimes charged Gravity analysis in the complementarity context should be multi-dimensional. To begin with, it ought to contemplate consideration of the crime charged by the ICC. Of the subject matter jurisdiction offences listed in Articles 6–8 of the Rome Statute, genocide and crimes against humanity are arguably more heinous than war crimes.[319] This is reflected in the jurisprudence of the International Criminal Tribunal for Rwanda, which has frequently referred to genocide as the 'crime of crimes'[320] and stated that war crimes 'are considered as lesser crimes than genocide or crimes against humanity'.[321]

The Rome Statute itself implies this. For example, states may accept the ICC treaty as a whole but opt out of subject matter jurisdiction over war crimes.[322] Moreover, the defenses of superior orders and defense of property are available with respect to war crimes but not with respect to genocide and crimes against humanity.[323] Allison Marston Danner offers a compelling explanation for the difference in the gravity calculus:

> [War] crimes may often be committed by soldiers acting on their own rather than according to a larger policy. Therefore, the [chapeaux of war crimes]

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[317] *Ibid*.

[318] Rome Statute, *supra* note 1, 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.'

[319] See, e.g. A. Marston Danner, 'Constructing a Hierarchy of Crimes in International Criminal Law Sentencing', (2001) 87 *Va. L. Rev*. 415, 462–7 (based on their chapeaux, ranking genocide as the most serious, followed by crimes against humanity and then war crimes).

[320] See, e.g., *Prosecutor* v. *Musema*, Judgment, Case No. ICTR-96–13-I, 27 January 2000, para. 981.

[321] *Prosecutor* v. *Kambanda*, Judgment, Case No. ICTR 97–23-S, 4 September 1998, para. 1417. The ICTY, on the other hand, has not embraced the distinction. See, e.g., *Prosecutor* v. *Tadić*, Appeals Chamber Judgment on Sentencing, Case No. IT-94–1, 26 January 2000) para. 69 (declaring that 'there is in law no distinction between the seriousness of a crime against humanity and that of a war crime').

[322] Rome Statute, *supra* note 1, Art. 124.

[323] *Ibid*. at Arts. 33(2), 33(1)(c).

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> 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.[324]

As a result, the ICC should treat complementarity deferral requests in cases of war crimes with greater deference than if genocide and 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), all things being equal, the Court should lean more toward a finding of inadmissibility versus charges involving the murder of civilians (an even more terrible crime).[325]

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 arguably more severe than unlawful imprisonment (Article 7(1)(e)) or deportation (Article 7(1)(d)).[326] Such differences should be factored into the admissibility test.

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 Prosecutor and Pre-trial Chambers at the ICC are instructive. For example, statements by the Prosecutor have revealed the following germane criteria in conducting 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 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.[327]

Moreover, in the *Lubanga* matter, Pre-trial Chamber 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'.[328] Applying this criterion, Pre-trial

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[324] Danner, *supra* note 319, 472–3.

[325] See Schabas, *supra* note 225, 741 (suggesting that recruitment of child soldiers is a less grave offense than charges involving homicide).

[326] Rome Statute, *supra* note 1, Arts. 7(1)(b) and (e), 7(2)(b) (stating that extermination '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 M. Bagaric and J. Morss, 'In Search of Coherent Jurisprudence for International Criminal Law: Correlating Universal Human Responsibilities with Universal Human Rights', (2006) 29 *Suffolk Transnat'l L. Rev*. 157, 203 (observing that deportation or forced transfer of population are arguably less serious forms of crimes against humanity).

[327] See American University War Crimes Research Office, 'The Gravity Threshold of the International Criminal Court', 2008, 19–21 ('Gravity Threshold').

[328] *Prosecutor* v. *Lubanga*, *supra* note 313, para. 46 (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.

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Chamber I found that 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.[329]

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 offences should be considered less grave. By the same token, it is instructive to inquire about the percentage of population involved as perpetrators and victims in the country. A smaller percentage, indicating more narrow demographics, tilts the complementarity balance in favour of inadmissibility.

On the other hand, mere numbers are not 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, that should factor in prominently.[330] So should the impact on the victims.[331]

Finally, the 'social alarm' criterion distilled by Pre-trial Chamber I in the *Lubanga* case could be expanded.[332] The Pre-trial Chamber identified 'social alarm' caused by the alleged conduct in the 'international community'.[333] This should also involve consideration of the impact on the domestic jurisdiction.[334]

Overall, as with the other categories, the gravity analysis should be sufficiently flexible so the Court can consider the totality of circumstances to make reasoned decisions based on the particular facts in each case.

4.5 The defendants

The final category in the complementarity admissibility test for alternative justice mechanisms should focus on the defendants themselves. Within this rubric, three factors

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Ibid., para. 50. Consideration of the defendant will be the final category of our alternative justice complementarity analysis, *infra* Section 4.5.

[329] *Ibid*., 66.

[330] See, e.g., *Prosecutor* v. *Krstić*, Judgment, Case No. IT-98–33, 2 August 2001, para. 702 ('[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').

[331] See, e.g., *Prosecutor* v. *Krnojelac*, Judgment, Case No. IT-97–25, 15 March 2002, para.512 (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').

[332] See *Prosecutor* v. *Lubanga*, *supra* note 313, para. 46.

[333] *Ibid*.

[334] See Gravity Threshold, *supra* note 327, 39 ('[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').

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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 post-conflict society.

4.5.1 Target selection

To begin, it is instructive to step back and consider the process of target selection by the ICC. Does the defendant at issue bear a significant measure of responsibility for the crimes charged? Are there other defendants who may bear equal or more responsibility 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 when the government forces they were fighting had committed mass atrocities but were not even the subject of an investigation. If the evidence marshaled in support of a deferral reveals the defendant bears a disproportionately small share of culpability for the global commission of crimes in a situation, 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 apprehending him should be taken into account. Moreover, even if the target is in custody, the complementarity calculus should also be informed by the Prosecutor's ability to collect evidence and properly develop the case against the target. If logistical issues such as apprehension and evidence collection appear problematic, this should be added to the inadmissibility side of the complementarity ledger.

4.5.2 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.[335] Consideration of 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 by the organization/government to which the person belonged in the commission of the crimes at issue.[336]

With reference to the third of these factors, it is useful to consider the type of entity to which the defendant belonged. 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 lesser deference for the referral request.

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[335] *Prosecutor* v. *Lubanga*, *supra* note 313, para. 50.

[336] See *ibid*., paras. 51–2 (providing criteria to determine leadership position within the gravity threshold context).

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4.5.3 Potential for post-justice reintegration

The third factor that enters into the equation here is the defendant's potential for reintegration after facing justice.[337] 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 (assuming the defendant does not receive a life sentence).[338] 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 post-justice will likely be the object of reintegration efforts.[339] 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.

4.6 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 will be recalled, Article 17 generally provides for ICC admissibility in cases of volitional or capacity deficits in domestic justice efforts.[340] 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 requires a consideration of both volition and capacity, as does the alternative justice mechanism itself.

Analysis of the crimes at issue and the prosecution target is somewhat more complex. Although these criteria entail, to a certain degree, issues of capacity and volition (such as the target's fugitive status[341] 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 component of the crimes at issue is consistent with the ICC's constitutional imperative of taking on only 'the most serious

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[337] See A. Cossins, 'Restorative Justice and Child Sex Offenders', (2008) 48 *Brit. J. Criminology* 359, 360 ('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').

[338] See M. Drumbl, 'Pluralizing International Criminal Justice', (2005) 103 *Mich. L. Rev.* 1295, 1310–11 (suggesting that reintegration of offenders can be problematic in mass atrocity situations); Drumbl, *supra* note 293, 1235 (noting that genocide leaders and 'notorious murderers' should be tried and punished but lesser offenders should ultimately be reintegrated into society).

[339] *Ibid*.

[340] See E. Greppi, 'Inability to Investigate and Prosecute under Article 17', in Politi and Gioia, *supra* note 230, 65 (noting that one measure of inability is when 'the State is unable to obtain the accused . . .').

[341] Rome Statute, *supra* note 1, Preamble.

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crimes of concern to the international community as a whole'.[342] Similarly, since the ICC is interested primarily in prosecuting the 'big fish',[343] the leadership position of the target is valuable in conducting complementarity analysis.[344] 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).[345]

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 chapter enrich the complementarity test by including the wider policy implications of the Rome Statute and by considering the important role played by the ICC itself in the delicate balance between respecting state 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.

5 Conclusion

In many ways, the relationship between complementarity and alternative justice mechanisms provides the most effective vehicle for sizing up the interplay between international retributive and local restorative approaches to post-conflict policy. In certain respects, both forms of justice share important goals. As this chapter has demonstrated, local restorative justice does often incorporate certain penal characteristics, including investigations, subpoena and search powers, public hearings with fixed procedural rules

[342] See W. C. Austin and A. B. Kolenc,'Who's Afraid of the Big Bad Wolf? The International Criminal Court as a Weapon of Asymmetric Warfare', (2006) 39 *V and. J. Transnat'l L*. 291, 341 (noting the ICC's interest in high-level perpetrators).

[343] See ICC-OTP, 'Paper on Some Policy Issues Before the Office of the Prosecutor', (2003) ('[A]s a general rule, the Office of the Prosecutor should focus its investigative and prosecutorial efforts and resources on those who bear the greatest responsibility, such as the leaders of the State or organisation allegedly responsible for those crimes').

[344] See M. Will, 'Comment, A Balancing Act: The Introduction of Restorative Justice in the International Criminal Court's Case of the Prosecutor v. Thomas LubangaDyilo', (2008) 17 *J. Transnat'l L. & Pol'y* 85, 88 (discussing the ICC's restorative justice aims in the context of victim participation and restitution).

[345] See M. Will, 'Comment, A Balancing Act: The Introduction of Restorative Justice in the International Criminal Court's Case of the Prosecutor v. Thomas LubangaDyilo', (2008) 17 *J. Transnat'l L. & Pol'y* 85, 88 (discussing the ICC's restorative justice aims in the context of victim participation and restitution).

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and due process rights, criminal referral and limited forms of incarceration (such as restrictions on movement) and a plethora of non-incarcerative sanctions including restitution/reparations, community service, reintegrative shaming, and the stripping of various civic privileges, such as the rights to vote and to run for public office.[346] By the same token, international retributive justice contemplates certain global restorative outcomes with its emphasis on re-establishing 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 as they concern the judicialization of alternative justice mechanisms. This chapter has illustrated that in certain situations domestic resort to these mechanisms could justify the ICC's ceding 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/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.[347] 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 and the impact on the local jurisdiction. This 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. Given the inherent gravity of the ICC's core crimes, this might be relatively rare. That said, in non-self-referral cases involving a timely request for deferral and less heinous crimes (such as child soldier recruitment), it may be appropriate for the ICC to step aside. Such a conclusion would certainly be more compelling if the country requesting deferral did not have a recent history of human rights abuses or of disrespecting democratic institutions. The case 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.

[346] See *supra* Section 3 (analyzing customary local procedures).
[347] See *supra* Section 4 (formulating a set of analytic criteria to evaluate complementarity).

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In this regard, countries should be warned against a one-size-fits-all approach[348] or exclusive reliance on one mechanism to the exclusion of others. For example, it may be preferable for a country to propose two mechanisms, such as a CLP and a truth commission, rather than just one.[349] But one can easily imagine the use of several at once. A CLP and truth commission complemented by lustration and reparations, for instance, presents a more compelling case for deferral than would just one or two mechanisms standing alone.

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 South Africa's TRC amnesties:

> 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 political compromises made by Nelson Mandela and others.[350]

In fact, one can easily envisage a well-designed package of multiple contemporaneous alternative justice mechanisms working smoothly and efficiently alongside one another. Each could conceivably complement the other well in terms of its individual and combined effects on truth-telling, victim satisfaction and social reconstruction. Conversely, although perhaps not impossible, it is hard to imagine that use of any one of the alternative justice mechanisms, on its own, would be enough to sway the complementarity decision in favor of deferral.[351]

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.

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[348] See J. Stigen, *The Relationship between the International Criminal Court and NationalJurisdictions: The Principle of Complementarity* (2008), 420 (noting that a one-size-fits-all approach should be avoided in this area of the law).

[349] See Keller, *supra* note 2, 212, 223.

[350] S. A. Williams & W. A. Schabas, 'Article 17 Issues of Admissibility', in O. Triffterer, *Commentary on the Rome Statute of the International Criminal Court* (2008).

[351] 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 1, 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 348, at 431–41.

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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 mechanisms should never be bred out of existence through domestic co-option of alternative mechanisms. Whatever is truly authentic and unifying in them 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 admixture of animal gore with the butcher of thousands of innocent children cannot be made to replace prosecution and punishment before a global citizenry. And so perhaps effective atrocity justice is more about striking the proper degree of a consensual labor division between local restoration and global retribution.[352] Complementarity, it appears, may be the ideal medium through which to achieve that balance.[353]

And when it is not, other Rome Statute mechanisms may certainly effect local transfer. As noted previously, Article 53(1)(c) authorizes the Prosecutor to kill a case if he discerns 'substantial reasons to believe that an investigation would not serve the interests of justice'.[354] 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 forteriori* this will be true if an alternative mechanism addresses the concerns even better than criminal justice.[355]

Article 16, which authorizes the United Nations Security Council to effect a twelve-month suspension of ICC cases upon issuance of a Chapter VII resolution,[356] could be another important means of activating local alternative justice mechanisms during post-atrocity peace negotiations or in otherwise delicate transitions. Gareth Evans, President of the International Crisis Group, has noted:

> 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

[352] See *ibid*., 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').
[353] See Informal Expert Paper, *supra* note 261, 19 (opining that, within the complementarity framework, 'the ICC and a territorial State incapacitated by mass crimes may agree that a consensual division of labour is the most logical and effective approach').
[354] Rome Statute, *supra* note 1, Art. 53(1)(c).
[355] Stigen, *supra* note 348, 434.
[356] Rome Statute, *supra* note 1, Art. 16.

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> 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.[357]

At the same time, however, justice and peace are often indispensible components of transitional success. In fact, many believe that one is not possible without the other.[358] 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 chapter to take a broader view of complementarity in relation to post-conflict restorative options, it will go a long way toward weaving peace and justice more seamlessly into the procedural fabric of international criminal law.

[357] G. Evans, *International Criminal Court Newsletter*, No. 9, October 2006, 5, www.icc.cpi.int/NR/rdonlyres/A553E1FB-3662-497E-B06E-5B089B22D01B/278464/ ICCNL9200610-EN.pdf.

[358] Former UN Secretary General Kofi Anan has noted that 'there can be no healing without peace; there can be no peace without justice; and there can be no justice without respect for human rights and rule of law'. Press Release, Secretary-General, 'Secretary-General Welcomes Rwanda Tribunal's Genocide Judgment as Landmark in International Criminal Law', UN Doc. SG/SM/6687L/2896 (2 September 1998).

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