Does Justice Always Require Prosecution? The International Criminal Court and Transitional Justice Measures

Elizabeth B Ludwin King, *Wake Forest University*
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ELIZABETH B. LUDWIN KING*

Two provisions of the Rome Statute of the International Criminal Court (ICC), those regarding complementarity and discretion to decline “in the interests of justice,” give the ICC Prosecutor the ability to yield to a state that wants to undertake its own transitional justice program. Given the global preference for the imposition of individual criminal liability for serious international crimes, as evidenced by the creation of the ICC, it is highly likely that most such programs will involve prosecution.

This Article asks whether the ICC Prosecutor might step aside when faced with a state that favors other mechanisms of accountability and reconciliation and decides not to prosecute the individuals suspected of involvement in the atrocities committed during the conflict. Before evaluating such a proposal, the Prosecutor should evaluate the stability of the country emerging from conflict, the will of the people affected by this proposal, and the gravity of the crimes at issue. The Article offers a framework for that a national plan for justice and peace that includes investigative, retributive, and reparative elements, and argues that such a plan is likely to pass muster with the ICC Prosecutor. It then and contends that the ICC Prosecutor should in fact decline to prosecute in these situations because the states themselves are in the best position to assess and implement their post-conflict goals and can tailor any policy to their needs. An insistence on prosecution by the Office of the Prosecutor would be shortsighted and would fail to take into consideration the complexities of each state’s unique climate as it transitions from violence to peace.

INTRODUCTION

Ethnically infused post-election violence, unfortunately not an isolated event in Kenyan politics, reared its head most recently in December 2007, when over one thousand people were killed following

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a disputed presidential election. The government’s response to the violence was a package of proposals that included criminal trials, a Truth, Justice, and Reconciliation Commission, constitutional reforms, and other measures, including economic assistance.

In neighboring Uganda, a decades-long civil war has pitted the government against the rebel Lord’s Resistance Army (LRA), a conflict characterized by mass killings, rape, torture, and forced recruitment of child soldiers. Proposals to end the violence there have included trials, a truth commission, amnesty, and a local reconciliation process, mato oput.

In both of these situations, the International Criminal Court (ICC) has become involved, indicating that the national efforts at peace and justice are insufficient. These packages of accountability and reconciliation measures contain the twentieth century’s two major responses to mass violence and human rights abuses: trials and truth commissions. The aftermath of World War II saw the birth of modern international criminal law, with the establishment of the Nuremberg and Tokyo Tribunals. These tribunals, while imperfect, injected


2 Id., at 6.


individual criminal liability into the narrative of post-conflict reconstruction and accountability.\(^7\)

In the 1970s, South America, and particularly the Southern Cone, experienced a period characterized by repressive military dictatorships that engaged in widespread disappearances and other human rights abuses.\(^8\) Before leaving office, several of these governments passed sweeping amnesty laws, preventing the people responsible for the violence and disappearances from being held accountable. Without prosecution as an option, truth commissions emerged as a method of restoring peace and order.\(^9\) This mechanism of accountability was particularly salient because in the wake of regimes where clandestine torture centers were commonplace, truth commissions provided information to the victims and the world at large.

The establishment of the International Criminal Court in 2002 could be seen a victory of the first response – trials – over the second – truth commissions. This Article argues that the language of the Rome Statute creating the ICC, however, reflects a compromise, and permits states to engage in non-prosecution based transitional policies.\(^10\) The key provisions in the Statute regarding complementarity and the interests of justice are particularly relevant to this argument.\(^11\) It further argues that not only does the Rome Statute...

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\(^7\) Despite their vital contributions to the field of international criminal law and post-conflict reconstruction, these tribunals were hastily established and plagued by claims of victor’s justice. See, e.g., Kristin Sellars, *Imperfect Justice at Nuremberg and Tokyo*, 21 Eur. J. Int’l L. 1085, 1086 (Nov. 2010).


\(^9\) Argentina did in fact try the members of the military junta that ruled from 1976-1983, but those found guilty were later pardoned, and subsequent amnesty laws prevented other alleged perpetrators from being held accountable. In 2003, however, the Argentine Supreme Court found that these amnesty laws were null, paving the way for new trials stemming from the abuses committed during the dictatorship. The trials are ongoing. See Elizabeth B. Ludwin King, *Amnesties in a Time of Transition*, 41 Geo. Wash. Int’l L. Rev. 577, 583 (2010). See generally Juan Forero, *Argentina puts officials on trial over the abuses of the ‘Dirty War’*, The Washington Post, Dec. 28, 2009; *Argentina’s last dictator gets 25-year prison sentence*, The Guardian, Apr. 21, 2010; Daniel Schweimler, *Argentina marks coup anniversary amid Dirty War Trial*, BBC News, Mar. 24, 2011.

\(^10\) See Rome Statute, supra note XX, at Arts. 17 & 53.

\(^11\) See Rome Statute, supra note XX, at Art. 17 (complementarity), and Art. 53 (interests of justice). Article 16, allowing for a state to seek a 12-month deferral from
Statute allow for alternative mechanisms of justice and reconciliation\textsuperscript{12} to flourish in lieu of prosecution, but that the Office of the Prosecutor at the ICC \textit{should} yield in these situations, under certain circumstances. That is to say that, for example, Kenya’s post-election violence plan included only a truth commission and constitutional reforms, could (and should) the ICC defer to this national recommendation, despite the fact that it does not provide for prosecution?

The time is especially ripe for such a discussion. In 2007, the then-Prosecutor Luis Moreno-Ocampo, issued a policy paper stating that his office would define the term “in the interests of justice” very narrowly, all but foreclosing the possibility of non-prosecutorial based transitional mechanisms.\textsuperscript{13} In July 2012, however, a new prosecutor, Fatou Bensouda, took office, and thus she has the ability to clarify the Office’s position on provisions such as this.\textsuperscript{14}

It must be noted at the outset that this Article is not advocating for \textit{genocidaires} to face, for example, a national investigative body only and then suffer no consequences for their criminal actions. Under international law, grave breaches of the Geneva Conventions of 1949, genocide, and torture require criminal prosecution.\textsuperscript{15} Not only do the

\textsuperscript{12} There is no single term that encompasses all of the options available to a country emerging from conflict. In this Article, various terms, such as transitional justice measures, mechanisms of accountability and peace, and justice and reconciliation policies are used interchangeably to illustrate the wide range of options for a country in such a situation.


treaties codifying these crimes provide for individual criminal liability, but requiring prosecution when these crimes occur is also considered to be customary international law. This Article contemplates that the remaining crimes enumerated in the Rome Statute—crimes against humanity and war crimes that do not constitute grave breaches—may be dealt with through alternative mechanisms of accountability. The Article proceeds as follows.

Perhaps paradoxically, this Article begins at the end, and explores the question of why the ICC Prosecutor should step back and permit countries exploring transitional justice mechanisms to define their own trajectory. Part I examines the benefits and drawbacks of prosecution versus more informal accountability procedures or reconciliation-based methods. It emphasizes the need for a tailored approach to post-conflict situations, as well as the space to allow new forms of justice and peace to develop. Part II backs up and provides an overview of the negotiations in drafting the Rome Statute, particularly with regards to whether the statute should foreclose the possibility of alternative mechanisms of justice.

Part III addresses the openings in the Rome Statute where the Prosecutor has leeway in confronting situations where a country chooses to forgo prosecution in favor of other justice and reconciliation processes. The first is the principle of complementarity, whereby the ICC Prosecutor can only investigate or prosecute a case if the state at issue is unwilling or unable to do so itself. The other possibility is the idea that the Prosecutor can consider the “interests of justice” when deciding whether or not to prosecute.

Thus far, the ICC Prosecutor has not been faced with such a situation, but when it arises, she should be ready to respond swiftly or serious injury to body or health, unlawful deportation or transfer of unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or willfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction an appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.” Id., at Art. 147.


17 The Rome Statute also includes the crime of aggression, which was recently defined at the Kampala Conference in 2011, but aggression does not become a prosecutable offense under the Statute until 2017. See ICC, Review Conference of the Rome Statute, Kampala Declaration, June 4, 2010.
and decisively. To aid her in this task, Part IV contains principles she should consider when deciding whether to investigate or prosecute a situation. These principles include the stability of the country at issue and whether it is still mired in violence, the will of the people affected by the conflict, and the gravity of the abuses committed.

Finally, Part V goes a step further and explores what an acceptable non-prosecutorial plan for dealing with severe human rights abuses might contain. First, such a plan would require an investigative element, thereby allowing the truth of what transpired to come to light and to provide a historical record. Second, a plan not involving prosecution would need a retributive element involving some type of consequence for the identified perpetrator, and ideally a reparative element as well, aimed at rebuilding communities that suffered due to the actions of the identified individuals. A plan that involved these elements, but not prosecutions, could satisfy the ICC Prosecutor and lead her to yield to national decisions.

I. THE PREFERENCE FOR PROSECUTION AND THE NEED FOR A TAILORED APPROACH TO ACCOUNTABILITY

Before establishing how the Rome Statute allows for alternative mechanisms of justice to play a prominent role in transitional accountability processes, it is important to answer the question why: Why should the ICC, with its mandate for prosecuting the most senior leaders who orchestrated the atrocities, sit back and watch a country not prosecute them? The answer is twofold. First, although prosecution serves many purposes in the quest for justice and peace in the wake of atrocity, it may not always be the best option for a country. Second, requiring prosecution in every situation in which it is possible, either by the ICC or the national governments, is a very top-down approach that ignores the complexities of each conflict and prevents the exploration of new or underutilized alternative mechanisms of justice. All this is not to say that prosecution has no place in post-conflict situations, just that it may not be appropriate in all post-conflict situations.

The ICC should defer to the decisions of countries that articulate a genuine transitional plan incorporating investigative, retributive, and reparative elements to encourage countries to take ownership of their own processes of accountability and reconcile and to tailor these

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18 See Rome Statute, supra note XX, at Preamble.
processes to their specific situation. Deferral in appropriate situations will also encourage countries to use autochthonous forms of justice and peace that could lead to greater confidence in the government and greater local buy-in of the other measures.

A. THE BENEFITS AND DRAWBACKS OF PROSECUTION

There are certainly many benefits to prosecuting individuals suspected of engaging in human rights abuses. Prosecutions can aid a country that was divided by the conflict, such as Rwanda, by individualizing guilt, thereby preventing accusations of collective guilt – that an entire people was responsible for the conflict.\(^{19}\) By the same token, trials identify the perpetrators as criminals, which debunks the aura of invincibility and impunity they may have had.\(^{20}\) In a post-conflict situation where a new administration gains power, holding trials can signify a clean break with the prior regime and announce to the nation and the world that this new government upholds human rights and the rule of law.\(^{21}\) Yet another reason that prosecutions can benefit a country grappling with violence and atrocity is that they can potentially act as a deterrent, cautioning others that they will not benefit from impunity if they engage in the same or similar conduct.\(^{22}\)

Despite the advantages prosecutions can provide for a country in transition, they also have drawbacks. Practical considerations like time and resources often come into play, particularly where the violence was committed by hundreds or even thousands of perpetrators. In such a situation, trials can be a “slow, blunt instrument [...] ill-suited for untangling the complex web of responsibility.”\(^{23}\) Moreover, the nature of prosecutions results in an incomplete historical record, in the sense that each case concerns particular events and acts and cannot comprehensively capture what

\(^{19}\) Robinson, *supra* note XX, at 489.


\(^{23}\) Robert H. Mnookin and William Marra, *Rethinking the Tension Between Peace and Justice: The International Criminal Prosecutor as Diplomat* 27 (5/19/12, SSRN).
occurred during a conflict. And in a situation where the conflict is on-going, indictments can “eliminate the full range of negotiated options for dealing with tyrants,” thereby stalling or completely derailing any previous peace process talks. A repressive dictator, for example, will have no incentive to step down if he or she knows prosecution is likely to follow.

B. ONE SIZE DOES NOT FIT ALL

Leaving aside the advantages and disadvantages of prosecutions aside for a moment, there still remains the fact that the ICC’s singular focus on prosecution imposes a one-size-fits all approach to accountability, despite the fact that “[n]o mechanism will ever deliver perfect justice.” The Rome Statute does not contemplate that international trials will work in isolation from, for example, reconciliation efforts at the national level, but the drawbacks of prosecution, as outlined above, may not make them a second- or third-best option.

Whether a country’s transitional plan should include prosecution depends on its goals. If a government and its people are primarily looking for the truth of what occurred, including the root causes of the conflict, then perhaps a comprehensive, impartial investigation that includes the names of the individuals determined to have committed the crimes would be appropriate. What is important is that a country genuinely wants to address what happened during the conflict, and that it be allowed to do so in a manner that best considers the multifaceted nature of its situation.

A single focus on trials as the preferred method of transitional justice fails to recognize the nuances inherent in any post-conflict or mid-conflict environment. Especially when a conflict is ongoing, governments may decide that the best path forward is to pursue peace. For example, the President of the Democratic Republic of Congo has defended his decision to engage with indicted rebel leader Bosco “The


25 Mnookin and Marra, supra note XX, at 26.

Terminator” Ntaganda, saying, “Why do we choose to work with Mr. Bosco, a person sought by the ICC? Because we want peace now. In Congo, peace must come before justice.”

Though the ICC must focus on prosecution and favor it among available mechanisms of accountability due to its mandate, it should not be “close-minded toward alternative experiments in dealing with the past which are genuine democratic efforts advancing the goals of accountability.”28 An insistence on prosecution ignores the complexities of each post-conflict situation and stifles any incentive for countries to come up with creative responses to widespread violence and human rights abuses. Instead, the ICC and its Prosecutor should be open to alternatives, thereby letting a country set its own course and create a plan tailored to its own needs and goals.

II. THE ROLE OF THE PROSECUTOR AND HER DISCRETIONARY OPTIONS

The Office of the Prosecutor (OTP) is one of the four organs of the ICC.29 The Prosecutor’s job entails, as in many national jurisdictions, investigating crimes, prosecuting individuals, and applying the law. Inherent in these tasks is the exercise of discretion, one of the most controversial aspects of the position, because during the negotiations some states were wary of giving the Prosecutor too much discretionary power. The structure of the role of the ICC Prosecutor reflects this concern, as do the provisions of the Rome Statute containing checks on the exercise of discretion.

A. THE ORGANIZATION OF THE OTP

The ICC Prosecutor is elected by the Assembly of States Parties;30 as of July 1, 2012, the office is held by Fatou Bensouda of The

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28 Robinson, supra note XX, at 504-505.

29 See Rome Statute, supra note XX, at Art. 34 (establishing the four organs of the Court: (1) the Presidency, (2) the Registry, (3) the Office of the Prosecutor, and (4) the Appeals Division, Trial Division, and Pre-Trial Division).

30 Id., at Art. 42(4).
Gambia.\textsuperscript{31} The Prosecutor holds the office for nine years, and cannot be re-elected.\textsuperscript{32} The position is a blend of civil and common law prosecutors, reflecting the legal traditions of the States Parties. The Prosecutor’s role involves deciding which cases to investigate and prosecute, and she can invoke the discretion granted to her in the Rome Statute to allow countries to implement their own mechanisms of accountability and reconciliation.

Given that the parties to the Rome Statute include those from both civil and common law backgrounds, it is natural that the OTP would likewise include elements from these two legal traditions.\textsuperscript{33} For example, in most civil law countries, the prosecutor has little discretion and is subject to judicial oversight.\textsuperscript{34} At the ICC, the Pre-Trial Chamber functions as a check on the decisions of the Prosecutor in several situations.\textsuperscript{35} At the same time, however, whereas in civil law countries the judge directs the investigation, at the ICC the Prosecutor controls the prosecution and is independent from the Court.\textsuperscript{36} Moreover, in many civil law countries the prosecutor is required to prosecute any case for which there is substantial evidence,\textsuperscript{37} but the OTP, as in many common law countries, has the ability to choose which situations and defendants to prosecute. This is the fundamental nature of the prosecutor’s discretion.

The OTP’s position entails receiving referrals and information regarding situations in which a crime under the jurisdiction of the ICC may have been committed.\textsuperscript{38} Matters can come to the attention of the

\begin{itemize}
  \item \textsuperscript{31} See Press Release, ICC, Election of the Prosecutor of the International Criminal Court, \textit{supra} note XX.
  \item \textsuperscript{32} See Rome Statute, \textit{supra} note XX, at Art. 42(4).
  \item \textsuperscript{34} Jingbo Dong, \textit{Prosecutorial Discretion at the International Criminal Court: A Comparative Study}, 2 \textit{J. POLITICS.} & \textit{L.} 109, 109 (2009).
  \item \textsuperscript{35} Id.
  \item \textsuperscript{37} William T. Pizzi, \textit{Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform}, 54 \textit{OHIO ST. L.J.} 1325, 1332 (1993).
  \item \textsuperscript{38} Rome Statute, \textit{supra} note XX, at 42(1).
\end{itemize}
OTP in one of three ways. First, a State Party can request that the Prosecutor investigate its own situation or that of another country.\(^{39}\) In the drafting of the Rome Statute, it was contemplated that states would refer situations in other countries, but thus far three State Parties have referred their own situations to the ICC Prosecutor, and no country has referred another.\(^{40}\) Second, a situation can be referred to the Prosecutor by the United Nations Security Council, acting under its Chapter VII powers, if it determines that a particular conflict is a threat to peace and security.\(^{41}\) As of publication, the Security Council has referred the situations in Sudan (Darfur) and Libya to the Prosecutor.\(^{42}\) The third manner by which a situation may be brought before the ICC Prosecutor is through her own \textit{propio motu} powers, as discussed in more detail below.\(^{43}\) The Prosecutor has thus far initiated, via her \textit{propio motu} powers, investigations into the

\(^{39}\) Id., at 14(1).


\(^{43}\) Rome Statute, supra note XX, at 42(3).
situations of post-election violence in Kenya and Côte d'Ivoire.\textsuperscript{44}

There are currently seven situations before the ICC: Central African Republic, Côte d'Ivoire, Democratic Republic of Congo, Kenya, Libya, Sudan (Darfur), and Uganda.\textsuperscript{45} The Office has been criticized in its handling of the cases and for its seemingly singular focus on Africa.\textsuperscript{46} To the comments about the ICC operating only in Africa, current Prosecutor Fatou Bensouda, herself from The Gambia, has said:

\begin{quote}
Again and again we hear criticisms about our so-called focus on Africa and about the court being an African court, having an African bias. Anti-ICC elements have been working very hard to discredit the court and to lobby for non-support and they are doing this, unfortunately, with complete disregard for legal arguments. With due respect, what offends me most when I hear criticisms about the so-called African bias is how quick we are to focus on the words and
\end{quote}


\textsuperscript{45} On July 12, 2012, the government of Mali requested ICC intervention into the violence that has been plaguing the northern part of country. The Prosecutor is currently conducting a very preliminary investigation. See Situations, Mali, available at http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/icc0112/; see also Mali Crisis: ICC Launches Inquiry Into “Atrocities,” BBC (7/18/22), available at http://www.bbc.co.uk/news/world/africa-18893233.

propaganda of a few powerful, influential individuals and to forget about the millions of anonymous people that suffer from these crimes ... because all the victims are African victims.47

Furthermore, the OTP, which is to be an independent and impartial body,48 came under fire regarding its perceived bias in favor of the Ugandan government. In July 2005, then-Prosecutor Luis Moreno-Ocampo appeared alongside Ugandan President Yoweri Museveni at a press conference announcing the issuance of arrest warrants for five members of the LRA, and declining to indict any members of the government forces.49 In response to the criticism of what was, at a minimum, a show of poor judgment, Moreno-Ocampo commented:

Some people say that the only way to retain our impartiality is to prosecute both the LRA and the UPDF [the government forces]. However, I think that impartiality means that we apply the same criteria equally to all sides. A major criterion is gravity. There is no comparison of gravity between the crimes committed by the Ugandan army and by the LRA – the crimes committed by the LRA are much more grave than those committed by the Ugandan army.50

The Prosecutor has likewise faced opposition to his decision to issue the indictment for Muammar Gaddafi while the conflict in Libya was ongoing.51 As mentioned earlier, the incentives for him to negotiate or seek exile disappeared once the ICC issued the warrant

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48 Rome Statute, supra note XX, at Art. 42.


51 Mnookin, supra note XX, at 26.
for his arrest. The OTP has stood firm and defended its decisions to intervene mid-conflict, stating that “[t]here will be no impunity in Libya.”

B. PROSECUTORIAL DISCRETION AT THE ICC

Prosecutorial discretion at any level – national or international – necessarily involves decisions about whether to prosecute, whether to drop a case, which charges to bring, and which defendants to charge. These decisions are naturally made pursuant to the practical considerations of the particular office’s time and resources. At their core, in exercising discretion, prosecutors decide where society’s interest is justice lies, a task that can be especially difficult at the ICC, where the Prosecutor is “hired” by the Assembly of States Parties, a hundred and twenty-one nations with varying ideas about justice and discretion.

These differences in opinion about prosecutorial discretion were front and center at the Rome Conference of Plenipotentiaries, at which the Rome Statute was drafted. Indeed, how much power to give the Prosecutor turned out to be one of most controversial issues at the conference. Several countries, including the United States, were concerned about giving the Prosecutor any proprio motu powers at all. These states were troubled by the possibility of the Prosecutor using these powers to meddle in their internal affairs and intrude on


55 Id.


57 Allison Marston Danner, Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court, 97 AM. J. INT’L L. 510, 513 (2003).

58 Nsereko, supra note XX, at 138.
their sovereignty. In addition, there were worries that a prosecutor who could initiate investigations without a referral from a State Party or the Security Council and who was unaccountable to anyone would make prosecutorial decisions based on politics alone. To date, these concerns appear unfounded, as the Prosecutor has only acted pursuant to the proprio motu powers in two situations – the post-election violence both in Kenya and in Côte d’Ivoire. Still, the countries that worried about unfettered discretion were able to negotiate provisions in the Rome Statute to cabin the Prosecutor’s powers.

Under the Rome Statute, the Office of the Prosecutor makes decisions about whether there is sufficient evidence to believe that any crimes under the Court’s jurisdiction have been committed, and also whether these crimes meet the “seriousness” threshold. In addition, the OTP selects defendants and charges. Former Prosecutor Luis Moreno-Ocampo has stated that the OTP will focus on “those bearing the greatest degree of responsibility.” These are all decisions that rest solely with the Prosecutor, though the Pre-Trial Chamber must confirm the charges the OTP decides to bring.

The Prosecutor has her first opportunity to exercise discretion when deciding whether a potential case would be admissible. At the admissibility stage, the Prosecutor has wide discretion to determine whether a case would be admissible. Pursuant to Article 17 of the Rome Statute, cases are not admissible if they are already being investigated or prosecuted by the country at issue. This principle of complementarity, whereby states can retain their sovereignty and handle matters internally, gives states the first chance to investigate and prosecute the individuals suspected of committing crimes within the jurisdiction of the ICC before the Prosecutor may step in. Thus, at least in theory, a country should, when faced with potential

59 Id.
62 OTP Policy Paper, supra note XX, at 7.
63 Rome Statute, supra note XX, at Art. 61.
64 Id. at Art. 17(1)(a).
involvement, be able to design its own transitional justice plan, thereby pre-empting any ICC action. Given the ICC’s mandate of prosecution, however, the country would have to craft its justice and reconciliation plan in a way that would satisfy the OTP that justice was being served. Such a plan would likely need to include investigative, retributive, and reparative elements.

When determining whether to initiate an investigation pursuant to the *propio motu* powers, however, the Prosecutor’s discretion is reined in somewhat. The OTP can initiate a preliminary investigation on its own, but it must seek approval from the Pre-Trial Chamber in order to launch a full-fledged investigation. Moreover, if, after investigating a situation the Prosecutor decides that continuing to pursue the case would not serve the “interests of justice,” she must inform the Pre-Trial Chamber of this decision. The same requirement applies if the Prosecutor comes to the same conclusion with regard to proceeding with a post-investigation prosecution.

These constraints on the exercise of the Prosecutor’s discretion may not appear to be severe, but they restrict one of the ways the Prosecutor can decide not to proceed with a case – when doing so would not serve the “interests of justice. This idea, that an investigation or prosecution may be contrary to the interests of justice, along with the principle of complementarity, are two provisions the Prosecutor can rely on if she decides to decline to prosecute a situation because the country is conducting national non-prosecutorial transitional justice processes.

III. CREATING SPACE FOR ALTERNATIVE FORMS OF JUSTICE

The issue of amnesties and alternative methods of justice were a topic of frequent and fervent discussion at the Rome Conference of

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65 The Prosecutor, when commencing an initial investigation, must notify the State that is being investigated, and may do so confidentially. Id., at Art. 18(1).
66 Id., at Art. 15(1).
67 Id., at Art. 15(3).
68 Id., at Art. 53(1).
69 Id., at Art. 53(2).
Plenipotentiaries in 1998. On one side was the group of states that argued for prosecution as the only appropriate response to situations characterized by mass violence and horrific human rights abuses. The other camp was populated by states that contemplated that other mechanisms of justice could be appropriate in this situation and should be accounted for in the Rome Statute. What both groups had in common was a mutual concern about any rule that completely foreclosed the possibility of employing non-prosecutorial transitional justice measures. The end result of these negotiations was a treaty that was silent as to the use or prohibition of alternative methods of accountability. Instead, “the drafters turned to the faithful and familiar friend of diplomats, ambiguity, leaving a few small avenues open to the Court and allowing the Court to develop an appropriate approach when faced with concrete situations.”

Two of the avenues left open are Article 17 and Article 53. Article 17 concerns issues of admissibility. It announces that the Court is guided by the principle of complementarity, meaning that the ICC will not intervene in a situation unless the country at issue is unwilling or unable to do so itself. Article 53 delineates the duties of the Prosecutor, and permits the Prosecutor to decline to investigate or prosecute a case if doing otherwise would not serve the interests of justice. Both of these provisions contain language that gives the Prosecutor leeway to step aside and permit a country to engage in non-prosecutorial transitional justice policies.

A. COMPLEMENTARITY AND INVESTIGATIONS

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72 Robinson, supra note XX, at 483.

73 Id., at 483.

74 Id.

75 Rome Statute, supra note XX, at art. 17.


77 Id., at art. 53(1)(c), 53(2)(c).
Although the text of the Rome Statute does not make explicit reference to the term “complementarity,” Article 17 codifies this concept. It states that a case will be deemed inadmissible before the ICC in four situations: (1) if a State with jurisdiction over the case is already investigating or prosecuting it, (2) if a State with jurisdiction over the case has investigated it but decided not to prosecute the individual(s) the ICC is seeking to prosecute, (3) if the individual(s) at issue has already been tried for the same conduct, or (4) if the OTP deems that the case is not sufficiently grave. These first two situations contain the exception that even if this criteria is met, the ICC can still intervene if the State demonstrates an unwillingness or inactivity with regards to a genuine investigative or prosecutorial effort.

The Statute goes on to explain that unwillingness includes considerations such as whether the national prosecution was a sham trial undertaken to shield the individual(s) from responsibility; whether there has been an unreasonable and unjustifiable delay, demonstrating perhaps a genuine lack of intent on the part of the state; and whether the process is independent and impartial. While unwillingness considers the purpose and the intent of the state holding the trial, inability refers to the strength (or even existence) of the judiciary and whether the state has the institutions necessary to conduct a trial.

For example, Kenya mounted an Article 17 challenge to the ICC’s investigation of post-election violence, the only State to do so thus far. The Government argued that a specially-created commission was investigating the situation, and that the commission had recommended the formation of a special tribunal to handle the crimes

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78 Rome Statute, supra note XX, at Art. 17(1).
79 Id.
81 Id., at Art. 17(3).
that occurred during the conflict.\textsuperscript{83} The tribunal never got off the ground, however, and in fact the Kenyan Parliament failed to pass several bills that would have established the court.\textsuperscript{84} As a result of this inaction on the part of the Kenyan Government, the ICC rejected its Article 17 challenge.\textsuperscript{85}

What is left unexplained and thus open for interpretation is the \textit{genuine investigation} language. Under the terms of the Statute, a case will be inadmissible if a State is already undertaking proceedings, “unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.”\textsuperscript{86} The Statute, despite defining “unwillingness” and “inactivity,” provides no guidance as to what constitutes a genuine investigation. It is in this language that the Statute could be interpreted to allow alternative mechanisms of accountability to take the place of criminal prosecutions, though the OTP may think otherwise.

Aside from indicating that complementarity means that in order for a case that would normally be within the jurisdiction of the ICC to be ruled inadmissible due to the existence of national proceedings, those proceedings must involve the same individual(s) and the same crime(s).\textsuperscript{87} The question becomes whether proceedings at issue must

\textsuperscript{83} Christine Bjork and Juanita Goebertus, \textit{Complementarity in Action: The Role of Civil Society and the ICC in Rule of Law Strengthening in Kenya}, 14 \textit{Yale Hum. Rts. \\

\textsuperscript{84} Id.

\textsuperscript{85} Prosecutor v Muthaura (Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case pursuant to Article 19(2)(b) of the Statute) (ICC, Pre-Trial Chamber II, Case No ICC-01/09-02/11-96, 30 May 2011) [44]; Prosecutor v Ruto (Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case pursuant to Article 19(2)(b) of the Statute) (ICC, Pre-Trial Chamber II, Case No ICC-01/09-02/11-101, 30 May 2011) [48].

\textsuperscript{86} Rome Statute, \textit{supra} note XX, at Art. 17(1)(a).

be prosecution, or whether another form of accountability can suffice. Given that the purpose of the ICC is to end impunity for serious crimes under international law,\footnote{Rome Statute, \textit{supra} note XX, at Preamble ("Determined to put an end to impunity for the perpetrators of [the most serious crimes of concern to the international community] and thus to contribute to the prevention of such crimes").} it would appear to some scholars that the principle of complementarity should be interpreted narrowly to allow only genuine prosecutions at the national level to render a case inadmissible before the ICC, and not simply a genuine investigation (which might, for example, take the form of a truth commission).\footnote{Michael Kourabas, \textit{A Vienna Convention Interpretation of the “Interests of Justice” Provision of the Rome Statute, the Legality of Domestic Amnesty Agreements, and the Situation in Northern Uganda: A “Great Qualitative Step Forward,” or a Normative Retreat?}, \textit{14 U.C. DAVIS J. INT’L L. & POL’Y} \textbf{59}, 76 (2007).} If this interpretation holds, then the window of opportunity for alternative mechanisms of justice becomes closed and locked.

Because the Statute does not provide guidance for the term “genuine investigation,” however, the window is still open for a broader interpretation. In fact, during the drafting negotiations, some states, most notably South Africa, advocated for an explicit consideration of truth commissions within the language of Article 17.\footnote{Robinson, \textit{supra} note XX, at 499.} The topic proved to be controversial, and in the end was “deliberately sidestepped.”\footnote{Id.} Yet it remains undefined what a genuine investigation must entail, and thus the possibility exists that the Prosecutor could consider an alternative form of justice such as a truth commission or other impartial and official inquiry to constitute a “genuine investigation” for purposes of admissibility under Article 17. If and when this happens, the Prosecutor should step aside and let national efforts at accountability and peace function, as long as they are genuine and aimed at investigating the situation, identifying the culpable individuals, and imposing some form of reparations or community restoration efforts.
B. The “INTERESTS OF JUSTICE”

Another provision in the Rome Statute that could be interpreted in a way to allow alternative mechanisms of justice at the national level to replace trials is Article 53 concerning the initiation of investigations and prosecutions.\textsuperscript{92} Under this article the Prosecutor, when deciding whether to initiate an investigation, is to consider whether there is a reasonable basis to believe that one of the crimes under the jurisdiction of the Rome Statute has been committed; whether the case would be admissible under Article 17 (complementarity); and whether, considering the seriousness of the crime and the interests of the victims, an investigation would serve the interests of justice.\textsuperscript{93} The same factors come into play when the Prosecutor decides, after investigating the situation, whether to proceed with a case.\textsuperscript{94} In both situations, however, if the Prosecutor decides not to investigate or prosecute based on the interests of justice provision, she must inform the Pre-Trial Chamber of her decision.\textsuperscript{95} The Pre-Trial Chamber is not required to render an opinion on the Prosecutor’s decision, though it may.\textsuperscript{96} If the Pre-Trial Chamber opts to review the Prosecutor’s decision, then it must confirm the decision in order for it to be valid.\textsuperscript{97}

The operative phrase in this article, “the interests of justice,” is undefined in the Rome Statute.\textsuperscript{98} As such, its interpretation is important to the question of whether the Prosecutor can yield to national transitional policies that do not involve prosecution. As with complementarity in Article 17, if “the interests of justice” is interpreted narrowly to mean solely criminal justice, then it seems that prosecution would be the only option. But, however, if the phrase is given a broad interpretation, then there is room for other mechanisms to lead a transitional process.

\textsuperscript{92} Rome Statute, \textit{supra} note XX, at Art. 53.
\textsuperscript{93} Id., at Art. 53.
\textsuperscript{94} Id., at Art. 53(2). This part of the article also considers the age of the accused and his or her role in the alleged crime. Id.
\textsuperscript{95} Id., at Arts. 53(1) and 53(2)(c).
\textsuperscript{96} Id., at Art. 53(3)(b).
\textsuperscript{97} Id.
\textsuperscript{98} See OTP Policy Paper, \textit{supra} note XX, at 2.
1. INTERPRETING THE “INTERESTS OF JUSTICE”

Under the Vienna Convention on the Law of Treaties, the first step to understanding treaty language is to identify its ordinary meaning, keeping in mind the object and purpose of the treaty.\textsuperscript{99} If the word or phrase is still ambiguous, then it is appropriate to consult the \textit{travaux préparatoires}, the functional equivalent of legislative history.\textsuperscript{100}

In order to consider the ordinary meaning of the “interests of justice,” then, it is necessary to identify ordinary meaning of the phrase as well as the object and purpose of the Rome Statute. Unfortunately, there is no consensus with regard to the ordinary meaning of the “interests of justice.”\textsuperscript{101} Indeed, “justice” has many meanings; it can be conceptualized as both retributive and restorative, for example, and its definition changes with context.\textsuperscript{102}

The Preamble to the Rome Statute contextualizes the phrase somewhat, but still does not provide certainty. In it, the States Parties affirm “that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured [...].”\textsuperscript{103} It then declares that the States Parties are “determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,” and recalls that it is the duty of States to “exercise criminal jurisdiction over those responsible for international crimes.”\textsuperscript{104} With its focus on prosecution and accountability, it is clear that the drafters expressed a strong preference for prosecution, but the Preamble does not unequivocally indicate the prosecution is the only appropriate response to situations of mass atrocity.\textsuperscript{105}

\textsuperscript{100} Id., at Art. 32.
\textsuperscript{101} Brian D. Lepard, \textit{How Should the ICC Prosecutor Exercise His or Her Discretion? The Role of Fundamental Ethical Principles}, 43 J. MARSHALL L. REV. 553, 562 (2010).
\textsuperscript{102} See Henry Lovat, \textit{Delineating the Interests of Justice}, 35 DENV. J. INT’L L & POL’Y 275, 277 (2007); see also Clark, supra note XX, at 543.
\textsuperscript{103} Rome Statute, supra note XX, at Preamble.
\textsuperscript{104} Id.
\textsuperscript{105} Indeed, one scholar claims that there is a “general consensus” that the object and purpose of the Rome Statute is to put an end to impunity. Kourabas, supra note XX, at 73.
The travaux do not provide much guidance, either. In fact, during the drafting of the Statute there was much debate surrounding the meaning of “in the interests of justice,” but no consensus was reached. The ambiguity of the term is arguably intentional, reflecting the sentiment of the drafters regarding the question of whether mechanisms of justice that do not involve prosecution can adequately stand in for trials.

2. THE PROSECUTOR’S INTERPRETATION

Shortly after the Rome Statute was drafted, the new Prosecutor, Luis Moreno-Ocampo, having identified this ambiguous phrase, requested that several leading non-governmental organizations weigh in with their interpretations. He opted to follow NGOs such as Human Rights Watch and construe the “interests of justice” very narrowly, a point that was made clearly in a 2007 OTP policy paper.

The OTP policy paper established three things at the outset. First, the use of Article 53(1)(c) and 53(2)(c), the provisions allowing for the consideration of the interests of justice, would be exceptional and used as a “last resort” because the OTP operates with a presumption of prosecution. Second, the OTP will be guided by the Rome Statute’s object and purpose, which the policy paper indicates is ending impunity for those who commit crimes within the jurisdiction of the ICC. Finally, the OTP maintains that there is a difference between “the interests of justice” and the “interests of peace,” and that responsibility for the latter falls outside the purview of the Court.

In deciding whether to decline a case pursuant to the interest of justice provisions of Article 53, the policy paper continues and adds

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107 Kourabas, *supra* note XX, at 61. See also Scharf, *supra* note XX, at 521-22.
109 OTP Policy Paper, *supra* note XX.
110 Id., at 9.
111 Id., at 1.
112 Id.
that the OTP will evaluate three factors. The first is the gravity of the crime, which includes the scale and nature of the crimes, how they were committed, and their impact.\textsuperscript{113} Second, the OTP will consider the interests of the victims, which includes their interest in justice as well as their protection.\textsuperscript{114} According to the policy paper, the “Office will give due consideration to the different views of victims, their communities and the broader societies in which it may be required to act.”\textsuperscript{115} To identify the interests of the victims, the OTP will meet with them, as well as “respected intermediaries and representatives” in order to get a comprehensive understanding of the situation.\textsuperscript{116} Finally, the OTP will consider the particular circumstances of the accused, meaning that it will reflect on the accused’s relative position in any hierarchy, and take into account the accused’s role in the commission of the crimes.\textsuperscript{117}

The OTP policy paper then addresses the issue of other mechanisms of justice. It notes the need for other approaches to justice and that they can be complementary to ICC prosecution.\textsuperscript{118} The OTP also states its commitment to work with institutions striving to carry out these approaches.\textsuperscript{119} Finally, and perhaps somewhat surprisingly, the OTP takes a broad view of the “interests of justice,” commenting that it encompasses more than criminal justice, but then adds that “it should not be conceived of so broadly as to embrace all issues related to peace and security.\textsuperscript{120}

Despite this last comment, which perhaps opens the door slightly for alternative mechanisms of justice, on the whole the OTP interprets Article 53 narrowly as involving only considerations that relate to criminal justice. While it acknowledges that there is a space for

\textsuperscript{113} Id., at 5.
\textsuperscript{114} Id.
\textsuperscript{115} Id.
\textsuperscript{116} Id., at 6.
\textsuperscript{117} Id., at 7.
\textsuperscript{118} Id.
\textsuperscript{119} Id., at 8.
\textsuperscript{120} Id. Indeed, in a footnote the OTP writes, “Since Article 53(1)(c) foresees a possibility of pursuit of criminal justice not being ‘in the interests of justice,’ it follows that the concept must be broader than criminal trials.” Id., at fn 13.
alternative mechanisms of accountability and reconciliation, the OTP is careful to note that these mechanisms function alongside, and not instead of criminal prosecution. This interpretation is unfortunate, and the new Prosecutor would be wise to revisit it.

The Prosecutor’s narrow reading of the phrase “interests of justice” is shortsighted. Under the Prosecutor’s reading, even a situation where the issuance of arrest warrants might exacerbate a conflict and prevent or stall peace negotiations, pursuing the case would still serve “the interests of justice” as per OTP policy. The Statute itself contemplates non-criminal factors like the age of the accused when the Prosecutor is determining whether or not to proceed in a case. Furthermore, Article 53(1)(c) “specifically juxtaposes traditional criminal justice considerations – the gravity of the crime and the interests of the victims – with the broader notion of ‘interests of justice’ and clearly indicates that the latter might trump the former.” Were the Prosecutor to read Article 53 as permitting alternative mechanisms of justice to substitute for criminal prosecution in certain circumstances, countries could take control of their accountability and reconciliation processes and could craft them to meet their specific needs. In requiring prosecution at all costs, which is essentially the OTP’s position, the Prosecutor is considering only one small piece of a complex situation.

IV. CONSIDERING ALTERNATIVE MECHANISMS OF JUSTICE: GUIDELINES FOR THE PROSECUTOR

In its policy paper, the OTP spelled out three factors it will consider in the rare occasion when it might entertain the notion of declining a case out of the interests of justice: the gravity of the crime, the interests of the victims, and the circumstances of the accused. There is no mention in the paper of whether these factors are weighted equally against one another or if there is a hierarchy among them. Regarding claims of inadmissibility due to national proceedings

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121 When the OTP issued the indictment for President Omar al-Bashir of Sudan, for example, his first response was to order all humanitarian aid organizations out of the country. See e.g., Garry W. Jenkins, Nongovernmental Organizations and the Forces Against Them: Lessons of the Anti-NGO Movement, 37 BROOK. J. INT’L L. 459, 496 (2012). This is of course a different situation to the one mentioned above, but it is illustrative of some of the possible reactions ICC defendants may have.

122 Rome Statute, supra note XX, at Art. 53(2)(c).

123 Robinson, supra note XX, at 488.
under Article 17, the only guideline from the OTP is “same individual, same crime.”

But what if the OTP is presented with a situation where a country wants to forego prosecution in favor of alternative mechanisms of accountability? What if, for example, Uganda’s Agreement on Accountability and Reconciliation included only a truth commission, amnesty – perhaps in exchange for the truth, and local, autochthonous forms of reconciliation? What factors should guide the Prosecutor’s decision to yield or not, regardless of the vehicle (Article 17 or 53)? Three factors, all of which come from the Rome Statute itself, are particularly relevant and should be evaluated in this order: the stability of the country wanting to forego prosecution, the will of the population, and the gravity of the crimes committed.

A. STABILITY

In order for a country that recently experience mass violence and human rights abuses to have the capacity to create and implement an alternative justice plan, it first must be stable. That is to say, the conflict must have ended and the country must at least be working toward a restoration of order. There must be a constitution or other governing document approved in a democratic manner, a demonstration that the country operates in a manner that respects human rights, and a functioning judicial system. All of these requirements are interrelated, but they each serve different purposes.

In the aftermath of conflict, a country wishing to take ownership of its accountability process must first garner the support of the population. An amended or new constitution, approved in a democratic process, will set the tone for the future and inspire confidence in the new government. If the previous constitution was approved democratically and upheld but for the conflict, it may survive the violence, but its core principles and values need to be reiterated by the government as a way to assure the population that the government will stand by the terms of the document.

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124 Statement by Olivia Swaak-Goldman, supra note XX.

125 Stability can be read into Article 17. If a country is not stable, it is unlikely that it will be pursuing a “genuine investigation” or have the institutions in place to conduct such an investigation. See Rome Statute, supra note XX, at Art. 17. Gravity appears in Article 53, which also mentions the victims (but not the population as a whole). Id., at Art. 53.
A constitution is also one way to demonstrate respect for human rights and the rule of law. In the wake of atrocity, it is especially important for the government to make an affirmative statement that it will abide by human rights norms and respect the security and dignity of human beings. Aside from constitutional reform, a government can demonstrate its commitment to upholding human rights by creating new institutions that have this very purpose. There are numerous bodies which, if established, would go far to show the population—and the rest of the world—that the country is emerging from conflict stable and stronger than before. Government departments dedicated to human rights, and truth commissions with a comprehensive, impartial focus are two important ways that a country can evidence its commitment to the rule of law and respect for human rights.

Yet another indicator of stability in a country recovering from war is a functioning judiciary. Even in the situation where a country decides to forego prosecution in favor of alternate measures of justice, a functioning judiciary is necessary, at a minimum, in the event that these measures are challenged in court. Moreover, an independent judiciary can be another indicator of stability and dedication to upholding human rights. Even if, in the immediate aftermath of conflict, a state's judiciary is slightly compromised, evidence that genuine judicial reforms are underway can be sufficient to garner the attention and confidence of international actors willing to offer assistance. The crucial aspect of a functioning—or soon-to-be-functioning—judiciary is that it demonstrates the country's commitment to justice, peace, and stability.

A government, even one emerging from a conflict or repressive regime characterized by human rights abuses, that has a governing document that respects human rights and a functioning, impartial judiciary is likely going to be sufficiently stable to carry out its own accountability and peace initiatives. Stability helps to ensure that the proposed policies and mechanisms are able to be implemented, and that ideas are able to become actions. That is not so stay that stability is a guarantor of success—it is not. But a stable government is going to have a greater likelihood of fulfilling its promise to the population that there will be a full accounting of the events that transpired, identification of those who perpetrated the atrocities, and efforts to repair and restore communities impacted by the violence.

B. THE WILL OF THE PEOPLE
The second factor that should guide the ICC Prosecutor’s decision about using her discretion to allow a country to pursue a non-prosecutorial transitional justice policy is the will of the people. This factor, while similar to the OTP’s interpretation of Article 53 calling for an evaluation of the interests of the victims, differs in that it focuses not just on one segment of society, but on all of it. It is vital that everyone has an opportunity for her opinion to be heard as to the best way forward, be it international trials in conjunction with national reconciliation efforts, a purely national process that eschews prosecution in favor of a truth commission and reparations, or another combination of mechanisms of justice and peace. In assessing the will of the people, the Prosecutor should consider that those affected by the conflict may be spread throughout the country, and that she needs to listen to all sectors of society, not just the victims. The ICC efforts to involve victims in the Court process are to be heralded, but they also can be improved.

Some conflicts may be so widespread, as, for example, in Rwanda, that it would be difficult to find a person who lived there during the genocide and who was not affected in some way. But even a more geographically focused conflict can have wide-reaching effects, causing people outsize the zone of conflict to feel a sense of ownership in its conclusion. It is important for the Prosecutor to keep in mind that entire populations can be affected by what happens in one small area of a country, and as a result these people should also have a say in how justice is defined in terms of their country’s particular conflict.

In attempting to discover how a population thinks justice should be interpreted – as including prosecutions or not, for example – it is vital that all sectors of the society be consulted. The OTP has performed this task relatively well, seeking the opinions of victims, community representatives, religious and tribal leaders, as well as local and international NGOs.\(^{126}\) A national outreach program, coupled with a referendum, however, would be a way for the government and the OTP to ascertain the will of the people as they construct a post-conflict plan of accountability. Part of the outreach should include many of the efforts the ICC already engages in, such as radio and television programs designed to inform the population of the role of the Court,\(^{127}\) but it should also include alternative options for accountability, such as national trials, an official investigation, and

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\(^{127}\) See Clark, *supra* note XX, at 533.
local forms of justice, and reparations. The most important aspect of this public education campaign is that it reaches the entire population, it provides full and complete information regarding accountability and peace measures, and that everyone has an opportunity to have his or her voice heard.

The OTP has indeed been very proactive in reaching out to the people of the countries it is investigating and attempting to discern the interests of the victims.\textsuperscript{128} For example, it has conducted over twenty-five missions to Uganda alone “for the purpose of listening to the concerns of victims and representatives of local communities,”\textsuperscript{129} and it has organized seminars and meetings in The Hague to discuss victims’ concerns.\textsuperscript{130} Such efforts to reach communities are laudable, but the OTP should ensure that it connects with groups other than the victims in order to get a comprehensive understanding of the will of the people, which includes those who may have had a role in perpetrating the violence. Furthermore, the OTP should focus more on its in-country efforts, as opposed to conducting meetings in The Hague. For reasons of practicality, the OTP is going to be able to listen to more people – victims, witnesses, people seemingly unaffected by the violence, and people who may have participated in the conflict – if it goes to them, rather than try to bring a few representatives to the Court.

The will of the victims and the will of the entire population will not necessarily coincide. By only taking the views of the identified victims, however, the OTP neglects other segments of society that may have differing, but still valid, opinions regarding the best way to move forward after the conflict. An outreach effort that aims at connecting with everyone gives the population as a whole a sense of participation and ownership in the package of justice and reconciliation mechanisms that is ultimately established. This wide sense of ownership can then translate into greater confidence in – and thus the stability of – the government.

C. Gravity of the Crimes

\textsuperscript{128} Antonopoulos, supra note XX, at 77.

\textsuperscript{129} OTP Policy Paper, supra note XX, at 6.

\textsuperscript{130} Id., at 6.
The ICC Prosecutor will clearly evaluate the gravity of the crimes committed when considering whether to defer to a country's non-prosecutorial accountability efforts. In fact, this will be a threshold matter, despite the fact that it is listed third in this sequential process, simply because there are some crimes that, under international law, must be prosecuted. Whether based on a treaty or a rule of customary law, states have a duty to prosecute individuals believed to have committed genocide, torture, or grave breaches of the Geneva Conventions of 1949.131 In situations where the Prosecutor has reason to believe these crimes were committed, she must ensure that the individuals accused of committing them are brought to justice in a court of law, whether at the ICC or a national court. Other crimes falling within the Court's jurisdiction, however, do not legally require prosecution.132

Still, it would be imprudent for the ICC Prosecutor end her gravity analysis here. The OTP's policy paper on the interests of justice announced that gravity for purposes of Article 53 would be assessed by considering the scale and nature of the crimes, the manner of their commission, and their impact.133 This list is likewise applicable in a situation where a country balks at the prospect of international trials – or criminal trials at all – and prefers alternative mechanisms of accountability. If the crimes are particularly serious or widespread, for example, any justice measure is going to have to account for this gravity and be crafted in a manner that addresses the nature of the crime. When the Prosecutor is reviewing a country's non-prosecutorial policy, she should assess the proposed responses to the crimes, keeping in mind that there are measures other than prosecutions that can achieve accountability.

131 See Convention on the Prevention and Punishment of the Crime of Genocide, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and Geneva Convention Relative to the Protection of Civilian Persons in Time of War, supra note XX.

132 It may seem illogical that the four crimes under the ICC’s jurisdiction, genocide, war crimes (including grave breaches of the Geneva Conventions of 1949), crimes against humanity, and aggression (as of 2017) should be treated differently when they are all considered to be “the most serious crimes of concern to the international community.” Rome Statute, supra note XX, at Preamble. With the continued ratification of the Rome Statute, however, we may see a new norm of international law that requires prosecution of all crimes that fall within the jurisdiction of the ICC. See Robinson, supra note XX, at 493.

133 OTP Policy Paper, supra note XX, at 5.
Thus, if the crimes believed to have been committed during a conflict are crimes against humanity or war crimes that are not grave breaches of the Geneva Conventions of 1945, they are eligible, and may be suitable, for non-prosecutorial efforts at justice and reconciliation. If they pass this threshold, the OTP should still assess the nature of the crimes for their gravity and the impact they had on the population. In general, the more serious and grave the crimes, the stronger the OTP’s argument for prosecution is going to be.

V. A NON-PROSECUTORIAL PROPOSAL FOR ACCOUNTABILITY

After establishing that the Rome Statute leaves some avenues open for the Prosecutor to step aside in a situation where a country emerging from conflict opts to pursue measures other than prosecution with respect to the crimes committed, and explaining why she should permit this course of action, the question naturally becomes whether the Prosecutor would ever allow alternative mechanisms of justice in lieu of criminal trials. This issue has yet to present itself before the ICC, but the Prosecutor would be wise to consider carefully a proposal that contains investigative, retributive, and reparative elements. These three elements are present in criminal prosecutions at the ICC, and as such, a non-prosecutorial plan that encompasses them is going to be more likely to pass muster than one that is less comprehensive.

After a conflict has ended, often what people in the country desire is knowledge – what happened, how, and why.\textsuperscript{134} This desire is especially fervent when the conflict was characterized by government secrecy. In situations where people were abducted by government forces and never heard from again, family members frequently want information before any sort of retribution.\textsuperscript{135} In any post-conflict situation, however, a non-prosecutorial policy must include a complete and impartial inquiry into the facts. This investigation may take the form of a truth commission, a body formed to provide a comprehensive narrative of what occurred and who was responsible.\textsuperscript{136} Another option could be a series of “truth trials,” in

\textsuperscript{134} See generally Priscilla B. Hayner, Unspeakable Truths: Confronting State Terror and Atrocity (2001).

\textsuperscript{135} Id., at 25-26.

which the individuals suspected of committing crimes go through a judicial process with the objective of shedding light on the events of the conflict. No punishment is meted out at these “trials,” but the truth becomes known. Regardless of the method used to obtain an accurate narrative of the events that occurred during the conflict, the investigation must involve testimony from all affected groups so as to remain comprehensive and impartial.

Despite the fact that a non-prosecutorial process of accountability and reconciliation will involve no criminal punishment, it is important that it contain some form of retributive justice as a way to express society’s distaste at the actions of some of its members. This element can take many forms. Lustration, common in Eastern Europe in the 1980s, involves removing from government office (and sometimes from civil society) the individuals identified in the investigation as having committed the crimes. These people are then banned for life from holding office again. Retributive justice can also take the form of naming and shaming. The report that is produced by the investigative body, for example, should include the names of the individuals determined to have committed the crimes. This act – of having one’s name published with a criminal label – may be a punishment that sufficiently satisfies society’s displeasure. Retribution could even take the form of community service, thereby blending it with ideas of restorative justice. Requiring the perpetrator to perform labor that benefits the community evinces both punishment and reparation.

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137 See Kathryn Sikkink, From Pariah State to Global Protagonist: Argentina and the Struggle for International Human Rights, 4/1/08 LAT. AM. POL’Y & SOC’Y 1 (2008).

138 Id.

139 If the conflict was particularly divisive, a country would be wise to consider bringing in outside investigators as a way to prevent claims of bias. See ACCOUNTABILITY FOR ATROCITIES, supra note XX, at 307.


141 Id.

142 Id.

Finally, a national accountability plan that does not include prosecution should have an element of reparation. This does not necessarily require that the perpetrator make reparations directly to the victims, especially since this may not always be practical or possible, but it does require some process by which the harms the victims and their communities faced are recognized materially. Financial reparations to the victims are certainly a possibility, though a government emerging from the chaos of war might not have the funds available for this purpose. International funding, in this situation, may be an option. A monument recognizing and remembering the conflict and its victims is another way a government can include a reparative element in its accountability and reconciliation plan, as would be government-assisted or perpetrator-assisted community rebuilding. The reparative elements aim not to restore the victims and their communities to their pre-conflict status, but instead they help to repair some of the damage done and acknowledge the suffering that occurred.

Any process of justice and peace that is designed to replace trials, either national or international, must be comprehensive and include some of the same attributes that are found in prosecution. It must contain a mechanism established to discover and make known the truth, so that a historical record exists that is comprehensive and impartial. This process must also involve a measure of accountability for the people identified as having committed the atrocities. Punishment does not have to be criminal, but it does have to label the individual as a wrongdoer and impose some type of sanction. The final piece of the peace and justice process is reparative, by which the government, with the assistance of the perpetrators, works to mend the harm done and recognize the many ways in which the country suffered.

CONCLUSION

The Rome Statute entered into force a mere four years after it was adopted, a likely indication of the emerging global preference for prosecution in the wake of mass atrocity. Despite this preference, however, prosecution – whether national or international – is not the only response to widespread violence and human rights abuses. Indeed, other mechanisms of justice and reconciliation have operated

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alongside or instead of trials since the 1980s, when countries began developing and employing truth commissions, amnesties, lustration, as well as local forms of peace and accountability.

The Rome Statute and the Office of the Prosecutor contemplate the co-existence of many forms of accountability, as long as the primary responsible actors who commit serious crimes of international are prosecuted. As more and more situations come before the ICC, however, it is likely that some states will indicate their preference for non-prosecutorial transitional justice measures over trials at any level. When this situation arises – when the Prosecutor is faced with the question of whether a state can forego prosecution in favor of other mechanisms of accountability and peace – she must be prepared.

The authority for yielding to national transitional justice plans comes from Articles 17 and 53 of the Rome Statute. Article 17 indicates that the ICC will not proceed with an investigation or prosecution if the state with jurisdiction over the crimes has already taken on this task. This principle of complementarity allows countries the first opportunity to address the crimes that were committed; only if they are unwilling or unable to do so will the ICC intervene. The language of Article 17, which refers to the question of whether a state is undergoing a “genuine investigation,” leaves the Prosecutor some room to reason that an investigation can include one that is not criminal in nature.

The other avenue open to the Prosecutor when a country wants to set its own transitional course is Article 53, which grants the Prosecutor discretion to decline to investigate or prosecute a case when doing so would not serve the “interests of justice.” This language remains undefined in the Rome Statute, and there is evidence that it was purposefully left as such due to a disagreement by various countries about whether it could ever be in the interests of justice for a state to opt for another mechanism of accountability over trials. The former ICC Prosecutor set out his narrow interpretation of the “interests of justice” in a policy paper five years ago. The current Prosecutor would be wise to revisit this interpretation and broaden it considerably.

When faced with a non-prosecutorial plan for justice and reconciliation, the Prosecutor must first determine whether the country pursuing its own path toward justice and peace is stable. She must also evaluate the will of the population, including the opinions
from all sides of the conflict. Finally, she needs to consider the gravity of the offenses committed.

Assessing stability asks whether such a transitional justice plan is even feasible. This criterion primarily considers stability: whether there a functioning judiciary, whether there is a democratically-approved governing document, and whether the government has indicated that it will uphold human rights and fundamental freedoms. A country with all of these elements is more likely to be a stable country capable of carrying out a transitional justice plan.

It is important that the Prosecutor investigate whether the entire population had a voice in designing a policy for accountability and peace, or whether it was crafted by a few people only. In order for a population to have confidence in the mechanisms of justice and reconciliation in operation, it must have had a vote in which ones are operational. The ICC does a commendable job of reaching out to the victims in these situations, but a country seeking to forge its own path needs to consider the population as a whole.

Even if a country is stable and has decided together how to address the crimes committed during the conflict, there are still situations in which prosecution is mandated by international law. Where the crimes included genocide, grave breaches of the Genocide Conventions of 1949, or torture, treaties and customary international law dictate that a court must impose individual criminal liability. Thus in some instances, even where a country has carefully designed a plan for accountability and peace that is comprehensive but that does not include prosecution, trials must occur.

If, however, the Prosecutor evaluates these three criteria, stability, will of the people, and gravity of the crimes, and determines that they are all met, then she should proceed to assess the elements of the country’s transitional justice proposal. In conducting this appraisal, the Prosecutor should look for mechanisms of accountability and peace that contain investigative, retributive, and reparative elements. An investigation is necessary to create a historical narrative that sets out the events and crimes that occurred and who was responsible. The individuals identified, though they may not confront criminal punishment, should face some sanction, whether it is lustration or a financial payment to the victims and their communities. Finally, the state, in conjunction with the perpetrators of the crime, needs to devise a way to assist the victims and their communities through rebuilding and reconstruction, or even, again, a financial assistance.
These elements are necessary to ensure that the goals of prosecution – identification of the perpetrators, punishment, and deterrence – are met by the alternate plan of justice and peace.

After this last analysis is concluded and the Prosecutor determines that all of the elements are met and that the proposed policy of justice and peace is likely to function as planned, the question remains whether, as a policy matter, she should step aside to let this package of mechanisms of accountability proceed. Why, when she has a mandate of prosecution, should the Prosecutor allow other transitional justice measures to preempt her directive? Exercising discretion in this scenario is wise for two main reasons. First, it is the states themselves that have just emerged or that are in the process of emerging from conflict that are in the best position to design a transitional plan tailored to their specific goals and requirements. A top-down insistence on prosecution neglects to consider the whole picture, which is often more complicated than simply identifying and prosecuting individuals suspected of having committed heinous crimes.

The second reason why, if a country’s national plan for accountability and peace meets all of the requirements listed above, the Prosecutor should defer to the country despite her mandate, is to encourage the development of new mechanisms of accountability. The existence of the International Criminal Court represents a significant development in the field of transitional justice. A shortsighted focus on prosecution as the preferred measure of accountability muffles the cries for new or underutilized or underdeveloped mechanisms of justice, many of which exist at the local level. The Prosecutor, in addition to the other players in the field of accountability and reconciliation, should advocate for the exploration of alternative mechanisms of justice, understanding that these mechanisms change and evolve, as have conflicts and their resolutions. A cookie-cutter approach to justice benefits no one, and the Prosecutor should be mindful of both her mandate of prosecution and her duty to consider the interests of justice, recognizing that they do not always coincide.