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COMPLEMENTARITY AND ALTERNATIVE JUSTICE

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

--Confucius1

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

--Feodor Dostoyevsky2

"If you want peace, work for justice."

--Pope Paul VI3

I. INTRODUCTION

Over the past twenty years, thousands of children have been woken up at gunpoint in the middle of the night, beaten, terrorized and forced to kill their own parents.4 So began their abduction into the "Lord's Resistance Army" (LRA) a northern Ugandan rebel group fighting the government of Yoweri Museveni.5 Once abducted, the children were subjected to, and forced to participate in, beatings, rapes and mutilations of each other and of other civilians in northern Ugandan villages.6 In 2005, based on a referral by the Ugandan government, five LRA leaders, including chief Joseph Kony, were indicted by the International Criminal Court (ICC).7 According to an ICC-issued arrest warrant, Kony's sealed indictment contains twelve counts of crimes against humanity, including murder, enslavement, sexual enslavement and rape.8 There are also twenty-one counts of war crimes, including murder, cruel treatment of civilians, intentionally directing an

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5 Id.
6 Id.
attack against a civilian population, pillaging, inducing rape, and forced enlistment of children.\(^9\)
Kony has remained a fugitive but engaged in peace talks with the Ugandan government that have
nearly resulted in his signing a peace accord, which, among other things, contemplates
establishment of a truth commission and the institution of "mat\o\ oput," a ritual practice wherein a
criminal faces relatives of his victim and admits his crime before both drink a bitter brew made
from a tree root mixed with sheep's blood.\(^10\) Although the peace accord does not involve LRA
international criminal prosecution, Kony refuses to sign it unless the ICC indictments are
dismissed.\(^11\) President Museveni has indicated that the ICC should dismiss its case against the
LRA leaders so they could avoid prison and face traditional justice.\(^12\)

Should Kony and his henchmen be handled through traditional/alternative methods at home rather
than prosecuted as criminals in the Hague? In large part, the answer pivots on an understanding
of the principle of "complementarity," which awards primacy of jurisdiction to a state's domestic
courts unless the ICC determines the state "unwilling or unable genuinely to prosecute."\(^13\) In his
excellent article, Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional
Justice, Lars Waldorf wonders how traditional domestic restorative justice should relate to
international criminal justice.\(^14\) For Waldorf, this "raises a key concern about the [ICC's
complementarity] regime: should meaningful, local justice be counted as part of a state's good
faith efforts to provide post-conflict accountability, such as would preclude the ICC from
asserting jurisdiction?"\(^15\)

Certain commentators have answered Waldorf's question in the affirmative. They believe that
alternative domestic justice mechanisms, such as mat\o\ oput or truth commissions, can relieve the
ICC of its obligation to prosecute under the complementarity principle.\(^16\) 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

\(^9\) Id.
\(^10\) Id.
\(^11\) Id.
\(^12\) Id.
[hereinafter Rome Statute].
\(^14\) Lars Waldorf, Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice, 79
TEMP. L. REV. 1, 5-6 (2006).
\(^15\) Id.
\(^16\) See, e.g., Linda M. Keller, Achieving Peace with Justice: The International Criminal Court and
truth commission and Mato Oput in Uganda would justify deferring ICC prosecution of LRA leaders);
Carsten Stahn, Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretive
Guidelines for the International Criminal Court, 3 J. INT'L CRIM. JUST. 695, 710 (2005) (concluding that
Art. 17 could provide room for inadmissibility of cases where crimes are investigated by domestic truth
commission); Thomas Hethe Clark, The Prosecutor of the International Criminal Court, Amnesties, and
the "Interests of Justice": Striking a Delicate Balance, 4 WASH. U. GLOBAL STUD. L. REV. 389, 414 (2005)
(finding that while ICC appears to require prosecution, ambiguous provisions leave room for alternative
justice schemes in limited circumstances); Claudia Cardenas Aravena, The Admissibility Test before the
International Criminal Court under Special Consideration of Amnesties and Truth Commissions, in JANN
K. KLEFFNER & GERBEN KOR, COMPLEMENTARY VIEWS ON COMPLEMENTARITY (2004) (providing a
mechanistic application of complementarity admissibility tests that closely tracks the facial language of the
Rome Statute and determining that in narrow circumstances use of alternative mechanisms could result in
ICC deferral of prosecution).
domestic procedure furthers retribution, deterrence, expressivism, and restorative justice to a similar extent as international prosecution.\footnote{Keller, supra note 16, at 279. Keller’s criteria do implicate some practical considerations such as the extent of punishment short of incarceration, victim participation, redress, and general societal reconciliation. \textit{Id}. at 266-78.}

Unfortunately, this analysis, while providing a good starting point, overlooks a relevant set of more detailed criteria both external to and lying below the surface of the justice mechanism itself.\footnote{In his article \textit{Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretive Guidelines for the International Criminal Court, supra} note 16, Carsten Stahn 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 art. 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. \textit{Id}. at 700-716. 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). \textit{Id}. at 706-07, 713. \textit{See also} Darryl Robinson, \textit{Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court}, 14 EUR. J. INT’L L. 481, 498-502 (2003) (providing limited, although helpful criteria, such as the “quasi-judicial” nature of the mechanism, but doing so only in the context of amnesties and truth commissions).} 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.\footnote{\textit{See} Darryl Robinson, \textit{Comments on Chapter 4 of Claudia Cardenas Arevena, in} KLEFFNER, supra note 16, at 146.} 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 (such as Kony)? If so, what is his position in the group? Is it contemplated that the target will ultimately be re-integrated 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 Article 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. Part II provides an overview of the statutory framework of the ICC complementarity regime and explain how it functions. Part III examines some of the forms of alternative justice that might confront the ICC in applying an admissibility test, including traditional practices such as \textit{mato oput} (and judicially hybridized forms of such practices), truth commissions, lustration (a political vetting mechanism), reparations and amnesties. Part IV then sets out the analytic criteria as organized into five general categories: (1) circumstances surrounding the ICC referral and request for deferral; (2) political system and infrastructure in the domestic jurisdiction; (3) analysis of the alternative justice mechanism itself;
(4) analysis of the crimes at issue; and (5) analysis of the prosecution target. Part V then applies the test to the case of the LRA leaders and the alternative justice mechanisms proposed in the LRA-Uganda peace accord.

The Article will demonstrate that in light of the scale and brutality of the LRA atrocities, the nature of the defendants and the proposed mechanisms, the LRA-Uganda resort to alternative mechanisms will not pass complementarity muster. On the other hand, it will show that, in certain situations, some forms of alternative justice -- especially multiple ones conjoined together or tethered to other domestic judicial efforts -- could conceivably pass the proposed complementarity admissibility test. Along the way, this analysis will also 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 Article 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 must be used to weave both peace and justice more seamlessly into the procedural fabric of international criminal law.

II. THE ICC COMPLEMENTARITY REGIME

A. INTRODUCTION

Complementarity, one of the cornerstone principles of the International Criminal Court, defines the relationship between States and the ICC. 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. 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.

In contrast to the "primacy" over national courts of the two ad hoc tribunals, the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), as well as the Special Court for Sierra Leone (SCSL), complementarity empowers

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20 See Jann K. Kleffner & Gerben Kor, Preface, in KLEFFNER & KOR, supra note 16, at V. Paragraph 10 of the preamble of the Rome Statute emphasizes that “the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions.” Rome Statute, supra note 13, Preamble, ¶ 10. Article 1 contains identical language.
21 Id.
22 Id.
23 Id.
States to foreclose ICC adjudication through good faith application of domestic criminal process.\textsuperscript{27}

### B. RATIONALES FOR COMPLEMENTARITY

There are three underlying rationales for this approach. The first is practical. Given the ICC’s relatively limited resources, infrastructure and personnel, its framers were loath to confer on it the potentially broad range and number of future atrocity cases likely to arise.\textsuperscript{28} It made more sense to leave the vast majority of those cases to municipal courts.\textsuperscript{29} Besides a resource advantage, the latter would have a strong jurisdictional connection with the case based on territoriality or nationality.\textsuperscript{30} Additionally, among other things, these domestic courts would likely have more means available to collect the necessary evidence and to collar the accused.\textsuperscript{31}

Second, the ICC architects were motivated to respect state sovereignty to the greatest extent possible.\textsuperscript{32} Complementarity pays obeisance to such a state-centric worldview and thus best preserves the dominant Westphalian order.\textsuperscript{33}

Third, complementarity enlarges the field of battle against the culture of impunity by incentivizing a large plurality of domestic jurisdictions to become more operational and effective at investigating and prosecuting cases of genocide, crimes against humanity and war crimes.\textsuperscript{34} The expanded number of jurisdictions has potential to bolster both the deterrence and expressive goals of international criminal justice.

### C. MECHANICS OF COMPLEMENTARITY

Complementarity is operationalized in the form of an admissibility examination set forth in Articles 17-20 of the Rome Statute.\textsuperscript{35} Article 17, itself, sets out the substantive principles of

\textsuperscript{27} See Kleffner & Kor, supra note 20, at V.
\textsuperscript{28} See ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 351 (1st ed. 2003).
\textsuperscript{29} Id.
\textsuperscript{30} The “territorial principle” permits assertion of jurisdiction over the defendant when the crime at issue is committed on the territory of the forum state. See Matthew D. Campbell, Note, Bombs over Baghdad: Addressing Criminal Liability of a U.S. President for Acts of War, 5 WASH. U. GLOBAL L. REV. 235, 254 (2006). The “nationality principle” gives rise to jurisdiction when the alleged defendant is a national of the forum state. Id. Even if these grounds were not available, jurisdiction could be asserted on grounds of universality. Pursuant to the universality principle, states may criminalize atrocity crimes, such as genocide, regardless of the crime’s location or perpetrator. See M. Cherif Bassiouni, International Crimes: Jus Cogens and Obligatio Erga Omnes, 59 LAW & CONTEMP. PROBS. 63, 68 (1996).
\textsuperscript{31} See CASSESE, supra note 28, at 351.
\textsuperscript{32} Id.
\textsuperscript{34} See CASSESE, supra note 28, at 353.
\textsuperscript{35} Rome Statute, supra note 13, arts. 17-20. See Kleffner & Kor, supra note 20, at V. Article 53, dealing with prosecutorial discretion, might at first blush be considered another threshold admissibility hurdle. See Rome Statute, supra note 13, art. 53. It permits the Office of the Prosecutor (OTP) to decline to initiate an investigation in the interests of justice -- even if there is a reasonable basis on the law and facts, and the case is admissible. Id. art. 53(1). It similarly allows declination to prosecute in the interests of justice after the OTP investigates an otherwise admissible case. Id. art. 53(2). Thus, Article 53 does not deal directly with admissibility -- it looks at the ”interests of justice” beyond the question of admissibility. See id. art. 53.
complementarity, while Articles 18 and 19 provide its procedural components. Article 20, titled "Ne bis in idem," provides a kind of retrospective complementarity protection by preventing persons from being tried or punished twice for the same crime -- effectively precluding ICC admissibility if a domestic jurisdiction has conducted a legitimate trial of the suspect at issue.

The Article 20 "ne bis in idem" protection is incorporated into Article 17(1)(c).

1. **Procedural Operation**

From a procedural perspective, Article 18 covers preliminary admissibility rulings and Article 19 covers subsequent admissibility determinations. Pursuant to Article 18, the ICC Office of the Prosecutor (OTP) must notify any State with apparent jurisdiction of a pending investigation and give it an opportunity to supplant the ICC. The State then has one month to inform the Court that it is investigating or has investigated certain persons related to the OTP's investigation and request that the OTP suspend the inquiry. Absent special authorization by the Court, the OTP must defer to the State's investigation under Article 18. The OTP may then ask for updates regarding investigation and prosecution.

Article 19 permits the ICC to consider admissibility on a *sua sponte* basis. Additionally, any arrest warrant target or State with jurisdiction may challenge Article 17 admissibility via Article 19. The State is required to do so at the earliest opportunity. The OTP may also ask the Court to determine admissibility. Prior to the confirmation of the charges, challenges to the admissibility of a case or challenges to the jurisdiction of the Court are to be referred to the Pre-Trial Chamber. After confirmation of the charges, they are directed to the Trial Chamber. While the challenge is pending, the investigation and presumably any prosecution would be suspended, although the validity of any arrest warrant would not be affected. If the Court determines that the case is inadmissible, the OTP does not have to drop the case completely and

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37 Rome Statute, supra note 13, arts. 17-19.
38 Rome Statute, supra note 13, art. 20. See Gregory S. Gordon, Toward an International Criminal Procedure: Due Process Aspirations and Limitations, 45 Colum. J. Transnat'l L. 635, 687 (2007) (explaining that the Latin phrase "ne bis in idem" roughly translates to "not twice for the same thing"). While this civil law protection is related to the common law double jeopardy protection, it is different because ne bis in idem addresses the possibility of repeated prosecutions for the same conduct in different legal systems, whereas double jeopardy generally refers to repeated prosecutions for the same conduct in the same legal system. Id.
39 See Keller, supra note 16, at 244-45.
40 Rome Statute, supra note 13, art. 17(1)(c).
41 Id. arts. 18-19.
42 Id. art. 18(1).
43 Id. art. 18(2).
44 See generally arts. 18 & 19. See also Keller, supra note 16, at 252.
45 Rome Statute, supra note 13, art. 18(3) & (5).
46 Id. art. 19(1).
47 Id. art. 19(2).
48 Id. art. 19(5).
49 Id. art. 19(3).
50 Id. art. 19(6).
51 Id.
52 Id. art. 19(7).
53 Id. art. 19(9).
54 Id. art. 19(8).
may ask the Court to review the decision if new facts arise that negate the basis for inadmissibility.\textsuperscript{55}

2. \textit{Substantive Considerations}

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

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it . . .

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

(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.\textsuperscript{56}

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."\textsuperscript{57} A prosecution, she opines, consists of a State's "opening and undertaking of a judicial criminal process."\textsuperscript{58} As previously discussed, 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.\textsuperscript{59}

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).\textsuperscript{60} That language deems a case admissible before the ICC when the State is "unwilling" or "unable" "genuinely" to carry out the investigation or prosecution.\textsuperscript{61}

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: (i) in fact, the national authorities have undertaken proceedings for the purpose of shielding the person concerned from criminal responsibility; or (ii) 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 (iii) the

\begin{itemize}
\item \textsuperscript{55} Id. art. 19(10).
\item \textsuperscript{56} Id. art. 17(1).
\item \textsuperscript{57} Cardenas Aravena, infra note 16, at 117.
\item \textsuperscript{58} Id.
\item \textsuperscript{59} Id. at 120.
\item \textsuperscript{60} Rome Statute, supra note 13, art. 17(1)(a) & (b).
\item \textsuperscript{61} Id.
\end{itemize}
proceedings are not being conducted independently or impartially or in any case in a manner showing the intent to bring the person to justice.\[^{62}\]

A State is "unable" when, chiefly owing to a total or partial collapse of its judicial system, it is not in a position: (i) to detain the accused or to have him surrendered by the authorities or bodies that hold him in custody; or (ii) to collect the necessary evidence; or (iii) to carry out criminal proceedings.\[^{63}\] 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.\[^{64}\]

As already indicated, Article 20, via Article 17(1)(c), also factors into the substantive admissibility determination. In particular, Article 20(3) prevents the ICC from asserting jurisdiction over a person who has been tried by "another court" for the same conduct unless the proceedings in the other court: (a) were for the purpose of shielding the person concerned from criminal responsibility; or (b) "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."\[^{65}\]

In extreme cases, such as total collapse of a country’s infrastructure, a country’s explicitly thumbing its nose at calls for justice, or prosecution of an atrocity suspect pursuant to the most rigorous due process standards, the statutory framework yields easy answers regarding admissibility. But is that true of the less black-and-white cases? What if a country processes a matter deviating 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?\[^{66}\] 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"?\[^{67}\]

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

\[^{62}\] Id. art. 17(2)(a), (b) & (c).
\[^{63}\] Id. art. 17(3).
\[^{64}\] See Cassese, supra note 28, at 352.
\[^{65}\] Rome Statute, supra note 13, art. 20(3).
\[^{66}\] See Jann K. Kleffner, Complementarity in the Rome Statute and National Criminal Jurisdictions 270-71 (Oxford Univ. 2008) ("While non-criminal accountability processes would accordingly render cases admissible in accordance with Articles 17(1)(a) and (b) in conjunction with Article 17(2)(a), they would also arguably do so under the other forms of "unwillingness" in Article 17(2)(b) and (c) under certain circumstances."). But see Anja Seibert-Fohr, The Relevance of the Rome Statute of the International Criminal Court for Amnesties and Truth Commissions, 7 Max Planck UNYB 553, 570 n.16 (2003) ("If 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.").
III. A TAXONOMY OF ALTERNATIVE JUSTICE MECHANISMS

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

A. CUSTOMARY LOCAL PROCEDURES

"Customary local procedures," or "CLPs" as used in this Article, 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. 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. In general terms, these mechanisms are less formal than official government adjudicatory mechanisms and they involve a higher degree of public participation. In the end, they often combine "truth-telling, amnesty, justice, reparations and apology."

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

1. Shalish -- Bangladesh

In Bangladesh, the "indigenous form of dispute resolution" is known as "shalish" – akin to an "informal village tribunal." There are currently three versions of shalish: (1) traditional; (2) government-administered; and (3) NGO-(non-governmental organization) modified.

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68 See David Gray, An Excuse-Centered Approach to Transitional Justice, 74 FORDHAM L. REV. 2621, 2622 (2006) (identifying amnesties, truth commissions, lustration, and reparations as mechanisms used in transitional contexts); Keller, supra note 16, at 275-76 (focusing generally on customary local procedures, such as mato oput, truth commissions, and reparations).

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

70 See Waldorf, supra note 14, at 9-10.

71 Id.


73 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 different locales that could have been included. In the interests of space and in line with its scope, this article is limiting itself to six of these procedures.

Traditional *shalish* involves consent-based arbitration or mediation procedures-- which may extend through numerous sessions over several months--during which disputants pursue negotiations both within and outside the *shalish* setting. The process has been described as "a loud and passionate event which is generally open to the whole community but is largely male-dominated."

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

Operating simultaneously with, but independently of, traditional *shalish*, government-administered *shalish* is run by the union *parishad* (UP) -- the lowest unit of electoral government in Bangladesh. It is charged by the state with arbitrating and settling family and civil disputes and minor criminal offenses. In these *shalish* village courts, the plaintiff and the accused are represented by two members of the *parishad* and two members from the village.

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

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77 Id.


80 Id.

81 GOLUB, supra note 76, at 4-7.

82 Id.


84 GOLUB, supra note 76, at 6. As Golub explains, 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. Id. at 7.

85 Zafarullah & Habibur Rahman, supra note 83, at 1030 n.45.

86 GOLUB, supra note 76, at 10. NGO-facilitated *shalish* has grown in recent years, prompted principally by the efforts of the Madipur Legal Aid Association (MLAA) and affiliated NGOs. Id.

87 Id.

88 Id.
2. **Rwanda -- Gacaca**

The indigenous traditional dispute resolution method in Rwanda is known as "gacaca," which translates as "justice on the grass" in the Kinyarwanda language.\(^89\) As with most communal restorative mechanisms, it was designed primarily to resolve sundry civil matters such as property, inheritance, and family law disputes.\(^90\) It occasionally dealt with minor criminal offenses but its sanction resembled a civil settlement, such as compensation, rather than a criminal punishment, such as imprisonment.\(^91\) *Gacaca* was traditionally presided over by community elders known in Kinyarwanda as "inyangamugayo," literally "those who detest disgrace."\(^92\) These older men dominated *gacaca* -- women were not even permitted to speak.\(^93\) Traditional *gacaca* imposed a wide range of sanctions to achieve restitution and reconciliation.\(^94\) Any such sanctions, though, were not individualized -- family members were also responsible for satisfying *gacaca* judgments.\(^95\) Injecting some festivity into the proceedings, the losing party typically had to provide beer, wine, or food to the community as a form of reconciliation.\(^96\) Overall, the principal goal of *gacaca* was to "restore social order, after sanctioning the violation of shared values, through the re-integration of offender(s) into the community."\(^97\)

In 1994, Rwanda was engulfed in massive violence that claimed the lives of close to one million people and has been described as "one of the worst genocides in history."\(^98\) Some refer to it as "a populist genocide," since nearly every stratum of society, including children, participated in killing their neighbors with common farm tools (most often, machetes).\(^99\) In the immediate aftermath of the genocide, it is estimated that close to 100,000 people were being held in detention on genocide-related charges.\(^100\) As of 2003, there were approximately 87,000 detainees still in Rwandan prisons.\(^101\) Given the unprecedented scope and number of perpetrators, and the limited capacities of international and domestic courts to process them,\(^102\) Rwanda developed a

\(\text{\(89\)}\) DRUMBL, supra note 66, at 85.
\(\text{\(90\)}\) Id., at 93. There is some disagreement as to whether *gacaca* occasionally encompassed adjudication of crimes.
\(\text{\(91\)}\) Connolly, supra note 67, at 269. Mark Drumbl writes that *gacaca* "exceptionally" handled "violent and serious crime." DRUMBL, supra note 64, at 85.
\(\text{\(92\)}\) Waldorf, supra note 14, 48.
\(\text{\(93\)}\) Id.
\(\text{\(94\)}\) Id.
\(\text{\(95\)}\) Id.
\(\text{\(96\)}\) Id. at 49; Phil Clark, Hybridity, Holism, and "Traditional" Justice: The Case of the Gacaca Courts in Post-Genocide Rwanda, 39 GEO. WASH. INT'L L. REV. 765, 778-79 (2007).
\(\text{\(97\)}\) Connolly, supra note 68, at 268.
\(\text{\(98\)}\) Maya Sosnov, The Adjudication of Genocide: Gacaca and the Road to Reconciliation in Rwanda, 36 DENV. J. INT'L L. & POL'Y 125, 125 (2008). More people died in Rwanda in three months (April to June 1994) than in over four years of conflict in Yugoslavia. Id. In fact, the pace of the killing was five times faster than the Nazi mass murder of Jews in the Holocaust. Id.
\(\text{\(99\)}\) Id.
\(\text{\(100\)}\) See Jose E. Alvarez, Crimes of States/Crimes of Hate: Lessons from Rwanda, 24 YALE J. INT'L L. 365, 393 (1999) (explaining that as of September 1996, 90,000 were being held in Rwandan prisons awaiting trial on charges stemming from the genocide).
\(\text{\(102\)}\) See Waldorf, supra note 14, at 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 International Criminal Tribunal for Rwanda (ICTR) has managed a total of only thirty convictions. See Inés Mónica Weinberg de Roca &
modified version of *gacaca* to dispense mass justice in a relatively compressed time frame.\textsuperscript{103} Two legal documents establish 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).\textsuperscript{104} The Organic Law is organized to prosecute “the crime of genocide or crimes against humanity” or “offences . . . committed in connection with the events surrounding genocide and crimes against humanity.”\textsuperscript{105}

This modified version of "*gacaca,״ established, promoted and operated by the Rwandan government, is comprised of approximately 9000 community-based courts, each overseen by locally-elected judges and designed to adjudicate the cases of lower-level perpetrators of the genocide (with higher level perpetrators facing justice in more formal domestic courts and before the ICTR).\textsuperscript{106} In all cases, investigations are carried out by the lowest-level *gacaca* panel, the *cellule*.\textsuperscript{107}

Assuming sufficient evidence is collected, there is an adjudication hearing\textsuperscript{108} where the accused appears but is not represented by counsel.\textsuperscript{109} The evidence against him is heard by seven judges

\begin{itemize}
\item \textsuperscript{103} See Waldorf, \textit{supra} note 14, at 48.
\item \textsuperscript{105} Organic Law, \textit{supra} note 104. Article 51 of the 2004 *gacaca* legislation creates three categories of offenders: (1) Category 1 – planners, leaders, notorious murderers, torturers, rapists and sexual torturers; (2) Category 2 – murderers, assailants who intended to kill, those who committed offenses against the person without intention to kill; and (3) those who committed property offenses. \textit{See} DRUMBL, \textit{supra} note 66, at 86-87. Category 1 offenders are excluded from local *gacaca* panels – they are prosecuted more formally. \textit{Id.} at 87.
\item \textsuperscript{106} \textit{Id.}
\item \textsuperscript{107} \textit{Id.}
\end{itemize}
and members of the public can attend the hearing.\textsuperscript{110} The gacaca law provides a very detailed punishment schematic, which includes life imprisonment and the death penalty.\textsuperscript{111} 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.\textsuperscript{112} Defendants have the right to appeal their sentence to a special gacaca court of appeal but not to the regular Rwandan court system.\textsuperscript{113}

In addition to the fact that it is hierarchical and state-directed,\textsuperscript{114} this newfangled gacaca differs 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.\textsuperscript{115} According to Jacques Fierens:

Such characteristics are in stark contrast to the present gacaca courts and their functioning. The only resemblance lies in the fact that the institutional framework for conflict resolution involves local and non-professional judges, and, even then, they are elected in the reinvented gacaca system, whereas traditional judges were appointed by consensus between the concerned parties. The present gacaca court arises from a complex written law; is not traditional; rests on a supposedly legal basis; confers no privileges on family members; allegedly respects individual rights; favours confessions; and does not include any references to religion.\textsuperscript{116}

3. Nahe Biti Boot -- East Timor

In East Timor, the traditional local dispute resolution method is known as "nahe biti boot," named for the unfolding of a large woven mat ("biti boot") on which disputants and community notables resolve differences.\textsuperscript{117} Nahe biti boot is initiated by village "katua" (elders) upon the request of a person with a grievance against people in another village.\textsuperscript{118} The katua organize an open meeting with the katua and villagers of the person on the other side of the dispute.\textsuperscript{119} Katua from each group, the disputants and their families and villagers meet to discuss matters until a resolution is reached agreeable to both parties.\textsuperscript{120} The katua and the community oversee the process and the

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110 Connolly, supra note 68, at 270; Linda E. Carter, Justice and Reconciliation on Trial: Gacaca Proceedings in Rwanda 14 NEW ENG. J. INT'L & COMP. L. 41, 45 (2007) ("Members of the crowd sit on benches out in the open or in a building that serves on other days as a classroom or meeting place.").

111 DRUMBL, supra note 66, at 87.

112 Id. at 88-89, 75.

113 See Maya Goldstein-Bolocan, Rwandan Gacaca: An Experiment in Transitional Justice, 2004 J. DISP. RESOL. 555, 389 (2005). However, judgments relating to offenses against property are not subject to appeal. Id.

114 Id.

115 Clark, supra note 93, at 788.


117 Waldorf, supra note 14, at 25.


119 Id.

120 Id.
administration of penalties. Katua have the authority to get things done and each side monitors the implementation to ensure penalties and corrective actions are carried out.

Traditionally, nahe biti boot served as a local forum to resolve minor disputes concerning use of land or resources. Instead of resorting to nahe biti boot or other less formal methods, during the 500 years they were ruled by the Portuguese and Indonesians, the Timorese had always relied on the official law courts of their overlords to deal with serious crimes.

Nevertheless, nahe biti boot was put to use in East Timor by the United Nations in the wake of massive violence there approximately one decade ago. After a sizable majority of East Timorese opted for independence from Indonesia in an August 1999 U.N.-sponsored referendum, Indonesian-backed militias brutally attacked civilians and property throughout the island, killing at least 528 people, creating over half a million refugees and internally displaced persons, and destroying much of the country's infrastructure.

In response, the U.N. Transitional Administration in East Timor (UNTAET) used a modified version of nahe biti boot as part of a "Community Reconciliation Process" (CRP) to hold local truth and reconciliation hearings designed, in part, to encourage the repatriation and reintegration of approximately one hundred thousand East Timorese refugees (including former militia members) then in West Timor. 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." 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.

Although the CRP contemplated handling only minor crimes, such as theft, minor assault, and the killing of livestock, the massive volume of cases overwhelmed the formal justice mechanisms.

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121 Id.
122 Id.
123 Id.
124 Id.
125 Id.
126 Waldorf, supra note 14, at 24.
127 Id. This was part of a truth and reconciliation process that involved the creation of a "Commission for Reception, Truth and Reconciliation" or "CAVR." Id.
129 Waldorf, supra note 14, at 25.
130 Id. at 24.
and the traditional process ended up being used for far more serious cases. 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.

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." According to the same UN official, the process was:

[being cosmetically applied, falling short of the aim of stopping the galling burr of perceived injustice forming and growing in this generation and poisoning the next. For people to have any hope of putting their worst experiences behind them, they need to see the offenders punished and remorseful. They need to feel they have been dealt with. There needs to be repair of the harm caused, if possible. In East Timor there are not enough resources or serious crimes investigators to deal with all the crime. The prisons and courts are backlogged. They appear to be dealing with the minor offenders and not the big players. Timorese militia leaders are just coming back, setting up and carrying on. When the UN backs off and the families of the victims see that nothing has happened to this guy, they are going to take the law into their own hands and dish out their own justice, and that comes at the end of a machete from what I’ve seen. The irony is . . . that the people, helped by their predominantly Catholic beliefs, have a strong will to forgive and put their trauma behind them. Simple processes of justice, if properly applied now, would have much success with a population who genuinely have no wish to be burdened forever by their past.

4. Kgotla -- Botswana

By the seventeenth century, tribes in Botswana had formed the kgotla – a formal assembly of male adults, which constituted a community-issues discussion forum and served as a tribal court. From the time Botswana became a British protectorate in 1885 (and developed a formal court system) until its independence in 1966, it retained the kgotla. Thus, it had formed a dual

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131 Security Man, supra note 115.
132 Id.
133 Id.
134 Id.
136 Connolly, supra note 68, at 281-282.
court system: tribal courts were competent to apply only customary law in civil cases; and the High Court and subordinate courts were competent to apply the common law.  

There are currently four levels of customary courts. At the bottom level, the lower customary courts correspond with the kgotla and are often convened by a "headman" in an outlying village. The second level is known as the higher customary court, or "chiefs' courts," which generally act as courts of appeal from the lower customary courts. Appeal may be taken from the chiefs' courts to the third level – the customary courts' commissioner and the customary courts of appeal. Finally, appeals from here may be raised in the High Court.

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

5. Katarungang Pambarangay -- The Philippines

Traditionally, the lowest unit of social organization for small communities in the Philippines was the "barangay." Throughout early Filipino history, the barangay was used as a forum for dispute resolution with friends and neighbors serving as mediators. This popular justice mechanism was known as Katarungang Pambarangay. 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").

The Katarungang Pambarangay law provides for a nationwide system of dispute processing by means of mediation at the neighborhood and village level. It does this by dividing the country into 42,000 barangays. Each barangay has a ten- to twenty-member Lupong Tagapamayapa (council of mediators), consisting of village residents. The Lupong members, who must possess integrity, impartiality, independence of mind, sense of fairness, and reputation for probity, are selected by a "Punong Barangay" -- the barangay captain or "Chairman of the

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138 1 LEGAL SYSTEMS OF THE WORLD: A POLITICAL, SOCIAL, AND CULTURAL ENCYCLOPEDIA 184 (Herbert M. Kritzer ed., 2002) [hereinafter LEGAL SYSTEMS].
139 Id.
140 Id.
141 Id.
142 Connolly, supra note 68, at 282.
143 Id.
144 Id. at 265.
145 GOLUB, supra, note 74, at 12.
147 Connolly, supra note 68, at 265.
148 GOLUB, supra note 74, at 12.
149 Id.
150 Id.
The barangay captain is the principal neighborhood/village official whose everyday occupation is normally non-governmental. Disputants begin the Katarungang Pambarangay process by submitting a case to the Punong Barangay, who attempts to mediate. If this initial attempt at mediation fails, the case is referred to a panel of three Lupong members (the "Pangkat") for conciliation. The Pangkat members are selected by the parties, or if the parties cannot agree, chosen by lot by the Punong Barangay. 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.” Lawyers may not participate as counsel. All mediation proceedings are recorded (both at the Punong and Lupong levels) and copies provided to the disputants and municipal government. 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. 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.

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. That said, agreements reached pursuant to this process are binding and ultimately enforceable by the formal state courts. The BJS 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.

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

151 Suarez, supra note 146.
153 Suarez, supra note 146.
154 Id.
155 Id.
156 Silliman, supra note 152, at 280.
157 Id.
158 Suarez, supra note 146.
159 Id.
160 Id.
161 Silliman, supra note 152, at 280.
162 Connolly, supra note 68, at 266.
163 Id.
164 See GOLUB, supra note 74, at 13.
165 Id.
166 Id.
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. In light of this, Brynna Connolly suggests that Katarungang Pambarangay may not meet basic human rights standards.

Of course, problems affecting the BJS 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 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.

6. Mato Oput -- Uganda

Mato oput is a traditional justice mechanism developed and used by the Acholi people of Northern Uganda. In Acholi, mato oput means drinking the herb of the oput tree, a blinding-bitter tree. The reconciliation process is called mato oput because it ends in a significant ceremony of reconciling the parties in conflict. The process involves the guilty acknowledging responsibility, repenting, asking for forgiveness, paying compensation and being reconciled with the victim’s family through sharing the bitter drink - mato oput. The victim’s clan must accept the plea for forgiveness for the reconciliation to be complete. The end-result may also include restrictions on the movement of the perpetrators.

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

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167 Id. at 14.
168 Id.
169 Connolly, supra note 68, at 266.
170 Golub, supra note 73.
172 Id.
173 Id. 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.
174 Id.
175 Id.
178 Id. Such separation is significant because of the communal nature of Acholi culture, wherein families from various clans share food, water, land, and social relations. Id.
including the motives, the circumstances of the crime, and an expression of remorse. Finally, in the last step, the family of the perpetrator pays compensation raised through the contributions of clan members.

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. Despite certain variations, the ceremony proceeds as follows:

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

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' seeming limited capacity to forgive. Moreover, it is not clear that *mato oput* is designed to deal with large-scale crimes such as mass abduction or killing.

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. Finally, *mato oput* applies only to Acholis. However, there are numerous ethnic groups in Uganda and *mato oput* is simply not able to accommodate them. By
the same token, these other groups are not likely to embrace a practice that is alien to them.\textsuperscript{188}

\section*{B. \textbf{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."\textsuperscript{189} 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,\textsuperscript{190} they also possess many features we might associate with the classic penological process: the taking of statements; the use of subpoena powers; the use of powers of search and seizure; the holding of public hearings; and the publication of findings of individual responsibility in a final report.\textsuperscript{191}

To date, more than a couple dozen truth commissions have been established around the world.\textsuperscript{192} In many respects, they vary widely. For example, some are established on presidential order;\textsuperscript{193} others by parliamentary decision.\textsuperscript{194} Some function outside the view of the international community while others do their work publicly.\textsuperscript{195} Certain ones function more like judicial commissions of inquiry\textsuperscript{196} when their counterparts employ less formal procedures resembling or incorporating local cultural rites.\textsuperscript{197} A number of commissions deal with large patterns of abuses,

\textsuperscript{188} Id.
\textsuperscript{190} See generally Priscilla B. Hayner, \textit{Unspeakable Truths: Confronting State Terror and Atrocity} (2001) (exploring the work of more than 20 truth commissions worldwide)
\textsuperscript{192} Freeman, supra note 191, Appendix 1.
\textsuperscript{194} Id.
\textsuperscript{196} See Anurima Bhargava, \textit{Defining Political Crimes: A Case Study of the South African Truth and Reconciliation Commission}, 102 COLUM. L. REV. 1304, 1398 (describing the work of the "Committee" portion of the South African TRC as "quasi judicial" and aspiring to "meet the expectations that attach to a legal institution").
such as the South African one.\textsuperscript{198} This contrasts with those handling only selected violations, such as the "disappearances"-focused Argentine commission.\textsuperscript{199}

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.\textsuperscript{200}

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

\textsuperscript{198} See Michael P. Scharf & Paul R. Williams, \textit{The Functions of Justice and Anti-Justice in the Peace-Building Process}, 35 CASE W. RES. J. INT'L L. 161, 171 (2003) ("The South African Truth and Reconciliation Commission was . . . given the task of documenting the full extent of government involvement in racial killing and incidents of torture").


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 [the war crimes tribunals following WWII], we in South Africa had to live with one another.” 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.”

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

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. Other truth commissions, such as Uganda’s 1974 version, were little more than thinly veiled efforts to placate the international community. 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 or completely thwarted because it was too critical of the new government. Some commissions have not

202 DESMOND TUTU, NO FUTURE WITHOUT FORGIVENESS 21 (2000).
204 Brahms, supra note 200.
206 Id.
207 See Hayner, supra note 189, at 619, 625. See also Truth Commission in Uganda, Trial Watch, available at http://www.trial-ch.org/en/international/truth-commissions/uganda.html (last visited Nov. 28, 2008) (“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.”).
209 See Reed Brody, Justice: The First Casualty of Truth? The Global Movement to End Impunity for Human Rights Abuses Faces a Daunting Question, THE NATION, Apr. 30, 2001, at 25 (indicating that the report of Haiti’s truth commission was published years after its work ended).
210 United States Institute of Peace, Truth Commissions Digital Collection, available at http://www.usip.org/library/truth.html (last visited Nov. 28, 2008) (The report of a commission of inquiry established in 1985 to investigate the killing of an estimated 1,500 political dissidents and other civilians in the Matabeleland region has not been made public to date by the government.
211 See Hayner, supra note 189, at 617.
even been allowed to complete their work. Those in Bolivia (1982-84) and Ecuador (1996-97) were disbanded before fulfilling their mandates because the government in each case found the process had become too politically problematic.\(^{212}\)

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

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

### C. 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.\(^{214}\) Lustration has been used widely in former Soviet Block countries, such as Poland and the Czech Republic, which have transitioned from communism to democracy.\(^{215}\) Lustration laws tend to cull names from the previous regime's police files.\(^{216}\) This information is then used to determine whether suspected individuals collaborated with the former state security service.\(^{217}\)

Lustration has also been used in post-war Germany to purge former Nazis, in post-Saddam Iraq as part of the "debaathification process" (Ba'ath was Saddam's party) and in post-authoritarian Latin

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\(^{212}\) See Brahm, supra note 200.

\(^{213}\) Id.

\(^{214}\) See Roman Boed, An Evaluation of the Legality and Efficacy of Lustration as a Tool of Transitional Justice, 37 COLUM. J. TRANSNAT'L L. 357, 358 (1999). “Lustration” is derived from the Latin word "lustratio," which means “purification by sacrifice.” Id. Traditionally, it was any of various processes in ancient Greece and Rome whereby individuals or communities would rid themselves of ceremonial impurity (e.g., bloodguilt, pollution incurred by contact with childbirth or with a corpse) or simply of the profane or ordinary state, which made it dangerous to come into contact with sacred rites or objects. Id. The purification methods varied from sprinkling with or washing in water, rubbing one's skin with various substances, such as blood or clay, to complicated ceremonies, some of which involved confession of sins. Id. Fumigation was also used. Id.

\(^{215}\) Id. 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 Ivan Simonovic, Dealing with the Legacy of Past War Crimes and Human Rights Abuses, 2 J. INT’L CRIM. JUST. 701, 704 n.14 (2004).


\(^{217}\) Id.
American societies, such as El Salvador. In Iraq, for example, U.S. administrator L. Paul Bremer established a Supreme National Debaathification Commission to root out senior Baathists from Iraqi ministries and hear appeals from Baathists who were in the lowest ranks of the party's senior leadership.

Lustration laws generally contain both substantive and procedural parts. 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) posts in the previous regime that would disqualify individuals (or necessitate inquiry) for service in the new government. The procedural aspect establishes the authority tasked to administer the lustration law and the process by which such law will be carried out. Lustration is typically performed by a "commission" or similar administrative body.

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. It lays out a special judicial procedure that is directly linked with Poland's regular criminal law. The process can be initiated by the prosecutor or a member of Parliament. 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.

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. 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 political favors under threat of having their past service exposed). 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.

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 implicated by the age of the records (raising statute of limitations or laches

218 Id.; Boed, supra note 214, at 358; Simonovic, supra note 215, at 701.
219 See Sharon Otterman, Iraq: Debaathification, Council on Foreign Relations, April 7, 2005, http://www.cfr.org/publication/7853/iraq.html (last visited Dec. 16, 2008). The party's foremost leaders--some 5,000 to 10,000 individuals--were not permitted to appeal their dismissals. Id. Two months later, Bremer dissolved the Supreme National Debaathification Commission, but the panel, with support from some members of the interim government, continues to operate. Id.
221 Id.
222 Id.
223 See Boed, supra note 214, at 364. In certain jurisdictions, an appeal process is included. Id.
224 See David, supra note 220, at 411.
225 Id.
226 Id.
227 Hollywood, supra note 216, at 96.
228 Id.
229 Id.
230 Id.
concerns), their hearsay quality and the *ex post facto* nature of the law giving rise to the accusations;\(^{231}\) (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 (4) the limited or non-existent rights to judicial review.\(^{232}\) In considering the Czech law, Roman Boed thus concludes that lustration:

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\ldots \text{results in legally-impermissible discrimination which breaches the state's}
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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.\(^{233}\)

D. REPARATIONS

Although they can be a component of other forms of transitional justice (such as truth commissions or traditional rituals), reparations to victims can be a justice mechanism in their own right.\(^{234}\) The UN's *Basic Principles on the Right to a Remedy and Reparation* list five categories of reparations: (i) restitution or *restitution in integrum*, which seeks to restore the victim to the *status quo ante* or “original situation” before the violation occurred; (ii) compensation, whereby victims receive money for quantifiable harms; (iii) rehabilitation, which could include all relevant medical, psychological, social and legal support services; (iv) satisfaction, a fairly broad category that includes varied measures such as public apologies, truth-finding processes, and sanctioning perpetrators; and (v) guarantees of non-repetition, including institutional and legal reform, and promoting mechanisms to prevent and monitor future social conflict.\(^{235}\)

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."\(^{236}\) 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.\(^{237}\)

Administration of reparations, however, can present a significant obstacle. First, few transitioning states have the funds to compensate all the victims deserving of assistance.\(^{238}\) And donations from wealthy foreign donors or even a "reparations tax" are unlikely to take care of the problem.\(^{239}\) Second, assuming the fledgling government is capable of paying reparations, doing

\(^{231}\) *Id.* at 97-99. Critics also point out that lustration deprives emerging democracies of rare and valuable human resources. *Id.* at 97. It also prevents old apparatchiks from being inculcated in the democratic values of the new regime.

\(^{232}\) See Boed, *supra* note 214, at 377-78.

\(^{233}\) *Id.* at 398-99.


\(^{236}\) *Id.*

\(^{237}\) *Id.*

\(^{238}\) See Hollywood, *supra* note 216, at 92

\(^{239}\) *Id.* at 92-93.
so may “unsettle property rights and interfere with economic reform by creating new claims against existing property holders.” 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. Among the issues, in this regard, are proof problems in demonstrating a sufficient nexus between specific criminal activity and particular injuries.

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. Such case-by-case reparations, though, risk "disaggregating the harm suffered by victims and fragmenting various victim groups." 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."

E. AMNESTIES

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

In the transitional justice context, there are different kinds of amnesties. Some of them are unqualified. 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 LRA rebels in 2000. Other amnesties are granted by new regimes vis à vis the crimes of their predecessor -- such as when the new Sandinista government in Nicaragua granted amnesty 1985 to armed forces that had been opposing the Sandinistas.

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. Such was the case

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242 See Adrian Di Giovanni, The Prospect of ICC Reparations in the Case Concerning Northern Uganda: On a Collision Course with Incoherence?, 2 J. Int'l L. & Rel. 25, 54 (2006) (noting, in the Ugandan context, that injuries to victims can often be attributable to more than one perpetrator).
243 Id. at 42.
244 Id.
245 Id.
246 BLACK'S LAW DICTIONARY 93 (8th ed. 2004).
247 See DRUMBL, supra note 66, at 154.
248 Id.
249 See Rose, supra note 177, at 353-54. 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. Id. at 353.
251 DRUMBL, supra note 66, at 154.
in Chile, for example, where the departing Pinochet government pardoned its leaders on the way out.

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. Often, this is done in the context of a truth commission. This was the case in South Africa. 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. This had to be corroborated with other testimony and evidence. And the perpetrator had to demonstrate that the crime was committed for a political purpose.

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; (2) amnesty provisions may be a precondition for dictatorial regimes to give up power; and (3) when a country's judicial infrastructure is in shambles, amnesties, in conjunction with truth commissions, may prove necessary to establish the truth regarding past abuses, which carries considerable healing power for individual victims and the transitional society at large.

Opponents of amnesties describe them as a miscarriage of justice that reinforces impunity and undermine the move toward a burgeoning rule of law. 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." Moreover, as noted by Mark Drumbl, notwithstanding any advantages of amnesties, they "selectivizate punishment of extraordinary international criminals at the national level in a manner that hampers retribution as a principled penological goal."

IV. 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

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252 Id.
253 Id.
254 Id.
256 Id.
257 Id.
258 Id.
260 Brahm, supra note 255.
261 Trumbull, supra note 259, at 314-16.
262 DRUMBL, supra note 66, at 154.
264 DRUMBL, supra note 66, at 154.
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.

A. CIRCUMSTANCES SURROUNDING THE ICC REFERRAL AND THE REQUEST FOR DEFERRAL

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

Cases may be referred to the ICC by one of four methods: (1) pursuant to Articles 13(a) and 14 of the Rome Statute, a member country of the Assembly of States Parties (i.e., a country that has ratified the Rome Statute) may refer a case;265 (2) the Security Council may refer the case (subject, of course, to veto from the permanent five members) per Article 13(b); 266 (3) under Articles 13(c) and 15, the ICC’s three-judge Pre-Trial Chamber panel may authorize a case initiated by the ICC Prosecutor; 267 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 may refer a case to the ICC. 268

Moreover, as noted above, a State may request ICC deferral on complementarity grounds either earlier or later on in the case. Pursuant to Rome Statute Article 18, 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. 269 On the other hand, Article 19 permits a State to request deferral at later stages of the case. 270

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. 271 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

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265 Rome Statute, supra note 12, arts. 13(a) and 14.
266 Id. art. 13(b). To date, the Security Council has made only one such referral – the “Situation in Darfur, Sudan” in March 2005. See William A. Schabas, Prosecutorial Discretion v. Judicial Activism at the International Criminal Court, 6 J. Int’l CRIM. JUST. 731, 758 (2008).
267 Id. note 13(c), 15.
268 Id. arts. 12(2)-(3).
269 Id. art. 18.
270 Id. art 19.
271 See supra notes 264-66 and accompanying text.
of international consensus.\footnote{272}{See Gregory S. Gordon, From Incitement to Indictment? Prosecuting Iran’s President for Advocating Israel’s Destruction and Piecing Together Incitement Law’s Emerging Analytical Framework, 98 J. CRIM. L. & CRIMINOLOGY 853, 915 (2008) (opining that Security Council referral to ICC indicates international acquiescence to prosecution); Christine H. Chung, The Punishment and Prevention of Genocide: The International Criminal Court as a Benchmark of Progress and Need, 40 CASE W. RES. J. INT’L L. 227, 239 (2007-2008) (“The Security Council’s referral of the situation in Darfur to the ICC for investigation in March 2005 was an achievement in expressing an international consensus that the perpetrators of the horrific violence and crimes in Darfur should be held accountable.”).} Similarly, prosecutions instituted by the ICC Prosecutor reflect internal checks and balances as they are reviewed and authorized by a Pre-Trial Chamber.\footnote{273}{Rome Statute, supra note 13, arts. 15(3)-(5).} Third-party member state referrals, for their part, reflect the Westphalian preference of the international community, as reflected in the earliest drafts of the Rome Statute, that state sovereigns should be the primary moving force in triggering international criminal prosecutions.\footnote{274}{See Schabas, supra note 266, at 734.}

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 \textit{travaux préparatoires}.\footnote{275}{Id. 751.} 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.”\footnote{276}{G.P. Fletcher, The Grammar of Criminal Law, American, Comparative, and International, Volume One: Foundations 189 (Oxford Univ. Press 2007). \textit{But see} Giorgio Gaja, Issues of Admissibility in Case of Self-Referrals, in THE INTERNATIONAL CRIMINAL COURT AND NATIONAL JURISDICTIONS (Mauro Politi & Federica Gioia, eds., 2007) [hereinafter \textit{NATIONAL JURISDICTIONS}] (“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.”).} William Schabas thus fears the end result would be “establishing a degree of complicity between the Office of the Prosecutor and the referring state.”\footnote{277}{Schabas, supra note 266, at 751.} Kenneth Roth, Executive Director of Human Rights Watch, elaborates:

\begin{quote}
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.\footnote{278}{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.” Id. at 765.}
\end{quote}

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).\footnote{279}{Id. 751.}

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. \^{280}

Conversely, a Rule 19 application submitted on the eve of trial should raise red flags and preclude deference. \^{281} 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 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 . . ." \^{282}

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.

B. THE STATE OF AFFAIRS IN THE DOMESTIC JURISDICTION SEEKING DEFERRAL

The next area of inquiry narrows the focus from international relations to internal political functioning: 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' . . ." \^{283} 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." \^{284}

\^{280} 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 13, art. 17(1).

\^{281} 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 13, art. 17(2)(b).

\^{282} LOUISE ARBOUR & MORTEN BERGSMO, CONSPICUOUS ABSENCE OF JURISDICTIONAL OVERREACH, in REFLECTIONS ON THE INTERNATIONAL CRIMINAL COURT 129, 131 (Herman A.M von Hebel et al. eds., 1999).


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).

1. **Legitimacy**

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 Ruti Teitel: "Post-Cold War transitional justice has been largely concerned with advancing a conception of the rule of law that is associated with the legitimacy of a country's local juridical and political conditions."\(^{285}\)

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.\(^{286}\) 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 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.\(^{287}\) 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.\(^{288}\)

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 Tejan Kabbah's overthrown government returned to power after the commission of crimes against humanity and war crimes by various rebel factions.\(^{289}\)

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Justice, and the Prevention of Genocide, 38 COLUM. HUM. RTS. L. REV. 477, 483 (2007) (referring to complications when transitional justice mechanisms have to be applied during ongoing conflict and for ongoing violations).


\(^{288}\) Evelyn Bradley, *In Search for Justice -- A Truth and Reconciliation Commission for Rwanda*, 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.").

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 was the case in East Timor where UNTAET (United Nations Transitional Administration in East Timor) governed the new country after its Indonesian overlords went on a violent rampage before pulling out.290

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 Museveni's government is fighting against the LRA, whose human rights violations have been detailed above.291 The other scenario is found in Sudan, where the existing government itself is accused of committing human rights violations in Darfur but seeks to bring its own members to justice.292

Of these two paradigms, the first -- new regimes emerging after extensive violence -- would generally appear to give greater assurance of the rule of law.293 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.294 And, of course, this often has positive rule of law implications.295

On the other hand, there are no guarantees in this regard. In the first place, rogue regimes may simply replace other rogue regimes.296 Moreover, even if a new regime starts out on the right path, it can often diverge. The RPF, for example, has been increasingly accused of human rights violations in Rwanda over the past decade.297 In addition, it is quite possible that justice efforts are initiated long after the regime takes power. That is the case in Cambodia, where justice efforts related to Khmer Rouge atrocities are only now being undertaken.298 In the meantime, the

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


293 See John Dermody, Note, Beyond Good Intentions: Can Hybrid Tribunals Work after Unilateral Intervention? 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).

294 Id.

295 See Charles P. Trumbull IV, Giving Amnesties a Second Chance, 25 BERKELEY J. INT'L L. 283, 305 (noting, inter alia, that in post-conflict societies, justice efforts are necessary to restore the rule of law).

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

297 See Luc Reydams, The ICTR Ten Years On: Back to the Nuremberg Paradigm?, 3 J. INT'L CRIM. JUST. 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).

298 See Kathleen Claussen, Up to the Bar? Designing the Hybrid Khmer Rouge Tribunal in Cambodia, 33 YALE J. INT'L L. 253 (2008) (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 current Cambodian government has allegedly accumulated a long record of flouting the rule of law.\textsuperscript{299}

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 DR Congo, where the government was democratically elected pursuant to a constitution passed with eighty-four percent of voters' support and a process blessed by the international community as fair and free.\textsuperscript{300}

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?\textsuperscript{301} (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?\textsuperscript{302} 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 terms of the deferral request 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 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 the finding of a fairly elected government 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.

\textsuperscript{299} See Michael Maley, Transplanting Election Regulation, 2 Election L.J. 479, 491 n.48 (2003) (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).

\textsuperscript{300} See Elizabeth Powers, Greed, Guns and Grist: U.S. Military Assistance and Arms Transfers to Developing Countries, 84 N.D. L. Rev. 383, 404 (2008).

\textsuperscript{301} 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 note 283 and accompanying text. So it can be instructive, if not dispositive, to know how soon the new regime has been in power.

\textsuperscript{302} See Jane Stromseth, Post-Conflict Rule of LawBuilding: The Need for a Multi-Layered, Synergistic Approach, 49 WM. & MARY L. REV. 1443,1443-1444 (2008) (“Increasingly, international and domestic reformers have come to appreciate that long-term solutions to security and humanitarian problems depend crucially on building and strengthening the rule of law: fostering effective, inclusive, and transparent indigenous governance structures; creating fair and independent judicial systems and responsible security forces; reforming and updating legal codes; and creating a widely shared public commitment to human rights and to using the new or reformed civic structures rather than relying on violence or self-help to resolve problems.”).
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. Of course, even if there is a finding of legitimacy, it will have to be weighed along with the other two factors in this category – capacity and stability.

2. Capacity

Even if a country seeking deferral satisfies the legitimacy criterion, its physical capacity to dispense justice must also be considered. In other words, does it possess the necessary resources and infrastructure? The physical infrastructure often will have sustained extensive, crippling damage. Has it been sufficiently restored? Given its connections to the previous regime, judicial personnel may be severely compromised or lacking in essential skills. Has there been sufficient vetting and training? Has the country been able to secure funds and assistance from international donors? Negative answers to these questions should lend support to an admissibility finding for complementarity purposes.

3. Stability

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

C. 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.

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.  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.

2.  Judicialization of the Mechanism

For complementarity purposes, this second criterion – judicialization of the mechanism – is likely the most crucial. In their purest restorative forms, alternative justice mechanisms in transitional societies are not judicialized at all – they tend to be formed on an ad hoc basis and consist of informal processes aiming to bring a community together and heal its wounds. 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. On a surface level, this is the ideal complementarity model for domestic efforts under Article 17 of the Rome Statute. But that does not necessarily preclude consideration of alternative mechanisms under Article 17. 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.

a. Constituent Nature of the Body

i. Type of Body

As a threshold matter, consideration of the type of mechanism is instructive. Of the alternative justice varieties previously considered, 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. They carry out investigations, they have

308 See Allison Morris, Critiquing the Critics: A Brief Response to Critics of Restorative Justice, 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.").
309 See DRUMBL, supra note 66, at 5.
311 See Keller, supra note 15, at 259-260.
312 See supra notes 187-88 and accompanying text.
subpoena powers, they conduct hearings, they name individuals, they can offer amnesty, and they
can refer cases for punishment. 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. 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 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.

   ii. 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. 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. Lustrations can be wide-ranging in
their preclusion effect – to the point of looking like a retributive tribunal. Mechanisms
endowed with these penal features and objectives begin to look rather judicialized and are more
attractive candidates for Article 18/19 deferral requests.

   iii. Permanent v. Short-Term

Institutions that are set up for only specific periods tend to look less judicialized. 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. Given their open-
ended mandates, these practices take on the appearance of more judicialized mechanisms.

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313 See FREEMAN, supra note 189, at Part II.
314 See supra Part III.A (exploring customary local procedures).
315 See GOLUB, supra note 73, at 5.
316 See generally FREEMAN, supra note 189 (exploring procedural aspects of truth commissions).
317 See M. Cherif Bassiouni, Searching for Peace and Achieving Justice: The Need for Accountability,
59-AUT Law & Contemp. Probs. 9, 22-23 (1996) (describing lustration mechanisms as "punitive in
nature").
318 See Randall T. Coyne, Reply to Noah Feldman: Escaping Victor's Justice by the Use of Truth and
Reconciliation Commissions, 58 OKLA. L. REV. 11, 17 (2005) (indicating the temporary nature of truth
commission and describing it as "nonjudicial.").
319 See supra Parts III.A.1, 5.
Similarly, if an institution records and keeps records of its proceedings, it has the appearance of a more permanent body with judicial features. 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 necessary. 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.

iv. Nature of the Proceeding

The nature of the body's proceedings should also factor into the analysis. For one thing, it is helpful to know if the body will rely on "adjudicators" (as opposed to a wide-open meeting style) to preside over the proceeding, maintain order, and render a decision based on the matters brought up during the session. This would distinguish the proceeding as more judicial in nature. The modernized CLPs, such as gacaca in Rwanda and kgotla in Botswana (where the "headman" of the village presides), tend to have this feature. The truth commissions also have it -- to the extent they conduct investigations, offer amnesties or refer matters for criminal prosecution. 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.

A further refinement of this feature could be the use of set procedures, as opposed to a free-flowing discussion among the parties. If the proceedings follow a set order or consist of predetermined statements, presentations and interactions, then the body 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 offenses and offenses.

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

322 See Suarez, supra note 144.


324 See Waldorf, supra note 14, at 48; NAT'L INST'L AFFAIRS, supra note 133, at 93-95.

325 See Bassiouni, supra note 317, at 21 (describing certain tribunals with investigatory functions as "hybrid" in nature).

apologize to the community. At the end of the ceremony, victims and community members verbally agree to accept the deponents' statements.

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. 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.

b. 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.

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)? Is there a right to appeal to a higher traditional court (as in gacaca), or, ultimately, to the national courts (as in Botswana's kgotla system)? 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." 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." A further sign of judicial character is the law's format. Written, as opposed to strictly oral, law further betokens a judicial nature. As indicated previously, modernized versions of CLPs, such

327 Security Man, supra note 116.
328 Id.
329 See supra notes 307-09 and accompanying text.
330 Zafarullah & Habibur Rachman, supra note 81, at 1030 n.45.
331 Goldstein-Bolocan, supra note 111, at 398.
332 Connolly, supra note 68, at 282.
333 Michael P. Scharf, The Case for a Permanent International Truth Commission, 7 DUKE J. COMP. & INT'L L. 375, 386 (1997). This rule was initially pursuant to a decision by the South African Supreme Court that was later overruled. Id. n.56 Nevertheless, the South African TRC decided to adopt the recommended procedure. Id.
335 See Donna Litman, Jewish Law: Deciphering the Code by Global Process and Analogy, 82 U. DET. MERCY L. REV. 563, 574 (2005) (“The written law contains the commandments regarding the judicial system with the appointment of judges for the people as well as a provision for resolution of those matters that cannot be resolved by these judges.”) (emphasis added).
as *gacaca*, are often established through written laws.\(^\text{336}\) The same is true of the other forms of alternative justice. Moreover, laws more consistent with, or seemingly derivative of, national codes are arguably further proof of a mechanism’s judicial essence.

c. Sanctioning Power

While alternative justice mechanisms almost always eschew incarceration, they nonetheless avail themselves of other penal or quasi-penal sanctions. As Mark Drumbl points out, CLPs themselves are established on the premise of fostering community reconciliation through "reintegrative shaming."\(^\text{337}\) 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."\(^\text{338}\)

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), witholding 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.\(^\text{339}\)

d. 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.

i. 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

\(^{336}\) See supra note 102 and accompanying text.

\(^{337}\) See generally Mark Drumbl, *Punishment, Post-Genocide: From Guilt to Shame to Civis in Rwanda*, 75 N.Y.U. L. REV. 1221 (2000) (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).

\(^{338}\) JOHN BRAITHWAITE, *CRIME, SHAME AND REINTEGRATION* 55 (1989). Drumbl posits that shaming sanctions, without reintegration, may create exclusionary humiliation and an absence of remorse. Drumbl, supra note 337, at n.167. He concludes that, in fragile post-atrocity societies such as Rwanda, this may simply prolong ethnic hatred. *Id.*

\(^{339}\) See Phakiso Mochochoko, *The Agreement on Privileges and Immunities of the International Criminal Court*, 25 FORDHAM INT’L L.J. 638, 640 (2002) ("It is also worth mentioning that like the two ad hoc Tribunals before it, one of the purposes of the ICC is to put an end to impunity by punishing those responsible for the most serious crimes.").
issuing and executing warrants (as in Botswana's Kgotla CLP). This represents the lowest degree of institutional linkage.

ii. Exhaustion Prerequisite

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

iii. 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. Similarly, although not to the same degree, in the Philippines remedies prescribed through Katarungang Pambarangay are enforceable through state courts.

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

3. Holistic Effect on the Transition Process

Regardless of its origins and judicial characteristics, the Rule 17 complementarity analysis should also include an assessment of the mechanism's likely effect on the country's 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. 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 leadership positions (referred to by Mark Drumbl as "conflict entrepreneurs"), 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. 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 . . .

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.

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. 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. According to the Rome Statute, the Court must “permit [victims'] views and concerns to be presented and considered at stages of the

community, rather than exacting retribution for crimes,' and 'promoting reconciliation and peace between and among the affected parties is more important than vengeance.'"

347 Drumbl, supra note 66, at 8.
348 Id.
349 Id. at 202-203.
350 Although the ICC targets those most responsible for international crimes, this article 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 12, Preamble.
352 See Gordon, supra note 37, at 696.
proceedings determined to be appropriate by the Court.” 353 In fact, the ICC must consider victims’ interests in making a plethora of decisions, including whether to initiate an investigation into particular allegations354 and whether to bring charges.355 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.

D. THE CRIMES AT ISSUE

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

1. Parallel Crimes?

As a threshold matter, complementarity entails parallel charging at the domestic level.356 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.”357 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.358 As a result, the case was found to be admissible.359

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."360 On the other hand:

[For] a crime under ordinary criminal law such as murder, rather than for the truly international offences of genocide, crimes against humanity and war crimes . . . 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

353 Rome Statute, supra note 12, art. 68(3).
354 Id. art. 53(1)(c).
355 Id. art. 53(2)(c).
356 See Christopher 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, 98 J. CRIM. L. & CRIMINOLOGY 1069, 1097 (2008) (“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.”).
358 Id.
359 Id.
360 WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 70 (2001).
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.361

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

a. **Crimes Charged**

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

And 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.366 Moreover, the defenses of superior orders and defense of property are available with respect to war crimes but not genocide and crimes against humanity.367 Alison 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] 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.368

361 *Id.*
362 *Id.* supra note 13, art. 17(1)(d). Article 17(1)(d) provides that a case is inadmissible where it is "not of sufficient gravity to justify further action by the Court." *Id.*
363 *See, e.g.* Alison Marsten Danner, *Constructing a Hierarchy of Crimes in International Criminal Law Sentencing*, 87 VA. L. REV. 415, 462-467 (2001) (based on their chapeaux, ranking genocide as the most serious, followed by crimes against humanity and then war crimes).
365 Prosecutor v. Kambanda, Case No. ICTR 97-23-S, Judgment, ¶ 1417 (Sept. 4, 1998). The ICTY, on the other hand, has not embraced the distinction. *See, e.g.*, Prosecutor v. Tadic, Case No. IT-94-1, Appeals Chamber Judgment on Sentencing, ¶ 69 (Jan. 26, 2000) (declaring that "there is in law no distinction between the seriousness of a crime against humanity and that of a war crime.").
366 *Id.* supra note 12, art. 124.
367 *Id.* arts. 33(2), 33(1)(c).
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).  

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)). Such differences should be factored into the admissibility test.

b. Additional Criteria

The criminal charge itself, though, cannot be the sole measure of gravity. In this regard, although considered in a different context, criteria used to interpret the Article 17(1)(d) gravity threshold by the 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 crime.

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." Applying this criterion, Pre-Trial 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.

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

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369 See Schabas, supra note 266, at 741 (suggesting that recruitment of child soldiers is a less grave offense than charges involving homicide).

370 Rome Statute, supra note 13, arts. 7(1)(b) & (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 Mirko Bagaric & John Morss, In Search of Coherent Jurisprudence for International Criminal Law: Correlating Universal Human Responsibilities with Universal Human Rights, 29 SUFFOLK TRANSNAT'L L. REV. 157, 203 (2006) (observing that deportation or forced transfer of population are arguably less serious forms of crimes against humanity).


372 Prosecutor v. Lubanga, supra note 357, ¶ 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. Id. ¶ 50. Consideration of the defendant will be the final category of our alternative justice complementarity analysis, infra Part IV.E.

373 Id. ¶ 67.
region. Geographically circumscribed offenses 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 favor 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. So should the impact on the victims.

Finally, the "social alarm" criterion distilled by Pre-Trial Chamber I in the Lubanga case could be expanded. The Pre-Trial Chamber identified "social alarm" caused by the alleged conduct in the "international community." This criterion should also consider the impact on the domestic jurisdiction.

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.

E. THE DEFENDANTS

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

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.

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374 See, e.g., Prosecutor v. Krstic, Case No. IT-98-33, Judgment, ¶ 702 (Aug. 2, 2001) ("[T]he Trial Chamber agrees with the Prosecutor that the number of victims and their suffering are relevant factors in determining the sentence and that the mistreatment of women or children is especially significant in the present case.").
375 See, e.g., Prosecutor v. Krnolejac, Case No. IT-97-25, Judgment, ¶ 512 (March 15, 2002) (holding that "the extent of the long-term physical, psychological and emotional suffering of the immediate victims is relevant to the gravity of the offences.").
376 See Prosecutor v. Lubanga, supra note 357, ¶ 46.
377 Id.
378 See Gravity Threshold, supra note 371, at 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.").
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.

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.\(^{379}\) 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 actual 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.\(^{380}\)

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.

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.\(^{381}\) 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).\(^{382}\) 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.\(^{383}\) 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.

\(^{379}\) Prosecutor v. Lubanga, *supra* note 357, ¶ 50.

\(^{380}\) See *id.* ¶¶ 51-52 (providing criteria to determine leadership position within the gravity threshold context).

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

\(^{382}\) See Mark Drumbl, *Pluralizing International Criminal Justice*, 103 MICH. L. REV. 1295, 1310-1311 (2005) (suggesting that reintegration of offenders can be problematic in mass atrocity situations); Drumbl, *supra* note 337, at 1235 (noting that genocide leaders and "notorious murderers" should be tried and punished but lesser offenders should ultimately be reintegrated into society).

\(^{383}\) *Id.*
F. THE ANALYTIC CRITERIA IN BROADER PERSPECTIVE

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

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

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 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 of a piece with the ICC's constitutional imperative of taking on only "the most serious crimes of concern to the international community as a whole." Similarly, since the ICC is interested primarily in prosecuting the "big fish," the leadership position of the target is valuable in conducting complementarity analysis. So is the potential for the target's reintegration, which is in line with the ICC's goals for restorative justice (especially as demonstrated by its concern with the future welfare of victims).

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

Overall, then, the analytic criteria set forth in this Article enrich the complementarity test by 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, insuring

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384 See supra Part II.C.2.
385 See Edoardo Greppi, Inability to Investigate and Prosecute under Article 17, in NATIONAL JURISDICTIONS, supra note 277, at 65 (noting that one measure of inability is when "the State is unable to obtain the accused . . .").
386 Rome Statute, supra note 13, preamble.
justice for massive human rights violations and promoting the prospects for peace and reconciliation both within the municipal jurisdiction and across the globe.

IV. APPLYING THE ANALYTIC CRITERIA TO THE LRA-UGANDA CASE

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

A. CIRCUMSTANCES SURROUNDING THE UGANDAN REFERRAL AND REQUEST FOR DEFERRAL

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

Overall, however, the surrounding circumstances militate in favor of denying any potential deferral request. The ICC should not allow a self-referring government to treat the Court as a conflict-strategy on-off switch. It is, instead, a justice mechanism. Once it is turned on, it should not be turned off until justice is done. Thus, if as appears to be the case, the Ugandan government wishes to kill the proceedings because ICC prosecutions have suddenly become inconvenient for the LRA negotiations, all other things being equal, that should weigh against the request for deferral.

B. STATE OF AFFAIRS IN UGANDA

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

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389 Rome Statute, supra, note 12, art. 17(2).
391 See id.
392 See Roth, supra note 278, at 765.
393 See supra Part IV.B.1 (examining the paradigms of legitimacy).
394 See supra note 285 and accompanying text.
395 See supra notes 295-96 and accompanying text.
The Museveni regime has been in power for well over twenty years amid recent allegations of flawed elections and human rights abuses both at home and in the neighboring Democratic Republic of Congo.\footnote{Profile: Uganda's Yoweri Museveni, BBC NEWS, Feb. 25, 2006, http://news.bbc.co.uk/2/hi/ africa/4124584.stm (last visited on March 11, 2009).} According to the BBC:

DR Congo . . . brought a case to the International Criminal Court in The Hague accusing Uganda of committing human rights violations and massacring Congolese civilians during its time there . . . During this period there were increasing complaints that Mr Museveni was growing more hard-line and relying increasingly on a kitchen cabinet of hard-line supporters . . . His 2001 presidential election victory was marred by an increase in state-sponsored violence - and Dr Besigye, again his main rival, fled the country claiming his life was in danger.\footnote{Id.}


Although Uganda appears to have a relatively stable governmental and economic infrastructure, along with a fairly developed degree of civil society and educational/media institutions,\footnote{See Jeffrey Gettleman, A Film Star in Kampala, Conjuring Amin's Ghost, N.Y. TIMES, Feb. 18, 2007, available at http://query.nytimes.com/gst/fullpage.html?res=9906E3DD153EF93B8A25751C0A9619C8B63&sec=&spon=&pagewanted=1} its seemingly poor human rights record and apparent flouting of democratic principles would likely strip it of legitimacy in terms of complementarity analysis. This is especially true in light of its alleged atrocities in connection with the LRA conflict, which provides a direct nexus with the case at issue and thus should most directly affect admissibility considerations under Rome Statute Article 17.

Finally, it is worth noting that the conflict in Uganda with the LRA is technically not at an end. Although it is relatively localized, Uganda is still involved in military operations to stop the LRA. This factor certainly affects the "stability" analysis in evaluating the proposed complementarity criteria.\footnote{See supra Part IV.B.3.}
The two primary alternative justice mechanisms contemplated for bringing the LRA leaders to justice have been *mato oput* and a truth commission. Although the circumstances behind any potential creation of such bodies do not suggest the Ugandan government seeks to establish them to deflect its own guilt or besmirch a previous regime, they do reveal that Museveni was probably using the ICC as little more than a leverage mechanism in its dealings with the LRA. This fact marginally tilts the complementarity balance in favor of admissibility.

So does the "degree of judicialization" factor -- at least with respect to *mato oput*. There is no indication in discussions to date regarding *mato oput* that it would carry the most prominent badges of judicialization. Although this customary restorative ritual consists of a series of formal stages, there is currently no hint that it will be modified to provide greater formal procedural coherence or uniformity. Nor has the government suggested that it seeks to incorporate the ritual into the domestic judicial infrastructure -- a move that would endow it with greater permanence and institutional linkage. And though this mechanism entails payment of sanctions, expressions of forgiveness and the possibility of restricted movement, it does not seem to mete out other non-incarcerative sanctions (such as community service or the stripping of various civic rights).

Finally, although it could have important restorative effects, *mato oput* could have a net negative holistic effect on the transitional justice project. As mentioned previously, *mato oput* applies only to Acholis. And so it will not be able to accommodate non-Acholi victims of the LRA's violence. This could alienate large sectors of Ugandan society and ultimately have a detrimental effect on the reconciliation process.

By the same token, it is important to consider that most Acholis themselves favor restorative justice mechanisms over the ICC procedure. According to Eric Blumenson: "It appears that a substantial majority of the Acholi people, who comprise both the victims and the perpetrators of the war with the LRA, want reconciliation and favor extending amnesty for all rebels."

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

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403 See Keller, *supra* note 15, at 212, 223 ("The proposed Ugandan Alternative Justice Mechanisms (AJM) apparently include a truth commission and traditional justice, particularly the Acholi mato oput process.").
404 *Id.* at 211.
405 See *supra* Part III.A.6.
408 *Id.*
409 *Id.*
410 *Id.*
And, of course, if it provides for competent commissioners and participation by a large cross-section of society, it could yield important holistic reconciliation dividends.

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

D. CRIMES AT ISSUE

As mentioned previously, the LRA leaders have been charged with having committed horrific atrocities, including war crimes and crimes against humanity.\(^{412}\) As a threshold matter, the Ugandan proposed alternative justice mechanisms would have to bring the suspects to justice with respect to parallel crimes. As noted above, it is not clear whether *mato oput*, which has never been used for dealing with mass atrocity, could be adopted for such purposes.\(^{413}\)

And although the LRA leaders have not been accused of genocide, the most grave of atrocities, the horrendous nature of their crimes is apparent in light of the large number of victims of "physical integrity" crimes, such as willful killing or rape, the scale, and the systematicity, depravity (including macabre amputations) and impact of the crimes, especially with respect to children.\(^{414}\) As reported by the Guardian UK:

> At its peak, the rebels' brutal insurgency displaced nearly two million people in large areas of northern Uganda. To date, the conflict has seen more than 10,000 people killed in massacres, while twice that number of children have been abducted by the LRA and forced to work as soldiers, porters and sex slaves . . . Civilians suspected of supporting the government or forming self-defence forces had their ears, lips and noses hacked off.\(^{415}\)

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

On the other hand, the crimes charged were committed by a fringe rebel group in a geographically circumscribed portion of the country. Most of the LRA's victims have been Acholi\(^ {416}\) and that group comprises only four percent of the population.\(^ {417}\) Acholiland, the area of Uganda in which the LRA has primarily operated, comprises a mere 11,000 square miles in a country that measures 93,104 square miles.\(^ {418}\) Still, while these facts help support an inadmissibility finding, the recent expansion of LRA operations into DR Congo, Sudan and the

\(^{412}\) See *supra* Part V.B (examining the state of affairs in Uganda).

\(^{413}\) See *supra* Part V.C (analyzing alternative justice mechanisms).


\(^{415}\) Id.

\(^{416}\) See Marieke Wierda, *Peace v. Justice: Contradictory or Complementary*, 100 AM. SOC'Y INT'L L. PROC. 368, 371 (2006) (noting that the Acholi tribe "constitutes both the majority of perpetrators and the majority of victims in the conflict with the Lord's Resistance Army . . .").


Central African Republic reveal a more widespread scope of crimes that should be considered in any efforts to bring the LRA leaders to justice.

E. THE DEFENDANTS

Target selection is one of the most compelling reasons for ICC deferral in the LRA case. Although the LRA leaders bear a significant portion of the responsibility for the atrocities at issue, as indicated above, Ugandan government forces have also participated in massive human rights violations. And yet their leaders are not the subject of ICC indictments. This skewed charging process translates into a pro-deferral factor.

On the other hand, Kony's recent forays into DR Congo, Sudan, and the Central African Republic demonstrate how elusive a fugitive he is. Given the increasingly transnational dimension of his crimes and flight, perhaps it makes more sense on balance to let the more internationally-oriented ICC retain jurisdiction.

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

Finally, it is hard to conceive the reintegration into post-conflict Ugandan society of Joseph Kony -- a mass murderer and self-proclaimed mystic with a "garbled pseudo-Christian ideology" who claims he is a medium for holy spirits and has his followers smear themselves with nut-oil to make them invulnerable to bullets. And given the atrocities that can likely be pinned on his indicted top henchmen (those who are still alive), their eventual re-introduction into society


420 See Keller, supra note 15, at 229 ("Direct victims include not only the Acholi and other Northern Ugandan tribes but also those in neighboring countries who have been victims of LRA attacks.").

421 See supra notes 413-14 and accompanying text.

422 See supra Part V.B.


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

seems equally dubious. To the extent the LRA's less culpable middle management might ultimately be indicted, the prospects for reintegration substantially improve. And they get even better for the LRA's other victims -- its unwilling foot soldiers.

F. THE END ANALYSIS

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

And, to a certain degree, the proposed alternative justice mechanisms also lend support to the deferral request. Neither would be used to discredit a previous regime and both are seemingly meant to foster reconciliation. They are preferred by the public over ICC prosecution and both nevertheless bear significant degrees of potential judicialization. For its part, a truth commission has the promise of a thorough investigation, subpoena and search and seizure powers, public hearings, criminal case referral and published findings of individual responsibility. And mato oput could include various non-incarcerative sanctions such as fines and restricted movement. Combined, mato oput and a truth commission could serve up a potent cocktail of restorative justice. This is especially true in light of the defendants' belonging to a fringe rebel group that operates in a hemmed in portion of the country - ostensibly a matter of less international concern for the ICC. The ICC's apparently skewed target selection only adds to the deferral appeal.

But these factors are ultimately outweighed by countervailing considerations. In the first place, the circumstances surrounding the referral and request for deferral strongly suggest Uganda has been using the Court to gain an advantage in its fight against the LRA -- not as part of a genuine effort to chronicle and punish decades of nightmarish atrocities. And this point is underscored by Uganda's own dirty hands in committing atrocities in its LRA fight and compromising democratic institutions within its own polity. The ultimate restrictions of mato oput and a truth commission in terms of limited potential sanctions and linkage with Ugandan courts is exacerbated by mato oput's confined cultural and temporal reach (given that the conflict is ongoing) and its questionable atrocity crime adaptability. And the atrocities at issue are widespread, long-term and particularly brutal. The accused appear patently liable for them and,

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428 See Investigate All Sides, supra note 399.
to the time of this writing, have continued their killing spree in other parts of the region. All this, combined with their violent religious fanaticism, augurs ill for their reintegration prospects. In short, notwithstanding the important factors considered above, this case does not appear to be a credible candidate for ICC deferral to alternative justice mechanisms on complementarity grounds.

V. 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 Article has demonstrated, local restorative justice does often incorporate certain penal characteristics, including investigations, subpoena and search powers, public hearings with fixed procedural rules 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, re-integrative shaming, and the stripping of various civic privileges, such as the right to vote and to run for public office.429 By the same token, international retributive justice contemplates certain global restorative outcomes with its emphasis on reestablishing peace and security. Moreover, it has evolved to emphasize even local restorative concerns with the ICC's emphasis on victim participation, reparation and healing.

For purposes of complementarity, these areas of overlap are instructive -- especially as concerns the judicialization of alternative justice mechanisms. This Article has illustrated that in certain situations domestic resort to these mechanisms could justify the ICC's ceding 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.430 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. The case of Uganda, the LRA and the mato oput/truth commission project is, in this regard, enlightening. Although this Article concludes that use of these alternative mechanisms with respect to the LRA leaders will not pass complementarity muster,431 one can easily conceive of slightly modified situations where the result would be different. For example, this might be so in cases other than self-referral, if the request for deferral were more timely and the crimes at issue less serious (such as child soldier recruitment). It would also help if the country requesting deferral did not have a recent history of human rights abuses or disrespecting democratic institutions. The case 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.

429 See supra Part III (analyzing customary local procedures).
430 See supra Part IV (formulating a set of analytic criteria to evaluate complementarity).
431 See supra Part V.F.
Of course, much depends on the nature of the alternative mechanism itself. Those mechanisms adapted to handle the special needs of mass atrocity, such as Rwanda's *gacaca*, should fare much better in the complementarity calculus than untouched traditional models better suited for social counseling and civil mediation. Restorative justice pursues noble goals but it cannot help a society heal itself in the complete absence of some written standards, procedural regularity and meaningful individual punishment.

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

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

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. Perhaps then, the ideal role for alternative justice mechanisms in this context could be as a supplement to domestic criminal proceedings. In other words, retributive and restorative justice models should not compete with one another in a zero-sum game. Working toward a fair determination of individual criminal responsibility can go hand in hand with the restorative goals of providing catharsis for victims, a record for posterity, reintegration for the offenders, and global healing for the community. Uganda may have the right idea in this regard as well. Pursuant to an agreement with the LRA, it is in the process of setting up a special domestic war crimes court seemingly for the purpose of prosecuting high-level LRA perpetrators, such as

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


435 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 13, at art. 53(2)(c) ("A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime."). See also **STIGEN, supra** note 432, at 431-441.
Kony. If this tribunal is used properly and in conjunction with the proposed alternative mechanisms to handle LRA "small fish" (including the legions of child soldiers), such a package could ultimately persuade the ICC to defer prosecution of Kony and his immediate surviving subordinates in favor of Uganda.

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 cooption 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. Complementarity, it appears, may be the ideal medium through which to achieve that balance.

And when it is not, other Rome Statute mechanisms may certainly effect local transfer. As noted previously, Article 53(1)(c) authorizes the Prosecutor to kill a case if he discerns "substantial reasons to believe that an investigation would not serve the interests of justice." 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.

Article 16, which authorizes the United Nations Security Council to effect a 12-month suspension of ICC cases upon issuance of a Chapter VII resolution, 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:

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436 See Anthony Dworkin, The Uganda-LRA War Crimes Agreement and the International Criminal Court, GLOBAL POLICY FORUM, Feb. 25, 2008, http://www.globalpolicy.org/intljustice/icc/investigations/uganda/2008/0225dworkin.htm ("Under the agreement [between the Ugandan government and the LRA], the government will set up a special division of the High Court of Uganda to try "individuals who are alleged to have committed serious crimes during the conflict.")

437 And that seems to be the plan. According to the Global Policy Forum: "At the same time, alongside the special war crimes division of the High Court, the agreement also gives a prominent place to traditional justice [to] deal with 'small crimes' but the precise division between crimes that will be handled by the War Crimes court and by traditional justice is not explicitly spelled out in the accord." Id.

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

439 Rome Statute, supra note 13, art. 53(1)(c).

440 STIGEN, supra note 432, at 434.

441 Rome Statute, supra note 13, art. 16.
I have no doubt that dealing with impunity and pursing peace can work in tandem even in an ongoing conflict situation: these are not necessarily incompatible objectives. The prosecutor's job is to prosecute and he should get on with it with bulldog intensity. If a policy decision needs to be made, in a particular case, to give primacy to peace, it should be made not by those with the justice mandate, but with the political and conflict resolution mandate, and that is the Security Council. The Statute allows for this in Article 16, and this is the way the international community should be thinking about it.\textsuperscript{442}

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.\textsuperscript{443} And in the case of alternative justice mechanisms, complementarity seems to be a place where they will often intersect. If the ICC uses the criteria formulated in this article to take a broader view of complementarity in relation to 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.

\textsuperscript{442} Gareth Evans, International Criminal Court \textit{Newsletter}, No. 9, Oct. 2006, p. 5.

\textsuperscript{443} Former U.N. 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, \textit{Secretary-General Welcomes Rwanda Tribunal's Genocide Judgment as Landmark in International Criminal Law}, U.N. Doc. SG/SM/6687L/2896 (Sept. 2, 1998).