

Do Alternative Justice Mechanisms Deserve Recognition in International Criminal Law?: Truth Commissions, Amnesties, and Complementarity at the International Criminal Court

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In the aftermath of crimes against humanity and gross violations of human rights, should international legal institutions promote the use of criminal sanctions or instead support forgiveness and reconciliation? Either response is better than silence, but comparing prosecutions and reconciliatory steps brings tough choices, both legally and politically. Adversarial criminal prosecution holds the promise of generating facts, holding individuals accountable, and deterring future horrific conduct, but criminal trials also can be time-consuming, expensive, inevitably selective, remote in time and location from the lives of those most affected, and indifferent to the goals of social peace and personal healing. Truth and reconciliation commissions, exemplified by South Africa's effort following the end of Apartheid, represent an alternative justice mechanism that pursues truth-telling and opportunities for reconciliation, rather than punishment. Such methods can provide occasions for individual wrongdoers to apologize, and for victims and survivors to forgive, but these methods can also be marred by corruption, compromise, and an appearance of condoning terrible acts. Trading truth for punishment may offer a predicate for social reconciliation, but unconditional amnesties following terrible violence—and pardons following flawed trials—likely signal political pressures to sacrifice justice.

The choice among approaches is left open in the design of the International Criminal Court ("ICC"), which seeks to encourage domestic legal systems to pursue international crimes against humanity, genocide, and other gross violations of human rights within their national justice systems. Through its notion of "complementarity," the ICC seeks to localize international norms through a relationship between domestic courts and a permanent Court with potential jurisdiction across the world; the ICC actually loses its authority to proceed when the domestic jurisdiction does so in an adequate way. To set the standards for international justice—and to build capacity to pursue justice in nations where mass violence occurs—should the international institution treat truth commissions, grants of amnesty, and other alternatives to prosecution as satisfying the predicate of national action that in turn deprives the ICC of authority to proceed? This Article analyzes the debates around alternatives to trials in fulfilling complementarity and advances recognition of some domestic restorative justice processes under specified criteria. The issues this Article explores have implications not only for international criminal justice but also for alternatives to adjudication in national and local responses to any criminal conduct.

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INTRODUCTION

Vicious killings of innocent civilians, repeated acts of rape of women and children, and the systematic coercion of young people, abducted from their homes and trained to become killers and rapists themselves:¹ what can and what should be done in response to those who order and those who commit such actions? Human rights advocates fueled antislavery movements of the nineteenth century and international responses to genocide and colonialism in the twentieth, and helped launch frameworks of moral and legal condemnation.² By the last quarter of the twentieth century, new advocates pressed for restorative justice, emphasizing victims' and community members' needs for participation and restitution after violence, and building on traditional forms of reconciliation.³ World religions encourage victims to find ways to forgive wrongdoers and let go of resentment and desires for revenge; experts in the fields of psychology, sociology, and medicine report evidence that forgiveness and restorative justice efforts help victims heal psychologically and physically.⁴

In the aftermath of crimes against humanity and gross violations of human rights, should legal institutions, such as the International Criminal Court ("ICC"), promote the use of criminal sanctions, or instead support forgiveness and reconciliation? Either response is better than silence, but comparing prosecutions and reconciliatory steps brings tough choices legally and politically. The Nuremberg Trials after World War II and the United Nations-created ad hoc tribunals after the fall of Yugoslavia and the Rwandan massacre established criminal trials as the international legal response after genocide and gross violations of human rights. Truth and reconciliation commissions, exemplified by South Africa's effort following the end of Apartheid and the dozens of truth commissions it inspired, represent an alternative justice mechanism that pursues truth-telling—offering amnesty to wrongdoers who confess—and opportunities for reconciliation rather than punishment.⁵ Adversarial criminal prosecution holds the promise of generating facts, holding individuals accountable, and deterring future horrific conduct, but it also can be time-consuming, expensive, inevitably selective in

1. See HUMAN RIGHTS WATCH, *COERCION AND INTIMIDATION OF CHILD SOLDIERS TO PARTICIPATE IN VIOLENCE* (Apr. 2008), <https://perma.cc/79CM-LQTX> (describing actions in Angola, Burma, Colombia, Liberia, Nepal, Sierra Leone, and Uganda).

2. See generally JENNY S. MARTINEZ, *THE SLAVE TRADE AND THE ORIGINS OF INTERNATIONAL HUMAN RIGHTS LAW* (2012); SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* (2010).

3. See generally JOHN BRAITHWAITE, *RESTORATIVE JUSTICE AND RESPONSIVE REGULATION* (2002); HOWARD ZEHR, *CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE* (3d ed. 2005); Allison Morris, *Critiquing the Critics: A Brief Response to Critics of Restorative Justice*, 42 BRIT. J. CRIMINOLOGY 596 (2002).

4. See, e.g., Alistair Spiers, *Forgiveness as a Secondary Prevention Strategy for Victims of Interpersonal Crime*, 12 AUSTRALASIAN PSYCHIATRY 261 (2004); Charlotte van Oyen Witvliet et al., *Granting Forgiveness or Harboring Grudges: Implications for Emotion, Physiology, and Health*, 12 PSYCHOL. SCI. 117 (2001).

5. See *infra* Part II.B (describing the South African Truth and Reconciliation Commission, amnesty conditions, and effects).

the context of mass violence, remote in time and location from the lives of those most affected, and indifferent to the goals of social peace and personal healing. Alternative dispute-resolution methods can provide occasions for individual wrongdoers to apologize, and for victims and survivors to forgive, but these methods can also be marred by corruption, compromise, and an appearance of condoning terrible acts. Trading truth for punishment may offer a predicate for social reconciliation, but unconditional amnesties following terrible violence—and pardons following flawed trials—likely signal political pressures to sacrifice justice.⁶

Many communities have long practiced forms of restorative justice. Others have more recently begun to explore restorative justice techniques. The choice among approaches animates a debate about the view international law should take toward adversarial and restorative justice practices. The debate became pointed during the design of the International Criminal Court, the first permanent institution for enforcing global condemnation of crimes against humanity, genocide, and other gross violations of human rights. The ICC's authorizing treaty, the Rome Statute, signed now by 138 countries and ratified by 123 of them, does something new.⁷ It creates an international institution that also seeks to encourage domestic legal systems to pursue international crimes within their national justice systems. By design, then, the ICC works to strengthen domestic legal systems and to spread international legal norms.⁸

The ICC departs from the approach used in the creation of previous ad hoc tribunals established by the United Nations to pursue human rights violations in the former Yugoslavia and Rwanda, which did not defer to domestic proceedings. Through its notion of “complementarity,” the ICC seeks to localize international norms through a relationship between domestic courts and a permanent Court with potential jurisdiction across the world.⁹ The ICC lacks sufficient resources or capacity to investigate and prosecute all relevant cases and thus by design seeks to promote responsibility and capacity among nations across the globe to pursue justice following mass violence. In this way, the ICC is part of a new era integrating international and domestic legal responses to genocide and crimes against human-

6. See generally Richard John Galvin, *The Case for a Japanese Truth Commission Covering World War II Era Japanese War Crimes*, 11 TUL. J. INT'L & COMP. L. 59 (2003); Stéphane Leman-Langlois, *Constructing a Common Language: The Function of Nuremberg in the Problematization of Postapartheid Justice*, 27 L. & SOC. INQUIRY 79 (2002). In addition, truth commissions instituted by repressive regimes risk manipulation, despite claims to provide accountability. See Daniel Saver, *When Not to “Forgive”? The Dynamics of Protest and Manipulation of Transitional Justice Mechanisms During Repressive Regimes in Light of the Arab Spring* (May 2012) (unpublished paper, Harvard Law School) (on file with author).

7. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

8. See Naomi Roht-Arriaza, Editorial Note, 7 INT'L J. TRANSITIONAL JUST. 383, 385, 387 (2013).

9. See *The Prosecutor v. Katanga*, ICC-01/04-01/07-1008-AnxA, Informal Expert Paper: The Principle of Complementarity in Practice, ¶ 1 (Mar. 30, 2009), <https://perma.cc/ZU9X-7G82>.

ity.¹⁰ The ICC can proceed with investigations and prosecutions of the most serious offenses while the national system proceeds with prosecutions against lower-level actors and lesser offenses.¹¹ The ICC has interpreted its mandate to include supporting the development of stronger domestic investigations and courts in order to enforce human rights protections (known as “positive complementarity”) while also undertaking its own investigations, prosecutions, and trials.¹² The ICC loses its authority to proceed if the affected state genuinely undertakes its own investigations and efforts to bring to justice the most serious offenders and incidents.¹³

When, if ever, should national processes devoted to restorative justice preclude activities by the ICC in response to crimes against humanity and other gross violations of human rights? Truth commissions and domestic investigations might support later prosecutions domestically or internationally,¹⁴ but they might instead represent justice conceived as restorative, communal, and adequate even without subsequent prosecutions. Should alternatives to prosecution ever count in satisfying the international legal commitment to promote responsibility by national justice systems in dealing with serious crimes in violation of international law? This is not an inquiry into unconditional amnesties for those most responsible for severe human rights violations, nor does this project imply sympathy for state immunity and impunity. Instead, the question is whether the search for accountability can

10. See generally Christopher Stone, *Widening the Impact of the International Criminal Court: The Prosecutor's Preliminary Examinations in the Larger System of International Criminal Justice*, in *THE FIRST GLOBAL PROSECUTOR: PROMISE AND CONSTRAINTS* (Martha Minow, C. Cora True-Frost & Alex Whiting eds., 2015). Article 17 of the Rome Statute seems to contemplate prosecutions, not alternatives like truth commissions, as domestic actions depriving the ICC of jurisdiction: it contemplates that an action pursued by a lawfully constituted tribunal means that the “case is being . . . prosecuted by a State which has jurisdiction over it.” Rome Statute, *supra* note 7, art. 17(1)(a). See also Mark A. Drumbl, *Policy Through Complementarity: The Atrocity Trial as Justice*, in 1 *THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY: FROM THEORY TO PRACTICE* 216 (Carsten Stahn & Mohamed M. El Zeidy eds., 2011) (domestic processes reflect “replication and dissemination of liberal legalist modalities of justice”). Commentators have debated whether flawed domestic trials would be sufficient. See, e.g., Payam Akhavan, *Complementarity Conundrums: The ICC Clock in Transitional Times*, 14 *J. INT'L CRIM. JUST.* 1043 (2016); Kevin Jon Heller, *Radical Complementarity*, 14 *J. INT'L CRIM. JUST.* 637 (2016); Frédéric Mégret & Marika Giles Samson, *Holding the Line on Complementarity in Libya: The Case for Tolerating Flawed Domestic Trials*, 11 *J. INT'L CRIM. JUST.* 571 (2013); H.J. van der Merwe, *The Show Must Not Go On: Complementarity, the Due Process Thesis and Overzealous Domestic Prosecutions*, 15 *INT'L CRIM. L. REV.* 40 (2015).

11. See LIONEL NICHOLS, *THE INTERNATIONAL CRIMINAL COURT AND THE END OF IMPUNITY IN KENYA* 29–46 (2015). For evidence that ICC prosecutions of those most responsible contribute to increases in domestic prosecutions of low-level officials, see generally Geoff Dancy & Florencia Montal, *Unintended Positive Complementarity: Why International Criminal Court Investigations May Increase Domestic Human Rights Prosecutions*, 111 *AM. J. INT'L L.* 689 (2017).

12. NICHOLS, *supra* note 11.

13. *Id.* For thoughtful assessments of ICC efforts, see generally LINDA E. CARTER, MARK STEVEN ELLIS & CHARLES C. JALLOH, *THE INTERNATIONAL CRIMINAL COURT IN AN EFFECTIVE GLOBAL JUSTICE SYSTEM* (2016); see also Aryeh Neier, *A Glimmer of Justice*, *N.Y. REV. BOOKS* (Mar. 8, 2018) (reviewing CARTER, ELLIS & JALLOH, *supra*).

14. See generally Joseph Yav Katshung, *The Relationship Between the International Criminal Court and Truth Commissions: Some Thoughts on How to Build a Bridge Across Retributive and Restorative Justices* (Ctr. Hum. Rts. & Democracy Stud., Democratic Republic of Congo, May 2005), <https://perma.cc/54PK-F3LH>.

encompass more forms of justice than the particular adversarial, criminal, prosecutorial form embraced by international criminal tribunals. To set the standards for international justice—and to build capacity to pursue justice in nations where mass violence occurs—should the international institution treat truth commissions, grants of amnesty, and other alternatives to prosecution as satisfying the predicate of national action that in turn deprives the ICC of authority to proceed? I will explore this issue, which arises with the complementarity doctrine at the cornerstone of the ICC. The issues explored here have implications not only for international criminal justice but also for alternatives to adjudication in national and local responses to any criminal conduct.

I. COMPLEMENTARITY

The ICC, by design, gives priority to national justice processes and embraces the primacy of each state in securing accountability for international crimes.¹⁵ Thus, the ICC may exercise jurisdiction only when “national legal systems fail to do so, including where they purport to act but in reality are unwilling or unable to genuinely carry out proceedings.”¹⁶ The basic idea is that the ICC is to “complement” domestic justice systems, not replace them. This principle of complementarity is implemented as an issue of admissibility governed by Article 17 of the Rome Statute, supplemented by Articles 18 and 19.¹⁷ When a national state prosecutes an international crime on its own, the ICC lacks power to do so; when the state investigates and concludes it does not have grounds to prosecute, the ICC similarly lacks power to proceed.¹⁸ The Rome Statute is silent about what happens to ICC jurisdiction when the state proceeds with a response other than adversarial criminal litigation. What if the country undertakes domestic fact-finding and conflict-resolution processes aimed at promoting forgiveness and restoration of community relationships, rather than criminal prosecution and punishment?¹⁹

15. See *The Prosecutor v. Katanga*, *supra* note 9.

16. *Id.*; see also Paul Seils, *Handbook on Complementarity* 3, 31–32 (Int’l Ctr. for Transitional Justice, 2016), <https://perma.cc/JJ2K-KQFD> [hereinafter *Handbook*].

17. Rome Statute, *supra* note 7. Procedurally, a state may not halt a preliminary examination by the ICC because the Court does not treat an investigation as a case, but once a formal investigation is started, the ICC must tell the relevant nation, which in turn can ask for a deferral; the Prosecutor at the ICC can still review the national effort and it may even take an appeal to determine if the ICC and the national system are pursuing the same matter. See *Handbook*, *supra* note 16, at 29–32. Whether the admissibility decision encompasses situations or specific cases is an issue not yet resolved by the ICC.

18. What if the state has granted amnesty to alleged violators? See *infra* text accompanying notes 178–83.

19. Most discussions of complementarity presume prosecutions are the domestic alternative to ICC action. See, e.g., Rome Statute, *supra* note 7, art. 17(1)(a). The “domestic” nation at issue is most likely the territory where the offenses occurred, but Article 17 of the Rome Statute might apply also to another nation able to exercise universal jurisdiction. See WILLIAM A. SCHABAS, *THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE* 340 (2010); William A. Schabas, *Justice, Democracy,*

A country—or its people—may prefer a truth and reconciliation commission to criminal prosecutions. Such an effort is devoted to obtaining facts about human rights violations and the resulting harms, with active participation by victims. It ideally results in a public report about the nature and scope of the violations. Such reports may “name names” and provide a basis for national education and change; others may be superficial or inconclusive, shielding people in power from responsibility. A truth commission may provide individualized consideration of wrongdoers and opportunities for apologies to victims and survivors from those who committed the harms.²⁰ Recent research identifies as many as seventy initiatives as truth commissions but to date very few satisfy five criteria of minimal quality: (1) a mandate to investigate a pattern of abuse occurring during a specified time period; (2) an official time-limited effort focusing on a past rather than an ongoing pattern of abuses in part by engaging the affected population; (3) taking testimony from victims, families, and witnesses; (4) issuing a final report with recommendations; and (5) making the final report publicly available.²¹

A nation may instead turn to customary local conflict-resolution processes, centering on repairing human relationships and the community through restitution to victims, including reparations by offenders’ family members or communities seeking to assist survivors.²² Other responses to mass atrocities include stripping named wrongdoers of public offices and benefits, establishing memorials recognizing victims, and engaging in religious or cultural rituals.²³ The nation may grant amnesty to wrongdoers as a means of putting the past behind everyone or as a mechanism to help secure

and Impunity in Post-Genocide Rwanda: Searching for Solutions to Impossible Problems, 7 CRIM. L.F. 523, 555 (1996).

20. See generally PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: TRANSITIONAL JUSTICE AND THE CHALLENGE OF TRUTH COMMISSIONS (2010).

21. This is the conclusion of research conducted by Kathy Lee under the supervision of Professor Kathryn Sikkink at the Harvard Kennedy School of Government. See Geoff Dancy, Francesca Lessa, Bridget Marchesi, Leigh A. Payne, Gabriel Pereira & Kathryn Sikkink, *The Transitional Justice Research Collaborative: Bridging the Qualitative-Quantitative Divide with New Data* (2014), <https://perma.cc/X947-EGJD> (last visited May 7, 2018). Thanks to Kathryn Sikkink for this reference and other guidance.

22. See Gregory S. Gordon, *Complementarity and Alternative Justice*, 88 OR. L. REV. 621, 634–59 (2009); see also MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE (1998). Receiving reparations does not necessarily mean granting forgiveness. See LILY GARDNER FELDMAN, THE SPECIAL RELATIONSHIP BETWEEN WEST GERMANY AND ISRAEL 44 (1984) (After World War II, Israel’s Prime Minister David Ben-Gurion told the public, “I was proposing neither forgiveness nor wiping the slate clean when I presented the demand for reparations from West Germany,” and a bare majority of the legislature voted to accept the payments.). Only one in ten Germans supported reparations. MICHAEL WOLFFSOHN, ETERNAL GUILT? FORTY YEARS OF GERMAN-JEWISH-ISRAELI RELATIONS 17, 19 (1993). Later, West German Chancellor Konrad Adenauer explained that he pursued reparations for “both moral and political reasons.” FELDMAN, *supra*, at 52.

23. See Martha Minow, *Making History or Making Peace: When Prosecutions Should Give Way to Truth Commissions and Peace Negotiations*, 7 J. HUM. RTS. 174 (2008).

a peaceful transition.²⁴ Along with truth commissions, these responses diverge from adversarial prosecutions.

Should a truth commission satisfy the ICC test for complementarity, so that if a nation undertakes the work of a truth commission with genuine commitment and resources, it deprives the ICC of power to proceed against the alleged violators of human rights? Could grants of amnesty ever satisfy the Rome Statute and halt ICC action? These questions essentially ask whether the ICC, and the project of international criminal justice it represents, leave room for alternative conceptions of justice beyond the Western, adversarial model. Does the ICC contemplate accountability for human rights violations through methods other than criminal prosecutions?²⁵

These are not abstract questions. The ICC has proceeded with investigations and arrest warrants arising from atrocities in Darfur, but the scope of that disaster—and the obstacles to arresting the indicted leaders—underscores concrete calls for domestic alternatives.²⁶ When the government of Uganda referred its own country as a situation worthy of investigation and potential criminal justice action by the ICC, critics knowledgeable about restorative justice practices of the Acholi people in Northern Uganda argued for deference to these traditional methods rather than ICC action.²⁷ The Justice Law and Order Sector of the Ugandan Government itself worked to create a system combining domestic prosecutions, amnesties, a truth commission, and local traditional justice mechanisms to deal with the 50 years of violence since national independence. Lacking clear guidance about whether those domestic efforts should bar international action, the ICC

24. Increasingly, with heightened optimism in the 1990s turning to more realism later, experts in these and other techniques of transitional justice consult with nations around the world as they consider responses to mass violence. See PIERRE HAZAN, *JUDGING WAR, JUDGING HISTORY: BEHIND TRUTH AND RECONCILIATION* 40 (2010); Tshepo Madlingozi, *On Transitional Justice Entrepreneurs and the Production of Victims*, 2 J. HUM. RTS. PRAC. 208, 213 (2010), <https://perma.cc/5RWN-SAWK>; Ruti G. Teitel, *Transitional Justice Genealogy*, 16 HARV. HUM. RTS. J. 69 (2003); Factsheet, *What is Transitional Justice?* (Int'l Ctr. for Transitional Justice, 2009), <https://perma.cc/G6R3-WZRB>. Some, though, argue that transitional justice stems from ancient times. See generally JON ELSTER, *CLOSING THE BOOKS: TRANSITIONAL JUSTICE IN HISTORICAL PERSPECTIVE* (2004).

25. For an effort to question the turn to criminal law in human rights more broadly, see Karen Engle, *Anti-Impunity and the Turn to Criminal Law in Human Rights*, 100 CORNELL L. REV. 1069 (2015). The issue is not whether peace is preferable to justice but instead what forms justice can take, while still supporting the international human rights movement to condemn and prevent genocide and other gross violations of human rights.

26. Christopher D. Totten & Nicholas Tyler, *Arguing for an Integrated Approach to Resolving the Crisis in Darfur: The Challenges of Complementarity, Enforcement, and Related Issues in the International Criminal Court*, J. CRIM. L. & CRIMINOLOGY 1069, 1070–71 (2008).

27. See Terry Beitzel & Tammy Castle, *Achieving Justice Through the International Criminal Court in Northern Uganda: Is Indigenous/Restorative Justice a Better Approach?*, 23 INT'L CRIM. JUST. REV. 41, 44, 48–49 (2013).

prosecutors proceeded with their own efforts.²⁸ The ICC's consideration of action put Uganda's reconciliation efforts in jeopardy.²⁹

Voluminous scholarship examines the potential relationship of the ICC to alternative justice mechanisms,³⁰ but the Court itself has not yet answered whether the domestic use of any of these alternatives suffices to bar ICC jurisdiction. The Rome Statute establishing the ICC offers several provisions of relevance, but it does not answer whether the ICC loses power to proceed if the State under scrutiny has undertaken a truth commission. Indeed, irreconcilable differences among the drafters of the ICC left the question unresolved.³¹ The statutory language most pertinent to the treatment of alternative justice mechanisms leaves open what the ICC should do. It is little surprise to find a scholarly analysis of complementarity and alternatives to domestic prosecution concluding that the subject is "elusive and requires significant consideration of issues beyond legal interpretation."³² The Rome Statute also creates avenues for multiple actors to influence how the ICC treats the issue and proceeds in particular matters.³³ As I will explore, the impasse in negotiations and the resulting statutory framework make normative judgments by the Prosecutor and judges at the ICC inevitable. This Article seeks to assist those judgments when states pursue domestic truth commissions instead of prosecuting international criminal law violations.

A. *The Central Concerns of Complementarity*

Ensuring that sovereign nations retain their sovereignty and earn and maintain national and international trust in their laws and institutions; aligning international and domestic law; and preserving limited global resources for when they are absolutely necessary—these are the key concerns at work in global debates over the enforcement of international criminal law.³⁴

28. See Patrick Wegner, *ICC Complementarity, Positive Peace and Comprehensive Approaches in Transitional Justice*, JUSTICE IN CONFLICT (Oct. 13, 2011), <https://perma.cc/JE3T-LG83>; see also *Situation in Uganda*, INT'L CRIM. CT., <https://perma.cc/W4VT-EJFY> (last visited Oct. 1, 2018).

29. See Alexander K.A. Greenawalt, *Complementarity in Crisis: Uganda, Alternative Justice, and the International Criminal Court*, 50 VA. J. INT'L L. 107, 109, 114–16 (2009); Scott Worden, *The Justice Dilemma in Uganda*, U.S. INST. PEACE 5 (Feb. 2008), <https://perma.cc/UEX7-CEHB>; see also Jeffrey Gettleman, *Uganda Peace Hinges on Amnesty for Brutality*, N.Y. TIMES, Sept. 15, 2006, at A1.

30. See Kate Allan, *Prosecution and Peace: A Role for Amnesty Before the ICC?*, 39 DENV. J. INT'L L. & POL'Y 239, 245–46 (2011).

31. See *infra* Section I.A.

32. CARTER, ELLIS & JALLOH, *supra* note 13, at 206. Treating the issue ultimately as a political one, these authors recommend that the Assembly of states parties established by the Rome Statute "convene a panel of experts to consider whether any forms of alternative mechanisms should be taken into account in decisions by the Court." *Id.*

33. See *infra* Section I.B.

34. Handbook, *supra* note 16, at 6–9. Perceptive observers can even discern from the ICC budget whether much capacity for further investigations or prosecutions lies ahead. See Patryk I. Labuda, *Taking Complementarity Seriously: Why Is the International Criminal Court Not Investigating Government Crimes in Congo?*, OPINIO JURIS (Apr. 28, 2017), <https://perma.cc/82KZ-GDJD>.

The framework chosen by the states parties to the ICC reflects a balance of two interests: respecting state sovereignty and ensuring accountability for serious international crimes.³⁵ The basic idea is that the ICC has authority to prosecute unless the domestic jurisdiction—in good faith and with sufficient commitment and resources—proceeds instead. The ICC is meant to be a “court of last resort” rather than a “port of first call.”³⁶

Complementarity involves the usual coordination problems that arise when multiple jurisdictions could proceed with the same matter, but also more profound interests in strengthening both domestic and international justice institutions and norms.³⁷ It is these deeper concerns that animate the following analysis. Especially after the kinds of mass violence giving rise to possible ICC prosecutions, domestic justice institutions may be in shambles, or trust in them may be minimal, and avoiding ICC action may stimulate investment in domestic courts and prosecutors.³⁸ But international pressure and domestic sentiment might instead strengthen existing or build new domestic alternatives to adversarial prosecutions. Here, the intention of the Rome Statute remains unclear.

B. *ICC Decision Makers, If a Nation Uses Alternative Justice Mechanisms*

The Rome Statute emerged after decades of discussion about a possible permanent international criminal court, and a five-week diplomatic conference in 1998 produced a final draft. One of the most divisive issues among the drafters was the scope of complementarity³⁹—including the status of alternative dispute-resolution mechanisms. Representatives from South Africa and Colombia wanted to reserve the right to grant amnesties under

35. See Markus Benzing, *The Complementarity Regime of the International Criminal Court: International Criminal Justice Between State Sovereignty and the Fight Against Impunity*, 7 MAX PLANCK Y.B.U.N.L. 591, 595 (2003); Katherine L. Doherty & Timothy L.H. McCormack, “Complementarity” as a Catalyst for Comprehensive Domestic Penal Legislation, 5 U.C. DAVIS J. INT’L L. & POL’Y 147, 152 (1999); John T. Holmes, *The Principle of Complementarity*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE—ISSUES, NEGOTIATIONS, RESULTS 41, 74 (Roy S. Lee ed., 1999).

36. See Chris Merritt, *Court of ‘Last Resort’ No Threat to Sovereignty: ICC President Sang-Hyun Song*, AUSTRALIAN (July 15, 2011), <https://perma.cc/DAK3-QMRS>.

37. On coordination goals and practices, see Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639 (1981). On coordination between the ICC and domestic processes, the Rome Statute presumes that the domestic process involves a prosecution and addresses three factual scenarios: 1) where national authorities are currently dealing with the same case as the ICC; 2) where national authorities have investigated the same case and decided not to prosecute; and 3) where the same case has been prosecuted at the national level. See Handbook, *supra* note 16, at 38 (discussing Rome Statute Article 17(1)). For consideration of complementarity’s effect on international peace and security with the new recognition of the crime of aggression, see Julie Veroff, Note, *Reconciling the Crime of Aggression and Complementarity: Unaddressed Tensions and a Way Forward*, 125 YALE L.J. 730 (2016).

38. See, e.g., Traoré Drissa, *Understanding the Principle of Complementarity in Côte d’Ivoire*, INT’L CTR. FOR TRANSITIONAL JUSTICE (Aug. 18, 2016), <https://perma.cc/Y99H-M74F>.

39. Rep. of the Ad Hoc Comm. on the Establishment of an Int’l Criminal Court, ¶ 46, U.N. Doc. A/50/22 (Sept. 6, 1995).

certain circumstances.⁴⁰ Others wanted to underscore prosecution as a duty. The drafters ultimately left the issue unresolved, or, in the words of the drafting committee's chair, Philippe Kirsch, "creatively ambiguous."⁴¹

Further ambiguity arises as the Rome Statute permits multiple actors to consider whether domestic use of alternative justice mechanisms precludes ICC action. Rather than assigning the question to one particular and decisive actor, the Rome Statute allows three different institutional actors to construe the complementarity principle. Thus, the Rome Statute created multiple avenues for confining the exercise of jurisdiction by the ICC in the face of the domestic use of a truth commission. The Prosecutor could decide not to initiate an investigation or prosecution.⁴² The Chambers of the ICC can review the Prosecutor's decision, assess the efficacy of a domestic justice mechanism, and overturn the Prosecutor's decision not to act or express its views on the issue in the context of an admissibility ruling on an actual case.⁴³ And the Security Council could request the deferral of an investigation or prosecution.⁴⁴

The Rome Statute does identify criteria the Prosecutor must consider when determining whether to open an investigation, as well as considerations to guide the Prosecutor's decision to proceed from an investigation to a prosecution. The Prosecutor could prevent the ICC's involvement in a situation where crimes otherwise fall within the authority of the Court by con-

40. See Allan, *supra* note 30, at 248–49; Dwight G. Newman, *The Rome Statute, Some Reservations Concerning Amnesties, and a Distributive Problem*, 20 AM. U. INT'L L. REV. 293, 318–28 (2005). Additionally, the American delegation circulated a "non-paper" arguing that "a decision by a democratic regime to grant an amnesty should be a consideration in determining the admissibility of a case before the ICC." Diba Majzub, *Peace or Justice? Amnesties and the International Criminal Court*, 3 MELB. J. INT'L L. 247, 268 (2002); see also Ruth Wedgwood, *The International Criminal Court: An American View*, 10 EUR. J. INT'L L. 93, 96 (1999).

41. See Newman, *supra* note 40, at 321. For more discussion of the drafting history of the Rome Statute, see Sharon A. Williams, *Article 17: Issues of Admissibility*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE 383, 389 (Otto Triffterer ed., 1st ed. 1999); Linda M. Keller, *Achieving Peace with Justice: The International Criminal Court and Ugandan Alternative Justice Mechanisms*, 23 CONN. J. INT'L L. 209, 237 (2008); Darryl Robinson, *Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court*, 14 EUR. J. INT'L L. 481, 483, 499 (2003); Anja Seibert-Fohr, *The Relevance of the Rome Statute of the International Criminal Court for Amnesties and Truth Commissions*, 7 MAX PLANCK Y.B.U.N. L. 553, 561–62 (2003). For a brief overview of the rationales for complementarity potentially considered by the drafters, see Gordon, *supra* note 22, at 627–28.

42. Rome Statute, *supra* note 7, art. 15(3), (6). The Prosecutor's discretion about whether to start a preliminary investigation is unconditional, although the Pre-Trial Chamber has power over authorizing an investigation. Ignaz Stegmüller, *Article 15: Prosecutor*, in COMMENTARY ON THE LAW OF THE INTERNATIONAL CRIMINAL COURT 184 n.188 (Mark Klamburg ed., 2017), <https://perma.cc/E6K5-HUAG>. The Prosecutor may seek a ruling from the Court regarding admissibility, Rome Statute, *supra* note 7, art. 19(3), and may also request relevant information from the state regarding its steps, *id.* art. 19(11).

43. Rome Statute, *supra* note 7, art. 53(3)(a), (b).

44. *Id.* art. 13(b). For a structural overview of situations in which the Court may have to deal with similar issues involving amnesties, see Carten Stahn, *Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretive Guidelines for the International Criminal Court*, 3 J. INT'L CRIM. JUST. 695, 696–99 (2005).

cluding that a matter is inadmissible pursuant to Article 17,⁴⁵ or by determining that pursuing an otherwise admissible case would not serve the “interests of justice.”⁴⁶ Essentially, the Prosecutor retains great discretion and room for judgment about whether a truth commission or other restorative justice effort undertaken by a country should take precedence over ICC action.

Luis Moreno Ocampo, the first ICC Prosecutor, conceded that alternative justice mechanisms are “an important part of the fabric of reconciliation,” but announced that the Office of the Prosecutor would not treat these alternatives as “criminal proceedings as such for the purpose of assessing the admissibility of cases” before the ICC.⁴⁷ He viewed his job as bringing cases based on legal analysis, with considerations of peace belonging to other actors, not the Prosecutor, even given the “interests of justice” provision.⁴⁸ While fully endorsing the “complementary role” that domestic justice mechanisms can play in relation to prosecutions,⁴⁹ Moreno Ocampo reasoned that there is a “presumption in favour of . . . prosecution” and emphasized that criminal justice is a “*necessary* response to serious crimes of international concern.”⁵⁰ Hence, Moreno Ocampo signaled that under his leadership, the Office of the Prosecutor would be very unlikely to forgo proceedings at the ICC in favor of national justice programs where the state response did not include criminal prosecutions, and the office never did so while Moreno Ocampo was its leader.⁵¹

A new prosecutor at the ICC is not bound by statements or positions of a predecessor, but the second Prosecutor, Fatou Bensouda, has not announced or pursued a new approach to these issues.⁵² Emphasizing cooperation and consultation, she has confirmed the readiness of the Office of the Prosecutor to take action if the domestic jurisdiction does not.⁵³ A country may forgo

45. Rome Statute, *supra* note 7, art. 53(1)(b), (2)(b).

46. *Id.*

47. U.N. Secretary-General, *Reps. of the Secretary-General on the Sudan*, at 3, U.N. Doc. S/PV.5459 (June 14, 2006), <https://perma.cc/2DLF-DKS4>.

48. *See generally* OFFICE OF THE PROSECUTOR, INT’L CRIM. CT., POLICY PAPER ON THE INTERESTS OF JUSTICE (Sept. 2007), <https://perma.cc/9S26-7AYK> [hereinafter OTP 2007 POLICY ON INTERESTS OF JUSTICE].

49. *Id.* at 7–8.

50. *Id.* at 1, 7 (emphasis added).

51. *See* Allan, *supra* note 30, at 243–44.

52. *Id.* at 244.

Under Fatou Bensouda, the ICC has treated complementarity as an examination of the existence of relevant national proceedings in relation to the potential cases being considered for investigation by the Office. This will be done bearing in mind the Office’s prosecutorial strategy of investigating and prosecuting those most responsible for the most serious crimes. Where relevant domestic investigations or prosecutions exist, the Office will assess their genuineness.

OFFICE OF THE PROSECUTOR, INT’L CRIM. CT., REPORT ON PRELIMINARY EXAMINATION ACTIVITIES 2017 2–3 (2017), <https://perma.cc/NKA9-UJJQ> (footnotes omitted).

53. Fatou Bensouda, *Reflections from the International Criminal Court Prosecutor*, 45 CASE W. RES. J. INT’L L. 505, 507–08 (2012).

prosecutions as part of a negotiated peace deal, but such a situation, in Bensouda's view, would not foreclose ICC action. Bensouda highlighted how the peace negotiations in Colombia excluded from its negotiated amnesty terms systemic crimes falling within the jurisdiction of the Court, and she asserted a role for the ICC even beyond these crimes by indicating that her office is investigating other nonsystemic crimes, also governed by that amnesty, that could lead to a case that is admissible under the ICC's rules.⁵⁴ The Prosecutor published an opinion piece in Colombia expressing this view.⁵⁵

The Prosecutor's actions, though, are at least as important as her statements, and the time frame for ICC involvement has no deadline and can be stretched to permit time for attention to domestic developments. In fact, following a preliminary examination into the situation in Colombia to identify crimes falling under the Rome Statute, the ICC waited and gathered information for over a decade, even though the Office of the Prosecutor had raised serious questions about the adequacy of Colombia's own efforts to investigate and prosecute.⁵⁶ During that time, the ICC contributed to a pro-

54. REPORT ON PRELIMINARY EXAMINATION ACTIVITIES 2017, *supra* note 52, at 33.

The exclusion of Rome Statute crimes, such as crimes against humanity and genocide from amnesty, pardons and the special benefit of waiver of criminal prosecution (*renuncia de la persecución penal*), as provided in the Amnesty Law, is an important aspect of the legal framework regulating the SJP. However, with respect to war crimes, the legal requirement that the conduct was committed in a *systematic* manner could lead to granting amnesties or similar measures to individuals responsible for war crimes that, while not committed in a systematic manner, may nonetheless fall under the ICC jurisdiction. Such an outcome could render any attendant case(s) admissible before the ICC—as a result of the domestic inaction or otherwise unwillingness or inability of the State concerned to carry out proceedings genuinely—and may also violate rules of customary international law.

Id. The Prosecutor also reported that in light of the general amnesty granted by the government of Afghanistan; the apparent obsolescence of an announced plan to pursue truth seeking, reconciliation, and refugee amnesty; and the absence of relevant domestic prosecutions, the ICC retains jurisdiction over matters arising in conduct there since 2003. *Id.* at 56–61. In announcing a preliminary investigation into the situation in Afghanistan, the Prosecutor pointed to the complementarity principle:

In undertaking this work, if authorised by the Pre-Trial Chamber, my Office will continue to fully respect the principle of complementarity, taking into account any relevant genuine national proceedings, including those that may be undertaken even after an investigation is authorised, within the Rome Statute framework. In this regard, I note the initiatives undertaken by the Government of Afghanistan over the course of the past year in an effort to build capacity to meet its obligations under the Rome Statute.

Office of the Prosecutor, *Statement of ICC Prosecutor, Fatou Bensouda, Regarding Her Decision to Request Judicial Authorization to Commence an Investigation into the Situation in the Islamic Republic of Afghanistan*, INT'L CRIM. CT. (Nov. 3, 2017), <https://perma.cc/4A6U-C9HU>.

55. Fatou Bensouda, *El acuerdo de paz de Colombia demanda respeto, pero también responsabilidad* [The Peace Agreement in Colombia Commands Respect but Also Responsibility], SEMANA (Jan. 21, 2017), <https://perma.cc/UFU3-UG84>.

56. See William W. Burke-White, *Reframing Positive Complementarity: Reflections on the First Decade and Insights from the US Federal Criminal Justice System*, in 1 THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY: FROM THEORY TO PRACTICE, *supra* note 10, at 341, 347–48; Kirsten Ainley, *The Great Escape? The Role of the International Criminal Court in the Colombian Peace Process*, JUST. IN CONFLICT (Oct. 13, 2016), <https://perma.cc/ZF7Z-W95L>; William W. Burke-White, *Reframing Positive Complementarity: Reflections on the First Decade and Insights from the US Federal Criminal Justice System*, in 1 THE

cess that led to Colombia's reparations law, a land restitution procedure, and a National Center for Historical Memory, and also influenced the peace negotiation process, in part strengthening the accountability elements of the peace deal.⁵⁷

Prosecutor Bensouda has also invoked the principle of complementarity in urging the government of the Democratic Republic of the Congo to investigate and take all necessary steps in relation to reported past and potential acts of violence between local militia and Congolese forces.⁵⁸ She reported how she encouraged the authorities to further strengthen their investigations and take steps toward national prosecutions "so that all those responsible on all sides for these alleged heinous crimes should face justice."⁵⁹ This is a statement general enough to permit steps that might express responsibility in forms other than prosecutions. Yet her office seems to contemplate prosecution as the necessary domestic method for securing justice. One indication of this arose when she reported that she had discussed "with the national authorities the country's current situation as well as the status of progress on investigations and national prosecutions against the alleged perpetrators of criminal acts committed in the DRC."⁶⁰ Bensouda made no reference to the creation by the Democratic Republic of the Congo of a truth commission to deal with an earlier period of mass violence or the potential role for a new truth commission standing alone or working alongside domestic prosecutions.⁶¹ If standing alone, a truth commission could offer a focal point for national memory and accountability; if proceeding alongside prosecutions, it could generate factual predicates for investigations and judicial accountability. In either case, truth commissions could generate knowledge and help build public acknowledgment around a narrative of events and responsibility for the events.

INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY: FROM THEORY TO PRACTICE, *supra* note 10, at 341, 347–48.

57. Ainley, *supra* note 56; see also *What Is Complementarity? National Courts, the ICC, and the Struggle Against Impunity*, INT'L CTR. FOR TRANSITIONAL JUSTICE, <https://perma.cc/R6DW-DXNS> (discussing Colombia); Courtney Hillebrecht, Alexandra Huneeus & Sandra Borda, *The Judicialization of Peace*, 59 HARV. INT'L L. J. 279, 279 (2018) (International courts engaged with Colombia "allow[ed] domestic players to reinterpret the content of Colombia's international legal obligations" and "the terms of Colombia's peace were produced through—not despite—the international courts' . . . engagement with the peace process.").

58. Office of the Prosecutor, *Statement by the ICC Prosecutor, Fatou Bensouda, at the Conclusion of Her Visit to the DRC: "The Fight Against Impunity and the Critical Prevention of Crimes Under the Rome Statute Are Essential for Social Stability,"* INT'L CRIM. CT. (May 4, 2018), <https://perma.cc/T7R7-P2MW>.

59. *Id.*

60. *Id.*

61. See *Truth Commission: Democratic Republic of Congo*, U.S. INST. PEACE (July 1, 2003), <https://perma.cc/ZNV5-RP6S>; Alicia D. Weaver, *Truth and Justice? Towards Comprehensive Transitional Justice in Uganda and the Democratic Republic of Congo* 36–38 (Dec. 2016) (unpublished M.A. thesis, University of Nebraska), <https://perma.cc/6SNL-QKDD>.

The Pre-Trial Chamber, at the request of a state⁶² and the United Nations Security Council,⁶³ can each challenge the Prosecutor's decision not to proceed with investigation or prosecution in the face of threats to international peace and security.⁶⁴ These avenues encourage further examination by judges and diplomats of the acceptability of domestic uses of alternative justice mechanisms as part of a peace negotiation and might prevent the ICC from proceeding with a matter handled through a truth commission or other alternative.⁶⁵ In addition, when the Prosecutor makes an affirmative decision to initiate proceedings, a state under investigation can ask the Prosecutor to defer to local justice efforts.⁶⁶ The Rome Statute creates a presumption that the Prosecutor should defer to a genuine national investigation.⁶⁷ The Pre-Trial Chamber can overcome this presumption.⁶⁸ Such a decision remains subject to further review by the Appeals Chamber.⁶⁹ At each of these junctures, the acceptability of an alternative justice mechanism can be considered, and ICC proceedings can be avoided. The same issue can also be raised if the accused or a state pursuing domestic justice mechanisms under Article 19 challenges the admissibility of a case.⁷⁰ The Rome Statute explicitly mentions the complementarity considerations in Article 17 as the proper criteria for assessing such challenges.⁷¹ All of these opportunities could prevent ICC action in the face of a domestic use of a truth commission, but the Prosecutor may still request further review—potentially leading to ICC prosecution—if he or she is “fully satisfied that new facts have arisen which negate the basis on which the case had previously been found inadmissible.”⁷²

The United Nations Security Council can play roles beyond triggering the Pre-Trial Chamber.⁷³ It can prevent allocation of funds for a particular ICC investigation. The Security Council also can exclude participation by people from nonstate parties who otherwise would be participants in an ICC

62. Rome Statute, *supra* note 7, art. 53(3)(a).

63. U.N. Charter art. 39.

64. Rome Statute, *supra* note 7, art. 53(3)(a).

65. *Id.*

66. *Id.* art. 18(2).

67. *Id.* art. 17.

68. The Rules of Procedure and Evidence state that the Pre-Trial Chamber “shall consider the factors in article 17 in deciding whether to authorize an investigation” in light of a request for deferral. ICC R.P. & EVID. 55(2). *See also* Rome Statute, *supra* note 7, art. 18(3) (importing language from Article 17 by authorizing the Prosecutor to review a request for deferral after six months “or at any time when there has been a significant change of circumstances based on the State’s unwillingness or inability genuinely to carry out the investigation”).

69. Rome Statute, *supra* note 7, art. 18(4).

70. *Id.* art. 19(2), (6).

71. *Id.* art. 19(1), (2).

72. *Id.* art. 19(10).

73. *See generally* Jennifer Trahan, *The Relationship Between the International Criminal Court and the U.N. Security Council: Parameters and Best Practices*, 24 CRIM. L.F. 417 (2013).

investigation and prosecution, and restrict cooperation obligations to circumscribe ICC action.⁷⁴

The ICC thus hedges its bets, affording many different players the chance to weigh in on whether international criminal prosecution should proceed in the wake of domestic use of a truth commission, while allowing the Prosecutor to continue to press for prosecution. With so many avenues allowing consideration of whether an alternative mechanism like a truth commission can substitute for a domestic prosecution and be sufficient to deprive the ICC of power to proceed, competing statutory and normative arguments can help resolve the ambiguity in the Rome Statute's view of the subject, as developed in the following section.

C. Statutory Arguments: Alternative Justice Mechanisms Could Be Adequate to Prevent ICC Action—or Not

Let's imagine the argument that a truth commission pursued at the domestic level renders a case inadmissible under Article 17.⁷⁵ This argument treats use of the alternative mechanism as evidence that the nation having jurisdiction over the crimes is genuinely willing and able to conduct an investigation. The argument also rests on the claim that after investigation, and a decision not to prosecute, the national decision warrants deference.⁷⁶ Can a domestic truth commission itself count as an investigation for the purposes of the ICC's complementarity consideration? Arguably, investigative steps taken by the state do not have to follow criminal law practice in order to support a decision making a matter inadmissible before the ICC.⁷⁷ The Rome Statute directs that a sufficient state investigation involves what can be described as "good-faith, methodological evidence gathering,"⁷⁸ or "a diligent, methodical effort to gather the evidence and ascertain the facts relating to the conduct in question, in order to make an objective determination in accordance with pertinent criteria,"⁷⁹ so long as the inquiry is focused on individuals and their responsibilities, not simply general events or actions by groups.⁸⁰ Under this reasoning, investigation by a truth com-

74. *Id.* at 418.

75. Keller, *supra* note 41, at 251–52.

76. For a cogent call for clear criteria relevant to the admissibility decision, see Karolina Wierczynska, *Deference in the ICC Practice Concerning Admissibility Challenges Lodged by States*, in *DEFERENCE IN INTERNATIONAL COURTS AND TRIBUNALS: STANDARD OF REVIEW AND MARGIN OF APPRECIATION* 355, 368 (Lukasz Gruszczynski & Wouter Werner eds., 2014).

77. *See, e.g.*, Seibert-Fohr, *supra* note 41, at 569.

78. SEAN D. MURPHY, *PRINCIPLES OF INTERNATIONAL LAW* 427 (2006).

79. Robinson, *supra* note 41, at 500.

80. *See, e.g.*, BRUCE BROOMHALL, *INTERNATIONAL JUSTICE AND THE INTERNATIONAL CRIMINAL COURT: BETWEEN SOVEREIGNTY AND THE RULE OF LAW* 101 (2003) (suggesting that evidence-gathering for determination of liability in individual case could be considered an "investigation" within the meaning of the Rome Statute); Iain Cameron, *Jurisdiction and Admissibility Issues Under the ICC Statute*, in *THE PERMANENT INTERNATIONAL CRIMINAL COURT: LEGAL AND POLICY ISSUES* 65, 90–91 (Dominic McGoldrick et al. eds., 2004); Seibert-Fohr, *supra* note 41, at 564–67; Stahn, *supra* note 44, at 711

mission could be sufficient, especially if it does not preclude prosecution at the national level.⁸¹

More difficult is addressing whether a truth commission offering amnesty to those who testify would render a matter inadmissible before the ICC.⁸² Such a practice differs from amnesty without any conditions. It might produce a more cooperative and hence effective investigation than even a criminal prosecution could. Individualized amnesty, conditioned on cooperation with a truth commission's consideration of facts pertaining to the criminal conduct and culpability of the individual perpetrator, might therefore reach the goals of accountability and ending impunity.⁸³ Following this logic, a truth commission mechanism like the one used in South Africa would indeed satisfy the requirement of an investigation.⁸⁴ Especially a truth commission that "names names," establishing individual responsibility, could well be sufficient under this argument.

Similarly, the ICC might well lose jurisdiction when a state has pursued any alternative justice mechanism that produces social condemnation of individuals engaged in human rights violations, even without punishment or

(arguing that "investigations" should be interpreted to include "individualized truth and reconciliation formulas following the example of South Africa and East Timor" (footnotes omitted)).

81. CARTER, ELLIS & JALLOH, *supra* note 13, at 172. Truth commissions may be used at the same time, before, or even after prosecutions, and ideally these two kinds of efforts should be coordinated. See Eduardo Gonzales Cueva, *The Peruvian Truth and Reconciliation Commission and the Challenge of Impunity*, in TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY: BEYOND TRUTH VERSUS JUSTICE 70, 85–89 (Naomi Roht-Arriaza & Javier Mariezcurrena eds., 2006); William A. Schabas, *The Sierra Leone Truth and Reconciliation Commission*, in TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY: BEYOND TRUTH VERSUS JUSTICE, *supra*, at 21, 35; Minow, *Making History or Making Peace*, *supra* note 24, at 179.

82. Unconditional amnesty would not generate testimony. On the Rome Statute's treatment of amnesties, see H. Abigail Moy, *The International Criminal Court's Arrest Warrants and Uganda's Lord's Resistance Army: Renewing the Debate over Amnesty and Complementarity*, 19 HARV. HUM. RTS. J. 267, 271–73 (2006).

83. See, e.g., Stahn, *supra* note 44, at 711; see also Ronald C. Slye, *The Legitimacy of Amnesties Under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible?*, 43 VA. J. INT'L L. 173, 239–47 (2002) (arguing that amnesties, such as the conditional amnesties given by the South African Truth and Reconciliation Commission, are legitimate if they impose some accountability on wrongdoers and provide some relief or reparations to victims). This is deemed a "contingent approach" that concedes the potential value of amnesties and offers a middle ground between complete judicial accountability and impunity. See Tricia D. Olsen, Leigh A. Payne & Andrew G. Reiter, *Conclusion: Amnesty in the Age of Accountability*, in AMNESTY IN THE AGE OF HUMAN RIGHTS ACCOUNTABILITY: COMPARATIVE AND INTERNATIONAL PERSPECTIVES 336, 340–45 (Francesca Lessa & Leigh A. Payne eds., 2012).

84. See Seibert-Fohr, *supra* note 41, at 568–69. Allan describes ways in which the South African Truth and Reconciliation Commission, as a quasi-judicial body, might satisfy a requirement for "criminal jurisdiction," because "perpetrators were brought to account through submitting to the jurisdiction of the institution, facing victims, truth telling, and providing reparation." Allan, *supra* note 30, at 251. However, she ultimately decides that the South African Truth and Reconciliation Commission would not qualify, because it "did not contemplate prosecution, rather, [it] contemplated amnesty." *Id.* For a contrasting view, see CARTER, ELLIS & JALLOH, *supra* note 13, at 172 (suggesting that South Africa's Truth and Reconciliation Commission involved a genuine investigation with opportunity to contemplate prosecutions). Some critics of the South African Truth and Reconciliation Commission specifically objected to the trade of punishment for truth-telling. See generally CHANDRA LEKHA SRIRAM, *CONFRONTING PAST HUMAN RIGHTS VIOLATIONS: JUSTICE VS. PEACE IN TIMES OF TRANSITION* (2004).

the possibility of incarceration.⁸⁵ The Rome Statute does not specify that a nation must use criminal prosecution with a sanction of incarceration in order to avoid ICC action.⁸⁶ If only Western-style prosecutions in criminal courts, generating prison sentences, deprive the ICC of jurisdiction, the principle of complementarity is susceptible to a postcolonial critique that the Rome Statute elevates the Global North's adversarial legal traditions over others.⁸⁷ The ICC has faced postcolonial critiques already, given its selection of cases predominantly from Africa rather than Europe or the United States, although that pattern is beginning to change.⁸⁸

No less plausible, though, is the argument, interpreting the same Rome Statute, that alternative justice mechanisms used domestically will not be adequate, and therefore the ICC should be able to proceed with both investigation and prosecution. Given the model of criminal investigation and prosecution of the ICC itself, it could be that only criminal investigations and prosecutions by a state could render a case inadmissible before the ICC because sufficient effort is underway domestically.⁸⁹ Interpreting the term "investigation" in Article 17(a)(1) with reference to the preamble and Article 1—to exercise "criminal jurisdiction" over certain crimes—bolsters this interpretation.⁹⁰ This reading of the Rome Statute also finds support in Article 17(2), which asserts that a state may be deemed "unwilling" to genuinely carry out proceedings if it attempts to shield perpetrators from "criminal responsibility."⁹¹ The Rome Statute implies that prosecution fol-

85. Keller, *supra* note 41, at 256. For a more detailed description of the *matu oput* process, see *id.* at 229–37. An alternative justice mechanism could provide for sanctions that fall short of incarceration. See Dan Markel, *The Justice of Amnesty? Towards a Theory of Retributivism in Recovering States*, 49 U. TORONTO L.J. 389, 431 (1999).

86. Keller, *supra* note 41, at 256.

87. See generally Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT'L L.J. 201 (2001).

88. For discussion of the issue see Forum, *Is the International Criminal Court (ICC) Targeting Africa Inappropriately?*, ICC FORUM (Mar. 2013–Jan. 2014), <https://perma.cc/YP39-LQLK>; see also Asad Kiyani, *A TWAIL Critique of the International Criminal Court: Contestations from the Global South* (2011), <https://perma.cc/3XT5-LYRQ>.

89. See, e.g., Holmes, *supra* note 35, at 77.

It is clear that the [Rome] Statute's provisions on complementarity are intended to refer to criminal investigations. Thus, where no such [criminal] investigation occurred, the court would be free to act. A truth commission and the amnesties it provides may not meet the test of a criminal investigation, since the simple telling of the truth to a non-judicial body may convey an individual immunity from national prosecution.

Id. See also Majzub, *supra* note 40, at 268 ("There can be little doubt that the investigations and trials contemplated by article 17 are criminal investigations and trials.")

90. Allan, *supra* note 30, at 250; see also Jessica Gavron, *Amnesties in the Light of Developments in International Law and the Establishment of the International Criminal Court*, 51 INT'L & COMP. L.Q. 91, 111 (2002); Michael P. Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court*, 32 CORNELL INT'L L.J. 507, 522 (1999).

91. Allan, *supra* note 30, at 250; Scharf, *supra* note 90, at 525; see also John T. Holmes, *Complementarity: National Courts Versus the ICC*, in 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 667, 674 (Antonio Cassese et al. eds., 2002).

lows a successful investigation,⁹² so a successful national investigation followed by amnesties should not bar ICC action.⁹³ This reading would not, however, mandate ICC prosecution whenever there is a domestic amnesty policy producing denials of or exemptions from amnesty, leaving genuine prospects for domestic prosecutions of responsible individuals.⁹⁴

Whether the ICC could proceed would depend on whether a state's decision to use amnesties, truth commissions or other alternatives indicates an unwillingness or inability genuinely to prosecute. If the ICC personnel discern that the nation used the alternative justice mechanism as a device to shield people from criminal responsibility, or determine that the entire treatment of the matter domestically was a sham, then ICC jurisdiction remains an option under Article 17(2)(a).⁹⁵ But the intent and effect of the national behavior may well be hard to uncover and understand by lawyers and judges at the ICC in The Hague. The ICC retains authority if the national proceedings are conducted in a manner that is "inconsistent with an intent to bring the person concerned to justice."⁹⁶ So ICC action could proceed if local authorities clearly create a truth commission to avoid any consequences for themselves or their colleagues. More difficulties arise, though, without evidence of an obvious sham or dodge, because a sincere and vigorous national truth commission capable of bringing individuals to account might meet the test of "bring[ing] to justice"; a truth commission that identifies individuals who are responsible for human rights violations may satisfy a broad and inclusive definition of "bring to justice."⁹⁷ One commentator approvingly points to the East Timorese Truth and Reconciliation

92. See Allan, *supra* note 30, at 252; Robinson, *supra* note 41, at 500.

93. See Seibert-Fohr, *supra* note 41, at 568.

94. See Robinson, *supra* note 41, at 501; Stahn, *supra* note 44, at 711–12; see also Seibert-Fohr, *supra* note 41, at 568. Stahn argues that the truth commission in East Timor would also meet the criteria because it was obliged to refer credible evidence of the commission of serious crimes to the Office of the Public Prosecutor. Stahn, *supra* note 44, at 711–12, 712 n.65. Others take a different view. See, e.g., Allan, *supra* note 30, at 252 ("While denials of amnesty left the possibility of prosecution open, [the South African Truth and Reconciliation Committee's] investigations did not contemplate prosecution, rather, they contemplated amnesty."). Keller seems to agree with this position in the context of Uganda; the peace deal that resulted in the creation of the truth commission had "already taken prosecution off the table," and thus the commission's investigations cannot be considered as a decision not to prosecute. Keller, *supra* note 41, at 256–57.

95. See Sharon A. Williams & William A. Schabas, *Article 17: Issues of Admissibility*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE 605, 622–23 (Otto Triffterer ed., 2d ed. 2008).

96. Rome Statute, *supra* note 7, art. 17(2)(b), 17(2)(c).

97. Howard Zehr contrasts retributive justice—viewing crime as a violation of the state's laws, calling for punishment—with restorative justice—viewing crime as a violation of people and relationships, calling for reconciliation. ZEHR, *supra* note 3, at 181. On the roots and meanings of restorative justice, see Paul McCold, *What is the Role of Community in Restorative Justice Theory and Practice*, in CRITICAL ISSUES IN RESTORATIVE JUSTICE 155 (Howard Zehr & Barb Toews eds., 2004). Restorative justice programs have been adopted in the United States, Europe, Canada, New Zealand, and Australia. See Vernon Jantzi, *What is the Role of the State in Restorative Justice Programs*, in CRITICAL ISSUES IN RESTORATIVE JUSTICE, *supra*, at 189, 194; U.S. DEP'T OF JUSTICE, THE RESTORATIVE JUSTICE AND MEDIATION COLLECTION (2000), <https://perma.cc/4A3A-7BMK>. Contrasts between restorative and retributive justice implicate broader debates over whether law and justice could or should have universal meanings. See generally David

Commission, which conditioned grants of amnesty for low-level perpetrators on “the performance of a visible act of remorse serving the interests of the people affected by the original offense, such as community service, reparation, a public apology and/or other acts of contrition.”⁹⁸ Others, however, might find such conditions to fall short of what the ICC means by bringing alleged violators of human rights to justice.⁹⁹

The Rome Statute introduces some ambiguity over what it means to “bring to justice” culpable individuals. “Bring to justice” may initially imply criminal prosecution with the possibility of a prison sentence, but the Rome Statute also reads that “in the interests of justice,” the Prosecutor has discretion not to proceed with prosecution.¹⁰⁰ Accordingly, “justice” here could mean a global sense of the societal costs and benefits of prosecution, including assessment of the risks to stability or perceived legitimacy of the national regime. In this light, it is possible to argue that the ICC Prosecutor should defer to a national use of an alternative dispute-resolution mechanism used domestically.

The Rome Statute itself inevitably invites debate about the meaning of “justice.” If you were the ICC Prosecutor, you might prefer a clear directive about the status of domestic truth commissions, one way or the other. Or perhaps you would most want discretion to make your own case-by-case determinations in light of specific facts about the atrocities and the state’s intentions. Preserving latitude for choice is precisely the road taken by the first Prosecutor. The 2007 policy statement of the Office of the Prosecutor addresses “the interests of justice” by allowing latitude for ICC action in the context of domestic use of alternative dispute-resolution mechanisms.¹⁰¹ The first Prosecutor’s statements preserved the possibility of treating alternative justice proceedings that depart from criminal prosecutions as sufficient to satisfy the complementarity requirements.¹⁰² Keeping the possibility open is not simply a way to ensure broad power to the Prosecutor and hence to the ICC. Many commentators believe that prosecutorial discretion is the most viable avenue through which the ICC may accommodate alternative justice mechanisms.¹⁰³ Professor Robert Mnookin, a leading expert on negotiation and peacemaking, concludes that preserving prosecutorial discretion to treat truth commissions and similar efforts as satisfying the complementarity requirement is smart policy because it creates incentives for nations to use

Gray, *Transitional Disclosures: What Transitional Justice Reveals about “Law,”* in *TRANSITIONS: LEGAL CHANGE AND LEGAL MEANINGS* 147 (Austin Sarat ed., 2012).

98. Stahn, *supra* note 44, at 716.

99. See generally Mahmood Mamdani, *Amnesty or Impunity? A Preliminary Critique of the Report of the Truth and Reconciliation Commission of South Africa (TRC)*, 32 *DIACRITICS* 33, 57–58 (2002).

100. Rome Statute, *supra* note 7, art. 53(1)(c).

101. See generally OTP 2007 POLICY ON INTERESTS OF JUSTICE, *supra* note 48.

102. See International Criminal Court, Office of the Prosecutor, Policy Paper on Preliminary Examinations (draft) ¶ 52–66 (Oct. 4, 2010); International Criminal Court, Office of the Prosecutor, Prosecutorial Strategy 2009–2012 ¶ 38 (Feb. 1, 2010) (describing strategic considerations).

103. For a list of citations, see Keller, *supra* note 41, at 246 n.320; Seibert-Fohr, *supra* note 41, at 579.

justice mechanisms suited to local needs for both peace and justice.¹⁰⁴ Other commentators disapprove of leaving the matter to prosecutorial discretion.¹⁰⁵ If the meaning of justice is not simply left to the prosecutor to decide, what should it mean? For that, a more extensive normative analysis is required.¹⁰⁶

II. MEANING OF JUSTICE?: IS PURSUING FORGIVENESS A JUST ALTERNATIVE TO CRIMINAL RESPONSIBILITY?¹⁰⁷

Sham domestic proceedings should never interfere with international justice efforts, but international security and peace considerations may at times make it wise for the Prosecutor, ICC, or Security Council to postpone or avoid international criminal prosecutions. Outside of these circumstances, there may remain situations warranting international deference to alternative domestic justice mechanisms. Domestic mechanisms such as nonadversarial truth inquiries—advancing a version of justice aimed at accountability, memory, and reconstruction—may, under some circumstances, provide acceptable and even valuable substitutes for an international criminal process, in line with the goal of bringing individuals to justice and preventing future human rights violations. Before exploring this complex issue and arguing for such acceptability under some circumstances, it would help to consider why an alternative to pursuing prosecution may be a desirable form of justice in the simpler but still profound context of one victim in relation to one wrongdoer. Efforts to strengthen restorative justice are underway across the globe and focus on accountability for wrongdoers, with an emphasis less on establishing what happened in the past than on improving prospects for the future for the entire community. Restorative justice practices invite participants and surrounding community members to understand how all are affected by the harm, to support victims with opportunities to express the impact of the harm, to afford wrongdoers chances to ask for apologies or restitution, and to allow victims, wrongdoers, and others to let go of negative emotions and trauma.¹⁰⁸

104. Robert H. Mnookin, *Rethinking the Tension between Peace and Justice: The International Criminal Prosecutor as Diplomat*, in THE FIRST GLOBAL PROSECUTOR: PROMISE AND CONSTRAINTS, *supra* note 10. Regional institutions could also play larger roles in the accountability effort, and in so doing, help to combat objections to the ICC as too remote or biased against a particular region. For a discussion of the role of regional institutions within the complementarity regime, see generally Miles Jackson, *Regional Complementarity: The Rome Statute and Public International Law*, 14 J. INT'L CRIM. JUST. 1061 (2016).

105. For a list of references, see Keller, *supra* note 41, at 246 n.320.

106. Whether peace or justice is a better response to mass violence is a related question, addressed in part below, and also discussed in Minow, *supra* note 81, at 174.

107. See generally Martha Minow, *Forgiveness and the Law*, 27 FORD. URB. L.J. 1394 (1999).

108. See generally Joanna Shapland, *Forgiveness and Restorative Justice: Is It Necessary? Is It Helpful?*, 5 OXFORD J.L. & RELIGION 94 (2016), §§ 2, 4; Ted Wachtel, *Restorative Justice Is Not Forgiveness*, HUFFINGTON POST (Jan. 30, 2013), <http://perma.cc/5F82-AYWL>. For a thoughtful critique of restorative justice in light of the demands it places on victims, see Analise Acorn, *COMPULSORY COMPASSION: A CRITIQUE OF RESTORATIVE JUSTICE* 24–25, 142–59, 161–62 (2004). For a striking narrative of an

After considering whether (1) use of restorative justice methods for individuals victimized by crime warrants forgoing domestic adversarial criminal prosecutions, I will turn to (2) whether societal processes focusing on restorative justice should deprive a domestic authority of the power to pursue criminal punishment, and (3) whether a societal process like a truth commission pursuing restorative justice should deprive the ICC of its authority to investigate and prosecute.

A. *Restorative Justice Practices*

In the context of private harms, such as a breach of contract or a car accident arising from negligence, the question of legal consequences is entirely in the hands of the victim.¹⁰⁹ Yet when the public has been harmed and operates a criminal process to hold wrongdoers to account, a public and societal process matters for deterrence and for accountability.¹¹⁰ Some communities, however, have concluded that these goals can be achieved through alternatives to criminal prosecution—alternatives with roots in traditional and global justice practices. Common elements, used across Africa, South America, and elsewhere include responses to crime that “1. Identify[] and tak[e] steps to repair harm; 2. Involv[e] all stakeholders; and 3. Transform[] the traditional relationship between communities and their governments in responding to crime,” as well as focus on social harmony.¹¹¹ Traditional face-to-face community justice mechanisms may be adapted in hopes of addressing mass violence, but these mechanisms may fall short of restorative goals and adversarial justice criteria for accountability.¹¹²

A restorative justice process often starts with a conference or meeting consisting of discussions, affording victims the chance to narrate their experiences and calling upon offenders’ opportunities to take responsibility for their actions.¹¹³ Outside of the context of gross violations of human rights,

informal use of restorative practices by a prosecutor in the United States, see Paul Tullis, *Can Forgiveness Play a Role in Criminal Justice?* N.Y. TIMES (Jan. 4, 2013), <https://perma.cc/W7HX-KHGK>. There, restorative justice circles produce a consensus decision, but in this case, the prosecutor reasserted that he declined to be bound by the process. Afterwards, the prosecutor consulted with community leaders and his own department and concluded that a forty-year sentence would be the norm in such a case. Ultimately, the prosecutor offered the offender a choice of either a twenty-year sentence plus ten years of probation or twenty-five years in prison.

109. JEFFRIE G. MURPHY & JULES COLEMAN, *THE PHILOSOPHY OF LAW: INTRODUCTION TO JURISPRUDENCE* 170 (1989) (“In crimes, we rely upon public officials, agents of the state, to enforce the relevant standard; in torts, the standards are enforced privately, in the sense that the burdens of detection and initiation of litigation fall on victims.”).

110. *Id.*

111. *Tutorial: Introduction to Restorative Justice*, CTR. FOR JUST. & RECONCILIATION (last visited Sept. 29, 2018), <https://perma.cc/FKK8-P4LR>.

112. See generally Hollie Nyseth Brehm, Christopher Uggen & Jean-Damascène Gasanabo, *Genocide, Justice, and Rwanda’s Gacaca Courts*, 30 J. CONTEMP. CRIM. JUST. 333 (2014), <https://perma.cc/5LVR-MQ4Z>. See *infra* text accompanying notes 165–205 (discussing the use of gacaca processes following the Rwandan genocide).

113. See MARK S. UMBREIT, ROBERT B. COATES & BORIS KALANJ, *VICTIM MEETS OFFENDER: THE IMPACT OF RESTORATIVE JUSTICE AND MEDIATION* 29–42, 75–90 (1994) (quantitative and qualitative

such conferences bring together the victim and the offender with an experienced community leader into a comfortable place, like the basement of the victim's church or a community center.¹¹⁴ The victim and offender each describe their experiences and feelings about the incident (theft, hateful graffiti, a physical or verbal assault) and often express strong emotions. The session might also include other members of the community who would take their turn describing the impact of the offense on them. The leader orchestrates a conversation about what the offender could do that would help the victim. Together they come to an agreement, often combining a monetary fine to cover the victim's losses with community service by the offender. Such efforts lead to agreements for future action, potentially including apologies by the wrongdoer and reparations in the form of services to the victim or community. Community service may include helping to educate others about the wrongdoing and its impact. Restorative justice conferences often engage others in the community—clergy, business people, community leaders—in efforts to prevent recurrences.¹¹⁵ In some settings, the leader helps the disputants negotiate an agreement; in others, the leader imposes a judgment. Either kind of restorative justice effort works to have the parties take responsibility for past and future relationships and also seeks to promote harmony and reconciliation in the future.¹¹⁶ Restorative processes can operate as an alternative or supplement to adversarial ones.¹¹⁷

Schools using restorative justice methods report reductions in offenses but also often require substantial work to build trust and justice in the school community.¹¹⁸ Many schools do so by involving fellow students in a peer court aimed at avoiding suspensions and the school-to-prison pipeline. A student identified as an offender is given the choice to attend peer court, where a judge and jury of their fellow students will hear the case, presented

evaluation showing successful effects of mediation on juveniles' likelihood of following through on restitution). See generally HOWARD ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* (rev. ed. 2015) (classic handbook about restorative justice methods).

114. Gordon Bazemore & Mark Umbreit, *A Comparison of Four Restorative Conferencing Models*, U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS (2001), <https://perma.cc/6N3J-4RB5> (offering examples of restorative justice conferences and mediations in the United States and Canada).

115. For case studies and explanations of restorative justice efforts, see COMMUNITIES FOR RESTORATIVE JUSTICE, <https://perma.cc/J2E8-6SND>.

116. See Françoise Steyn & Antoniette Lombard, *Victims' Experiences of Restorative Mediation: A Developmental Social Work Perspective*, 49 SOC. WORK/MAATSKAPLIKE WERK 332, 334–37 (2013); Jee Young Kim & Rasmus H. Wandall, *An Alternative to Prosecution: Victim Offender Mediation*, NAT'L ASS'N OF ATTORNEYS GEN. (Nov. 2017), <https://perma.cc/HY4S-BPNA>; Jennifer Polish, *How Can Restorative Justice Change the Legal System?*, L. STREET (June 27, 2015), <https://perma.cc/84MA-XB8D>.

117. See, e.g., Government of Canada Department of Justice, *Restorative Justice*, <https://perma.cc/ZK8W-V6UD> (Canadian options for restorative justice arise at all stages of the justice process.); Ntemi N. Kilekamajenga, *Learning from Contemporary Examples in Africa: Referral Mechanisms for Restorative Justice in Tanzania*, 63 SA CRIME Q. 17, 19, 20–23 (March 2018) (Restorative processes in Tanzania and elsewhere can work as a complement to adversarial justice processes.).

118. See Larry Ferlazzo, *Response: How to Practice Restorative Justice in Schools*, EDUC. WEEK TCHR. (Feb. 6, 2016), <https://perma.cc/78PZ-FAA8>; David Newton, *Restorative Justice and Juvenile Offenders*, FBI L. ENF'T BULL. (Oct. 6, 2016), <https://perma.cc/8H7X-DAVX>. See also CTR. FOR JUST. & RECONCILIATION, *supra* note 111.

by a student advocate who also interviews community members to learn about their perceptions of the wrongdoing and its impact. The alleged offenders are also given a chance to tell their stories and to describe the larger context. An experienced facilitator of such efforts in several schools observed how the process helped young people take ownership of the justice issues. She reported, “we’ve seen this process help students understand the wide net their actions cast. This process allows students to accept responsibility and gives students an action plan to move forward productively instead of continuing to repeat the cycle of misbehavior and punitive response from administration.”¹¹⁹

In the United States, the use of restorative justice in instances of murder remains unusual, but it is growing in use for juveniles and for lesser offenses.¹²⁰ Prosecutors and courts try to support and coordinate with restorative justice conferences on many levels. Discussions during the conferences can give victims opportunities to describe their experiences, their perspectives, and their feelings, and can at the same time call upon offenders to explain what they believe happened and to take responsibility for their actions.¹²¹ An informal restorative justice process in one U.S. murder case afforded the parents of the murder victim a meaningful supplement to the criminal prosecution.¹²² The mother of victim Ann Margaret Grosmaire reached out to visit defendant Conor McBride in jail after he was charged with killing her daughter, who was his girlfriend.¹²³ The Grosmaires involved Sujatha Baliga, a former public defender who directs the restorative justice project at the National Council on Crime and Delinquency in Oakland, California.¹²⁴ At a “pre-plea conference,” conceived by a chaplain and a prosecutor, Baliga then set out ground rules: the prosecutor would read the charges and summarize the police and sheriff’s reports; next the parents of the victim would speak; then the defendant; then the defendant’s parents; and finally, a community representative would speak.¹²⁵ No one could interrupt.¹²⁶ If the victim’s parents heard statements that they believed their daughter would have disapproved, they would simply hold up her picture, and that act would halt the party making the offending remarks.¹²⁷ Baliga recalls that as Ann’s mother spoke, “She did not spare [Conor] in any way the cost of what he did. . . . There were no kid gloves, none. It was really,

119. See Ferlazzo, *supra* note 118 (quoting Jen Adkins).

120. Cynthia Alkon, *Restorative Justice for Murder?*, *INDISPUTABLY* (Jan. 6, 2013), <https://perma.cc/3ELW-MSV3>; Gordon Bazemore & Susan E. Day, *Restoring the Balance: Juvenile and Community Justice*, 3 *JUV. JUST.* 3, 4–5 (1996), <https://perma.cc/SD9T-6VPW>.

121. See UMBREIT, COATES & KALANJ, *supra* note 113, at 2–5, 210; ZEHR, *supra* note 113, at 56–58.

122. Paul Tullis, *Can Forgiveness Play a Role in Criminal Justice?*, *N.Y. TIMES MAG.* (Jan. 4, 2013), <https://perma.cc/RZ7J-8CDR>.

123. Tullis, *supra* note 122.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

really tough. Way tougher than anything a judge could say.”¹²⁸ The prosecutor also recalled, “It was excruciating to listen to them talk It was as traumatic as anything I’ve ever listened to in my life.”¹²⁹ Conor said that although he did not plan to kill Ann, it was an intentional act and he had no excuse. His parents spoke with remorse about their son’s action and about owning the gun he used. Baliga turned back to Ann’s parents and asked what they wanted as restitution.¹³⁰ Ann’s mother told Conor that he would need “to do the good works of two people because Ann is not here to do hers.”¹³¹ After hearing from Conor, she called for no less than five years of incarceration but no more than fifteen years in prison. Ann’s father said ten to fifteen years. Conor’s parents agreed.¹³² Conor took the twenty years, plus probation.¹³³ Later, the Grosmaires told the journalist that said they did not “forgive Conor for his sake but for their own.”¹³⁴

The restorative justice expert reflected,

We got to look more deeply at the root of where this behavior came from than we would have had it gone a trial route. . . . There’s no explaining what happened, but there was just a much more nuanced conversation about it, which can give everyone more confidence that Conor will never do this again. And the Grosmaires got answers to questions that would have been difficult to impossible to get in a trial.¹³⁵

Here, restorative justice did not halt the criminal justice system, but affected the discretionary choices about charges and punishment and the experience of those most directly involved. Whether a stand-alone alternative or a supplement to a formal adversarial criminal process, restorative justice practices offer steps for addressing the past and building a future for victims, perpetrators, and communities, especially if they have substantial track-records of meaningful responses to harms.

B. Why a Nation May Prefer Restorative Justice to Criminal Justice: Lessons from South Africa and Rwanda

A nation may adopt a process for restorative justice as a response to violence and human rights violations in order to avoid the financial and political costs of criminal prosecution and to build foundations for future peace and community harmony. The sheer existence of a restorative process, an alternative to criminal prosecution, does not necessarily foreclose domestic

128. Tullis, *supra* note 122.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

criminal prosecution; indeed, there could be a plan to supplement the restorative process with criminal prosecution and vice versa. The particular design of the public process—its intended purpose and its actual operation—would matter in assessing whether it is compatible with a domestic criminal process. The process is relevant to justice conceived both domestically and internationally, if international human rights violations are at issue. The examples of South Africa's Truth and Reconciliation Commission ("TRC") and conditional amnesty and Rwanda's *gacaca* process sharpen the questions about when an alternative justice process should be viewed as an alternative to criminal justice in response to gross violations of human rights.

The development of the South African TRC and its apparent role in contributing to a peaceful political transition have led people in many places to establish truth commissions to investigate human rights violations. Northern Ireland, Bosnia, Cyprus, El Salvador, Guatemala, Peru, Democratic Republic of the Congo, Kenya, and Timor-Leste are among the approximately 70 countries that created truth commissions as an acknowledgement of wrongs done and as efforts to move toward peaceful coexistence, or even forgiveness.¹³⁶ The example of South Africa's TRC—a formal institution that sought to couple amnesty with acknowledgment of wrongs—has inspired other societies to pursue truth commissions, although some may do so simply in hopes of avoiding criminal prosecutions and in turn neglect the serious political, psychological, and legal work undertaken in South Africa. Among the seventy or so other nations more recently launching truth commissions, only a handful accomplish a mandate to investigate a pattern of abuse occurring during a specified time period, then publicly issue a final report with recommendations.¹³⁷

If duplicated, key elements of the South African TRC suggest why the ICC should not be able to proceed in a matter where a vigorous domestic truth commission takes place. A vigorous TRC is one that follows the trail of truth wherever it leads, provides opportunities for both those who were victimized and those accused to speak for themselves, and issues a full and public report. Important elements of the TRC in South Africa include its status as a legal institution, duly authorized by the parliament and governed by political appointees. The TRC grew from efforts to ensure a peaceful political transition,¹³⁸ but as designed and as operated, it preserved the possibility of individual prosecutions. It offered avenues for individual amnesty

136. See generally *Can Truth Commissions Strengthen the Peace Process?*, INT'L CTR. FOR TRANSITIONAL JUST. & KOFI ANNAN FOUND. (June 16, 2014), <https://perma.cc/JE98-H882>; *International Justice, AMNESTY INT'L*, <https://perma.cc/2GDZ-6G8A>.

137. See Dancy et al., *supra* note 21.

138. Adrian Guelke, *Truth for Amnesty? The Truth and Reconciliation Commission and Human Rights Abuses in South Africa*, 10 IRISH STUD. INT'L AFF. 21, 21–22 (1999). For a discussion of whether alternative justice mechanisms adopted due primarily to political purposes of conflict avoidance should justify forgoing criminal sanctions, see *infra* Part II.B.

applications to be submitted and then granted or denied those applications in light of specific criteria. Those criteria included whether the applicant fully and truthfully reported on his or her criminal conduct and whether the conduct was proportionate—involved no greater degree of violence than necessary—to the political goals pursued. Putting to the side the political effects and social responses to the TRC, which remain a subject of debate,¹³⁹ the TRC preserved individualized judgments both within its own process about whether to grant amnesty and also for national prosecutors who assessed whether to pursue criminal prosecutions for individuals who did not receive amnesty. Despite initial concerns that no one would come forward to disclose their involvement in human rights violations in applications for amnesty, the TRC received testimony from 21,000 victims and 7,112 amnesty applications; it granted amnesty in 849 cases and refused in 5,392 cases, while the rest of the applications were withdrawn.¹⁴⁰ Amnesty could be granted only to individuals who admitted guilt and offered full disclosure of involvement with a violation of human rights associated with a political objective, occurring between 1960 and 1994.¹⁴¹

The TRC represents a pioneering effort to address human rights violations in an environment where law itself had become associated with unfairness and oppression, so much so that a setting other than a court was essential for finding facts and making a separation from the past. It sought acknowledgment by the general public of past wrongs. The TRC investigated the general causes of and specific participants in violations of human dignity by the Apartheid regime and also the violations committed by those who fought against it. The commission's public hearings and broadcasts offered occasions for victims to tell their stories and for offenders to acknowledge what they had done. No apologies were required, although some were given. When asked why the amnesty provisions of South Africa's Truth and Reconciliation process did not require expressions of contrition by the offenders, commissioners explained that any such expressions in the context of applications for amnesty could not be trusted.¹⁴² Without a legal requirement, expressions of contrition and of forgiveness, when they arise, are more

139. Compare PAUL GREADY, *THE ERA OF TRANSITIONAL JUSTICE: THE AFTERMATH OF THE TRUTH AND RECONCILIATION COMMISSION IN SOUTH AFRICA AND BEYOND* (2010) (endorsing the influential spread of the human rights focus elevated by the TRC while calling for more attention to structural violence) with RICHARD WILSON, *THE POLITICS OF TRUTH AND RECONCILIATION IN SOUTH AFRICA: LEGITIMIZING THE POST-APARTHEID STATE* (2001) (arguing based on field work that the TRC had little effect on local notions of justice).

140. *Truth Commission, South Africa*, U.S. Institute of Peace (Dec. 1, 1995), <https://perma.cc/DAG4-47W8>. For an analysis of applications in terms of political motivation and seriousness, see Antje du Bois-Pedain, *Accountability through Conditional Amnesty: The Case of South Africa*, in *AMNESTY IN THE AGE OF HUMAN RIGHTS ACCOUNTABILITY*, *supra* note 83, at 238, 246–47.

141. Promotion of National Unity and Reconciliation Act 34 of 1995 §§ 18, 20, 21 (S. Afr.) <https://perma.cc/28QJ-2WDQ>; TRUTH AND RECONCILIATION COMMITTEE OF SOUTH AFRICA, 6 FINAL REPORT at 7–10 (1998).

142. Commissioners told this to me during my visit to Cape Town, South Africa in December 1997 in a trip sponsored by the World Peace Foundation.

likely to be sincere, reliable, and meaningful. Moreover, the collective process is simply better suited to symbolic national reconciliation and forgiveness than interpersonal connection and personal emotional healing.

Some apologies seemed staged or insincere; in one particularly troubling instance, former Minister of Law and Order Adriaan Vlok offered only vague apologies “for apartheid,” without giving specific information or reparations, and did so while simultaneously mounting an ultimately unsuccessful defense against criminal prosecution.¹⁴³ Yet in other examples, individual perpetrators disclosed details of their violence with signs of sincerity, even pleading to be forgiven.¹⁴⁴ The amnesty committee tried to adhere to features of the rule of law in its commitment to public hearings, treating individuals with impartiality, neutrality, and restraint.

The TRC was not perfect. The actual effects and experiences of the TRC remain subject to ongoing studies, and factual evidence of the effects is limited.¹⁴⁵ Ultimately, fewer than 300 of the 1,650 amnesty applications deemed eligible for hearings came from members of the former government police and security forces.¹⁴⁶ Furthermore, “the majority of the applicants were black, with more members of the liberation groups applying than members of the security forces.”¹⁴⁷ Other disappointments include the failure of the TRC to generate reparations. As economic problems, a fractured political system, and violence persisted, the positive elements of the TRC faded from view. A whole generation has grown up since to live in a nation

143. See Rebecca Saunders, *Questionable Associations: The Role of Forgiveness in Transitional Justice*, 5 INT’L J. TRANSITIONAL JUST. 119, 129 (2011). For an experimental study indicating that apologies lead to at least some U.S. judges to be more punitive, see Jeffrey J. Rachlinski, Chris Guthrie & Andrew J. Wistrich, *Contrition in the Courtroom: Do Apologies Affect Adjudication?*, 98 CORNELL L. REV. 1189 (2013).

144. See, e.g., PUMLA GOBODO-MADIKIZELA, A HUMAN BEING DIED THAT NIGHT: A SOUTH AFRICAN STORY OF FORGIVENESS 37–47 (2003); *Truth and Reconciliation, ON BEING* (Mar. 22, 2007), <https://perma.cc/9T7D-7YAK> (interview with Pumla Gobodo-Madikizela). Therapeutic programs conducted outside of truth commissions may also help survivors and perpetrators confront one another and heal. See also ICYZERE: HOPE (Josiah Films 2009) (documentary film about a three-day gathering of survivors and perpetrators of the 1994 Rwandan genocide, working to build trust). The plea for forgiveness is, however, very different than the controlling behavior of some perpetrators of domestic violence who offer money or help but do not acknowledge wrong nor seek forgiveness. See Sharon Lamb, *The Trouble with Blame: Victims, Perpetrators, and Responsibility* 163 (1996).

145. This is true of transitional justice in general. See generally Geoff Dancy, Hunjoon Kim & Eric Wiebelhaus-Brahm, *The Turn to Truth: Trends in Truth Commission Experimentation*, 9 J. HUM. RTS. 45 (2010); Anna Macdonald, *Local Understanding and Experiences of Transitional Justice: A Review of the Evidence* (July 2013) (unpublished paper) (on file with the London School of Economics Justice and Security Research Programme) (July 2013), <https://perma.cc/L5R5-7HTU>; Oskar N.T. Thoms, James Ron & Roland Paris, *The Effects of Transitional Justice Mechanisms: A Summary of Empirical Research Findings and Implications for Analysts and Practitioners* (2008) (unpublished working paper) (on file with the University of Ottawa Centre for International Policy Studies). Efforts to build a basis for empirical research make the prospects of more reliable studies promising. See Helga Malmin Binningsbo et al., *Armed Conflict and Post-Conflict Justice, 1946–2006: A Dataset*, 49 J. PEACE RES. 731 (2012), <https://perma.cc/N4SJ-5S9U>.

146. Hugo van der Merwe & Audrey R. Chapman, *Did the TRC Deliver?*, in *TRUTH AND RECONCILIATION IN SOUTH AFRICA: DID THE TRC DELIVER?* 241, 250 (Audrey R. Chapman & Hugo van der Merwe eds., 2008).

147. *Id.* at 251.

of continued inequality and government corruption. Yet the nation had neither the financial nor expert resources to pursue criminal prosecutions of all or even many of those responsible for human rights violations during Apartheid. Even if the resources could have been mustered, there is little reason to believe that they would have been perceived as legitimate and worth the cost. The TRC combined vision and pragmatism but hit real constraints of politics and personality in realizing all that its designers hoped.

One scholar shows that a majority of over 3,000 individuals—including a majority within each racial group—accept the TRC and what it found, but those with highest degrees of accepting the truth show the least reconciliation.¹⁴⁸ In another study, victims participating in the process also sought prosecution and punishment.¹⁴⁹ Critics conclude that many wrongdoers escaped punishment because of amnesty or because they did not even come forward to apply for it. The TRC may have been marred by a focus on national narratives rather than on the relationships between community members, such as former informants, who need to continue to coexist and rebuild trust.¹⁵⁰ It may have falsely implied that nations, like individuals, have psyches and can forgive and heal, when it is individuals who forgive and heal.¹⁵¹ Some argue that the TRC may have focused too much on individual experiences rather than systematic and structural dimensions of Apartheid and violence, leaving racial segregation and disparate access to resources in place,¹⁵² while others stress that national reconciliation is necessarily an ongoing process requiring growth of political confidence to build social cohesion and efforts to tackle economic, political, and social challenges.¹⁵³ Issues related to social justice, violence and inequality persist in

148. See generally James Gibson, *Truth, Justice, and Reconciliation: Judging the Fairness of Amnesty in South Africa*, 46 AM. J. POL. SCI. 540 (2002); JAMES GIBSON, OVERCOMING APARTHEID: CAN TRUTH RECONCILE A DIVIDED NATION?, 129 (2004); James Gibson, *The Truth about Truth and Reconciliation in South Africa*, 26 INT'L POL. SCI. REV. 341 (2005); James Gibson, *The Contributions of Truth to Reconciliation: Lessons from South Africa*, 50 J. CONFLICT RESOL. 409 (2006).

149. See van der Merwe & Chapman, *supra* note 146.

150. See generally Hugo van der Merwe, *The Truth and Reconciliation Commission and Community Reconciliation: An Analysis of Competing Strategies and Conceptualizations* (1999) (unpublished dissertation submitted in partial fulfillment of the requirements of the degree of Ph.D. at George Mason University) (on file with the Center for the Study of Violence and Reconciliation) (identifying these limitations of the TRC).

151. See Brandon Hamber & Richard A. Wilson, *Symbolic Closure through Memory, Reparation and Revenge in Post-Conflict Societies*, 1 J. HUM. RTS. 35 (2002).

152. See, e.g., Janine Natalya Clark, *Reconciliation via Truth? A Study of South Africa's TRC*, 11 J. HUM. RTS. 189 (2012); see also HEIDI GRUNEBaum, MEMORIALIZING THE PAST: EVERYDAY LIFE IN SOUTH AFRICA AFTER THE TRUTH AND RECONCILIATION COMMISSION 65 (2011) (discussing limitations of the TRC).

153. See generally CHARLES VILLA-VICENCIO, WALK WITH US AND LISTEN: POLITICAL RECONCILIATION IN AFRICA (2009); David Mendeloff, *Trauma and Vengeance: Assessing the Psychological and Emotional Effects of Post-Conflict Justice*, 31 HUM. RTS. Q. 592 (2009). Some communities may prefer not to pursue transitional justice in the aftermath of mass violence because they do not want to jeopardize improved political circumstances by a focus on the past. See, e.g., Cyrus Samii, *Who Wants to Forgive and Forget? Transitional Justice Preferences in Postwar Burundi*, 50 J. PEACE RES. 219 (2013).

South Africa, and whatever people's views of the TRC, the nation is occupied with a sense of unfinished business.

Yet, in a country like South Africa, where the trappings of the legal system were so profoundly associated with a regime that routinely deprived people of their basic human rights, institutional innovation could be seen as a courageous step to help individuals and the nation turn the page and start a new commitment to equal respect and to the rule of law. At its best, the TRC served as a kind of new foundation for establishing public dealings on a basis of fairness and equality—and its individualized amnesty hearings preserved domestic criminal prosecution as an option for those unable or unwilling to satisfy the requirements of confession and detailed testimony.¹⁵⁴

One mother whose son was murdered by governmental agents explained her support for the amnesty process precisely because of the profound moral ambition to humanize victims and perpetrators alike. Thus, Cynthia Ngewu explained, “This thing called reconciliation . . . if I am understanding it correctly . . . if it means that this perpetrator, this man who has killed [my son], if it means he becomes human again, this man, so that I, so that all of us, get our humanity back . . . then I agree, then I support it all.”¹⁵⁵ Dawie Ackerman, whose wife was killed in a massacre orchestrated by the Azanian People's Liberation Army, asked the offenders to “look me in the face” and say “that you are sorry for what you've done. That you regret it and that you want to be personally reconciled.”¹⁵⁶

One of the first members appointed by Nelson Mandela to South Africa's Constitutional Court was Albie Sachs, who had spent time in solitary confinement for over five months for his work in the freedom movement, and who lost an arm and sight in one eye due to a bomb that was placed in his car. Years later, he spoke with Henri, one of the men who planted the bomb in the car. Justice Sachs recalled that he said to Henri, “Normally, when I say goodbye to somebody, I shake that person's hand. I can't shake your hand. But go to the Truth Commission, tell them what you know, and who knows, one day we'll meet.”¹⁵⁷ Later, they did meet by accident, and Henri reported that he had, in fact, gone to the TRC and told them everything he knew. Justice Sachs recalled:

I said, Henri, I've only got your face to tell me that what you're saying is the truth and I put out my left hand and I shook his

154. Mark Freeman & Max Pensky, *The Amnesty Controversy in International Law*, in AMNESTY IN THE AGE OF HUMAN RIGHTS ACCOUNTABILITY, *supra* note 83, at 42, 63.

155. ANTJI KROG, COUNTRY OF MY SKULL 109 (1998).

156. Pumla Gobodo-Madikizela, *Radical Forgiveness: Transforming Traumatic Memory Beyond Hannah Arendt*, in JUSTICE AND RECONCILIATION IN POST-APARTHEID SOUTH AFRICA 40, 58 (Francis du Bois & Antje Du Bois-Pedain eds., 2008).

157. Nina Totenberg, *From South Africa, Lessons in 'Soft Vengeance'*, NPR (Nov. 25, 2011), <https://perma.cc/WG2T-XCFG>.

hand. He went away absolutely elated, and I almost fainted. It was a real shock for me. But I heard afterwards that he'd been dancing around, and suddenly he left the party and he went home and he cried for two weeks. And that moved me. I'm not Henri's friend. I don't want to go to a movie with him, but we're starting to live in the same country, and to me, that's far more meaningful than if he'd been sent to jail.¹⁵⁸

The threat of prosecution for those who failed to apply for or those who did not receive amnesty apparently encouraged individuals to come forward and participate in the TRC. The perpetrators faced reputational costs, and victims and larger society received informational benefits.¹⁵⁹ Even a grant of amnesty by the TRC would not prevent victims and others from describing a perpetrator as a murderer. The Constitutional Court rejected a suit by Robert McBride, claiming that because he received amnesty he should be not called a murderer; the Court ruled that freedom of expression should ensure that victims can speak without fear of a lawsuit for defamation.¹⁶⁰

The South African effort contrasts with unconditional amnesty, as pursued in other countries, which does little to secure accountability.¹⁶¹ Nonetheless, when a nation like South Africa has engaged in a serious truth and reconciliation commission, authorizing an international criminal court to second-guess the domestic process is not likely to advance either the development of the rule of law domestically or greater accountability for the human rights violations at issue.¹⁶² If there is a shred of persuasiveness to this judgment, it offers grounds for at least preserving discretion for the ICC Prosecutor to decline to pursue investigation or prosecution in cases where there are genuine efforts to pursue alternative justice mechanisms by the nation where the harms arose.¹⁶³ Discerning what should be viewed as a "genuine effort to pursue alternative justice mechanisms" then becomes the operative challenge.

Rwanda presents an example of multiple strategies with ambiguous results. Opposing amnesty for perpetrators of genocide, the new government was overwhelmed by the numbers of alleged perpetrators after the mass murders of 800,000 persons in the 1994 genocide. International and domestic Rwandan legal institutions struggled to find an appropriate legal response. In part as an acknowledgment of international failures to intervene and halt the genocide, the United Nations followed the precedent of the ad

158. *Id.*

159. ANTJE DU BOIS-PEDAIN, TRANSITIONAL AMNESTY IN SOUTH AFRICA 337–48 (2007).

160. *Amnesty Does Not Erase the Truth*, TRANSITIONS: INT'L CTR. FOR TRANSITIONAL JUST. 1 (May 2011), <https://perma.cc/6E7A-6Q5W>.

161. Olsen, Payne & Reiter, *supra* note 83, at 353 (discussing Guatemala and El Salvador).

162. *See id.* at 357 (discussing the political contexts in which nations produce some accountability even after amnesties for human rights violations).

163. *Cf. Villa-Vicencio, supra* note 153 (urging international respect for traditional African justice and reconciliation processes).

hoc tribunal for the former Yugoslavia and set up the ad hoc tribunal for Rwanda. In placing the ad hoc international tribunal for Rwanda outside of Rwanda, and offering limited resources, the international effort frustrated and alienated many within Rwanda.¹⁶⁴

The domestic legal system was itself decimated during the mass slaughter. Despite heroic rebuilding efforts, it simply could not muster the resources to prosecute the 115,000 people incarcerated after the mass murders.¹⁶⁵ The domestic political leaders ended up pursuing several alternative justice mechanisms following the mass violence and human rights violations. Some sort of public response seemed vital, and yet, in a nation that desperately needed to rebuild its basic infrastructure, individualized criminal prosecutions were too costly. Domestic criminal law courts lacked capacity but also seemed a mismatch for the mass violence. Individualized blame may even have seemed conceptually difficult to disentangle from longstanding ethnic distrust, itself fomented by the gross manipulative pressures of unscrupulous leaders.

Rwandan officials decided to revive—or more aptly, transform—traditional communal dispute-resolution processes. The government deployed a new version of the traditional form of “gacaca,” communal hearings used at the village level, typically for disputes within families or between neighbors. In the traditional process, individuals tell their stories in front of the community and before a panel of elders elected by the community. During the process, the local community could participate in negotiating terms of reparations or contrition.¹⁶⁶ The government hoped that using a gacaca-style process following the genocide would offer a workable and legitimate alternative to formal criminal process. Yet, the new gacaca process addressed violent crimes of a sort never treated in the traditional communal hearings

164. See Megan M. Westberg, *Rwanda's Use of Transitional Justice After Genocide: The Gacaca Courts and the ICTR*, 59 KAN. L. REV. 331, 359, 361 (2010) (citing Bert Ingelaere, *The Gacaca Courts in Rwanda, in TRADITIONAL JUSTICE AND RECONCILIATION AFTER VIOLENT CONFLICT: LEARNING FROM AFRICAN EXPERIENCES* 25, 25 (Luc Huyse & Mark Salter eds., 2008) (“For the ordinary peasant the classical tribunals are both physically and psychologically remote institutions.”)). Because of the distance between the tribunal and the country where the genocide occurred, people inside of Rwanda could not watch activities at the tribunal or have other direct contact with it. See Alastair Leithead, *Rwanda Genocide: International Criminal Tribunal Closes*, BBC NEWS (Dec. 14, 2015), <https://perma.cc/9KQK-GVB2>. Other criticisms of the tribunal marred its legitimacy among Rwandans. See Victor Peskin, *International Justice and Domestic Rebuilding: An Analysis of the Role of the International Criminal Tribunal for Rwanda*, RELIEFWEB (Oct. 10, 1999), <https://perma.cc/8HEL-MCYT> (examining resentments within Rwanda toward the tribunal, based on perceptions of the tribunal's being a weak substitute for intervention during the genocide, its being indicative of colonial power, and its being practically slow and inadequate).

165. For a discussion of the contrasts between the domestic trials, which permit the death penalty, and the international ones, which do not, see MINOW, *supra* note 22, at 123–24. The government estimated it would take 200 years to hear all of the genocide cases through the formal process. See Homa Khaleeli, *Rwanda's Community Courts: A Unique Experiment in Justice*, GUARDIAN (Jan. 10, 2010).

166. See Noah Weisbord, *The Law and Ethics of Gacaca: Balancing Justice and Healing in Post-Genocide Rwanda* 122–23 (2002) (unpublished LL.M. thesis, McGill University) (on file with eScholarship@McGill); Jeevan Vasagar, *Grassroots Justice*, GUARDIAN (Mar. 17, 2005), <https://perma.cc/5FWC-AGWU>.

and relied on thousands of newly selected judges, many without the usual qualifications.¹⁶⁷ Those backing this approach argued that it would promote societal reconciliation or at least a basis for coexistence.¹⁶⁸ The *gacaca* process included elements meant to be restorative: involving the community members as witnesses and jury, the hearings were held informally and often included orders of reparations, sometimes by putting perpetrators to work in building schools, roads, and public housing for survivors.¹⁶⁹ The *gacaca* process to some observers required the accused to show humility and submission.¹⁷⁰ In practice, the *gacaca* effort proceeded with tensions between retributive and restorative goals, between individual and social needs, and between elites and popular, decentralized, local control.¹⁷¹

The *gacaca* process used 12,000 community tribunals to handle over 1.2 million cases.¹⁷² It did speed up resolution of cases and dealt with the backlog of criminal cases when the process started in 2001, but with complex results. To the surprise of many, this process sent many more than the expected number of people to prison, carrying considerable costs to the struggling country.¹⁷³ In a comprehensive study, Anuradha Chakravarty concluded that the Tutsi-dominated Rwandan Patriotic Front used the *gacaca* process for patronage and entrenchment of its rule into the authoritarian government by inviting neighbors to denounce one another.¹⁷⁴ Some believe the hearings were manipulated and politicized; many Rwandans

167. Rwanda 'Gacaca' Genocide Courts Finish Work, BBC NEWS (June 18, 2012), <https://perma.cc/SFK9-9ZVS>.

168. See generally Philip Clark, THE GACACA COURTS, POST-GENOCIDE JUSTICE AND RECONCILIATION IN RWANDA: JUSTICE WITHOUT LAWYERS (2010) (exploring potential social benefits of the *gacaca* process); MY NEIGHBOR, MY ENEMY: JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY (Eric Stover & Harvey Weinstein eds., 2004) (also discussing potential social benefits of the *gacaca* process).

169. Phil Clark, *The Rules (and Politics) of Engagement: The Gacaca Courts and Post-Genocide Justice, Healing and Reconciliation in Rwanda*, in AFTER GENOCIDE: TRANSITIONAL JUSTICE, POST-CONFLICT RECONSTRUCTION AND RECONCILIATION IN RWANDA AND BEYOND (Philip Clark & Zachary D. Kaufman eds., 2009).

170. See generally Mark A. Geraghty, *Genocide Ideology, Nation-Building, Counter-Revolution: Specters of the Rwandan State and Nation* (2016) (unpublished Ph.D. thesis, University of Chicago) (on file with author).

171. See Clark, *supra* note 169, at 251–56.

172. See *Justice Compromised: The Legacy of Rwanda's Community-Based Gacaca Courts*, HUMAN RIGHTS WATCH (May 31, 2011), <https://perma.cc/K72L-CLLW>; Laura Seay, *Rwanda's Gacaca Courts Are Hailed As a Post-Genocide Success. The Reality Is More Complicated.*, WASH. POST (June 2, 2017), <https://perma.cc/YE8R-76L6>.

173. Barbara Hola & Hollie Nyseth Brehm, *Punishing Genocide: A Comparative Empirical Analysis of Sentencing Laws and Practices at the International Criminal Tribunal for Rwandan Domestic Courts, and Gacaca Courts*, 10 GENOCIDE STUD. & PREVENTION 59, 73, <https://perma.cc/9JWV-CEBS> (stating that the sentences from the *gacaca* process were longer on average than sentences from the International Criminal Tribunal for Rwanda). Initially, sentences issued by the *gacaca* process were severe, but over time the sentences decreased and incarcerated individuals received reduced sentences. *Justice Compromised*, *supra* note 172, at 75–76; Hollie N. Brehm, *Rwanda: How to Deal with a Million Genocide Suspects*, CONVERSATION (Apr. 7, 2015), <https://perma.cc/SL68-KL2Y>; Colin O'Reilly & Yi Zhang, *Post-Genocide Justice: The Gacaca Courts*, 36 DEV. POL. REV. 561, 572 (2017).

174. ANURADHA CHAKRAVARTY, INVESTING IN AUTHORITARIAN RULE: PUNISHMENT AND PATRONAGE IN RWANDA'S GACACA COURTS FOR GENOCIDE CRIMES (2015).

were falsely accused of participation in genocide.¹⁷⁵ Many people struggled with competing loyalties to different family, clan members, and the new government. Yet, some serious offenders faced no or minimal consequences. Over time, the gacaca process expressed growing commitment to promote interpersonal forgiveness but also formalized processing of perpetrators, with scarce contact between perpetrators and victims.¹⁷⁶ Altogether, the process yielded mixed results, with some success and some disturbing features.¹⁷⁷

Thus, some observers found success in the Rwandan alternative justice effort. The gacaca cases involved nearly all the nation's adults as witnesses and parties.¹⁷⁸ A major survey of participants found support for the gacaca process but doubt about the credibility of confessions and about community safety after the process.¹⁷⁹ By the end of the genocide-related gacaca process in 2012, a 65% conviction rate resulted in over one million cases.¹⁸⁰ Although some people found the process meaningful, others sharply criticized the process for failing to provide reparations or restitution of property and for sending alleged perpetrators of the genocide back to live side by side with victims.¹⁸¹ Unlike the South African TRC, the gacaca hearings encouraged the accused to apologize, with the positives and negatives of apologies given under pressure.¹⁸²

One perpetrator reported to an interviewer: "You have to be able to go behind the mistakes, face the realities, and face what we see day to day . . . My current life could not cope with the past. My living condition could cope with the future. The more you focus on the past, the more you remain on the past."¹⁸³ Another perpetrator pled guilty in a gacaca hearing and asked for and received forgiveness from his victims' relatives. He later described how he received forgiveness:

"Survivors have not only forgiven us in theory, but this has also been put into practice. Out of the killings, the other crimes included destroying houses and destroying properties. During gacaca, the charges included to pay compensation for those

175. *Justice Compromised*, *supra* note 172, at 94–108 (describing manipulation of the process to express personal grievances, corruption, and other motives departing from the purpose of accountability for genocide).

176. See Clark, *supra* note 169, 156, 251–56.

177. See generally *supra* note 172; Jean Baptiste Kayigamba, *Rwanda's Gacaca Courts: A Mixed Legacy*, NEW INT'L LIST (June 15, 2012), <https://perma.cc/WEB9-327G>.

178. Phil Clark, *The Legacy of Rwanda's Gacaca Courts*, THINK AFRICA PRESS (Mar. 23, 2012).

179. See Joanna Pozen, Richard Neugebauer & Joseph Ntaganira, *Assessing the Rwanda Experiment: Popular Perceptions of Gacaca in Its Final Phase*, 8 INT'L J. TRANSITIONAL JUST. 31 (2014).

180. See, e.g., BBC NEWS, *supra* note 167.

181. See, e.g., *id.*; Khaleeli, *supra* note 165; Christopher J. Le Mon, *Rwanda's Troubled Gacaca Courts*, 14 HUM. RTS. BRIEF 16 (2007).

182. See Timothy Longman, *Trying Times for Rwanda*, HARV. INT'L REV. (2010), <https://perma.cc/3F7U-Y4DS>. See also *supra* Part II.B.

183. Lucy Britt, *First We Stopped Throwing Stones: Post-Genocide Rwanda and a Political Theory of Forgiveness* (Apr. 11, 2014) (unpublished B.S. thesis, Wesleyan University) (quoting interview with author (Nov. 16, 2012)), <https://perma.cc/JC7G-QHC6>.

properties which was [too much] money. But some survivors said, 'I know your situation, I know you are poor, so just give me the small amount.' This was a process that showed them they had a way of forgiving them."¹⁸⁴

More critical responses to the gacaca process are also prevalent.¹⁸⁵ Many participants expected to be forgiven but were not; many survivors grew more resentful as their hopes for the process encountered disappointing realities.¹⁸⁶ One study of sixteen widowed women who testified in the gacaca hearings found that all reported intense psychological suffering, new trauma, intimidation, and violence stemming from the process.¹⁸⁷ Although the gacaca process diverted many cases from the domestic criminal process, others proceeded in domestic criminal courts.¹⁸⁸ Human rights groups and other observers criticized the domestic trial processes as marred by biases unchecked by a lack of due process.¹⁸⁹ Observers claimed that the process at times reflected corruption and was at times used abusively to silence government critics.¹⁹⁰

Other lines of criticisms focused on the contrast between the gacaca process and adversarial justice—and the deployment of serious violent crimes which the gacaca process had not previously handled. The “grassroots justice” approach of the gacaca, based on local conversations, largely lacked elements of a formal court process. It nonetheless was extended to include

184. *Id.* (quoting interview with author (Nov. 14, 2012)).

185. See Phil Clark, *Creeks of Justice: Debating Post-Atrocity Accountability and Amnesty in Rwanda and Uganda*, in AMNESTY IN THE AGE OF HUMAN RIGHTS ACCOUNTABILITY, *supra* note 83, at 210, 213–14.

186. See Patrick Burgess, *De Facto Amnesty? The Example of Post-Soearto Indonesia*, in AMNESTY IN THE AGE OF HUMAN RIGHTS ACCOUNTABILITY, *supra* note 83, at 263, 290; see also Olsen, Payne & Reiter, *supra* note 83, at 351.

187. See Karen Brounéus, *Truth-Telling as Talking Cure? Insecurity and Retraumatization in the Rwandan Gacaca Courts*, 39 SEC. DIALOGUE 55, 68–71 (2008). See also Karen Brounéus, *The Trauma of Truth Telling: Effects of Witnessing in the Rwandan Gacaca Courts on Psychological Health*, 54 J. CONFLICT RESOL. 408, 419–25 (2010).

188. See Weisbord, *supra* note 166, at 51–53; see generally Hola & Brehm, *supra* note 173 (comparing results of Rwandan domestic trials, gacaca proceedings, and International Criminal Tribunal for Rwanda trials, arising from the genocide).

189. See Helen Scanlon & Nompumelelo Motlafi, *Indigenous Justice or Political Instrument? The Modern Gacaca Courts of Rwanda*, in PEACE VERSUS JUSTICE? THE DILEMMA OF TRANSITIONAL JUSTICE IN AFRICA (Chandra Lekha Sriram & Suren Pillay eds., 2010).

Despite estimates by the United Nations High Commissioner for Refugees that the [Rwanda Patriotic Front (RPF)] killed between 25,000 and 45,000 civilians in 1994, Rwanda has tried only 36 soldiers. These include four military officers charged with murdering 15 civilians (including 13 clergy) and tried perfunctorily in 2008. In February 2009 the military appeals court upheld the acquittals of the two more senior officers and reduced the junior officers' sentences from eight to five years' imprisonment.

In June the ICTR prosecutor told the UN Security Council that this RPF trial had met fair trial standards, and that he had no other RPF indictments ready to pursue. At an international conference assessing the legacy of the ICTR in July, many participants deemed the prosecutor's decision not to indict any RPF crimes to be the Tribunal's greatest failure.

HUMAN RIGHTS WATCH, WORLD REPORT 2010: RWANDA, <https://perma.cc/78SG-JFSH>.

190. See, e.g., HUMAN RIGHTS WATCH, *supra* note 189.

serious charges such as rape and local genocide planning.¹⁹¹ The process did not provide counsel or cross-examination for those charged.¹⁹² Particularly raising concerns about fairness, the gacaca experiment had no precise method for sensibly allocating cases between local and international processes. The gacaca process proceeded alongside domestic criminal prosecutions and did not halt prosecutions at the ad hoc international tribunal for Rwanda.¹⁹³ This international court proceeded with investigations, indictments, and trials, even as the government of Rwanda sought transfer of the international cases to domestic processes. Essentially, the international tribunal considered the most serious cases; the tribunal arrested eighty-three high-level perpetrators of the Rwanda genocide (nine of those indicted remained at large), and convicted sixty-five between its 1996 launch and its closure in 2012.¹⁹⁴ Abiding by international standards, the international ad hoc tribunal did not include the death penalty, while domestic criminal processes ostensibly did use the death penalty for less serious offenders.

The gacaca process for genocide matters ended without building domestic legal capacity and without connecting the nation with emerging international norms of criminal accountability. A knowledgeable observer argues that the gacaca experiment must be viewed as an evolving and valuable innovation, transforming a traditional justice process and combining it with human rights values and popular participation.¹⁹⁵ Similar comments have been made about traditional community reconciliation processes used in Sierra Leone after its long civil war, although the same study credits the Sierra Leonean Truth and Reconciliation Commission with overcoming a national culture of secrecy about violations.¹⁹⁶ Traditional methods often need to be adapted to address both the depth of trauma and the concerns of human rights. East Timor's use of traditional "tara bandu" ceremonies, encouraging people to commit to peace following brutal occupation by the Indonesian military, seem less successful than modified approaches integrating local knowledge and acknowledgment of human rights concerns.¹⁹⁷

191. See Hollie Nyseth Brehm, Christopher Uggen & Jean-Damascène Gasanabo, *Genocide, Justice and Rwanda's Gacaca Courts*, 30 J. CONTEMP. CRIM. JUST. 333, 336 (2014); Brounéus, *supra* note 187, at 57–58; William A. Schabas, *Genocide Trials and Gacaca Courts*, 3 J. INT'L CRIM. JUST. 879, 891–93 (2005).

192. See Phil Clark, *How Rwanda Judged Its Genocide*, AFR. RES. INST. (May 2, 2012), <https://perma.cc/39DN-ZXDW>; Kasajja Phillip Apuuli, *Procedural Due Process and the Prosecution of Genocide Suspects in Rwanda*, 11 J. OF GENOCIDE RES. 11, 18 (2009); Max Rettig, *Gacaca: Truth, Justice, and Reconciliation in Postconflict Rwanda?*, 51 AFR. STUD. REV. 25, 26 (2008).

193. See Hola & Brehm, *supra* note 173 (comparing the three processes).

194. Donna J. Maier, *Women Leaders in the Rwandan Genocide: When Women Choose to Kill*, 8 U. N. IOWA J. RES., SCHOLARSHIP & CREATIVE ACTIVITY (2012–13), <https://perma.cc/ZG9H-23P8>. Eight of those indicted either died before trial or had their cases transferred to Rwanda.

195. Clark, *supra* note 168, at 342–43.

196. See LAURA STOVEL, *LONG ROAD HOME: BUILDING RECONCILIATION AND TRUST IN POST-WAR SIERRA LEONE* 190–92, 229–30, 247 (2010).

197. See James Scambray & Todd Wassel, *Hybrid Peacebuilding in Hybrid Communities: A Case Study of East Timor*, in *HYBRIDITY ON THE GROUND IN PEACEBUILDING AND DEVELOPMENT: CRITICAL CONVERSATIONS* 181, 186–87, 192–99 (Wallis Joanne et al. eds., 2018).

Concerns that the Rwandan process involved manipulation for political purposes are heightened by an apparent narrative of forgiveness advanced by the government. When the *New York Times* published a set of powerful photographs growing from the national reconciliation work in Rwanda of a non-profit organization, Association Modeste et Innocent, it shared images of victims and perpetrators alongside texts celebrating exchanges of apologies and forgiveness.¹⁹⁸ Photographer Pieter Hugo is quoted: “These people can’t go anywhere else—they have to make peace. . . . Forgiveness is not born out of some airy fairy sense of benevolence. It’s more of a survival instinct.”¹⁹⁹ A perpetrator named Ndahimana is quoted: “The day I thought of asking pardon, I felt unburdened and relieved. I had lost my humanity because of the crime I committed, but now I am like any human being.”²⁰⁰ Kororero, a survivor, reports: “Sometimes justice does not give someone a satisfactory answer—cases are subject to corruption. But when it comes to forgiveness willingly granted, one is satisfied once and for all. When someone is full of anger, he can lose his mind. But when I granted forgiveness, I felt my mind at rest.”²⁰¹

Upon publication, the photographs and quotations elicited sharp criticism, especially from legally trained observers. Suchitra Vijayan, a barrister who worked for the United Nations ad hoc tribunals for the former Yugoslavia and for Rwanda, described the story as “a deeply disturbing piece of journalism” and “[p]rofoundly banal,” as it adopts the agenda of the Rwandan government to stigmatize all Hutu and misuse “the judicial process of reconciliation to consolidate power.”²⁰² In general, expectations about forgiveness may be imposed on some people and not others, and that desires for accountability and punishment should not be suppressed under pressures to forgive or move on.²⁰³ The fact that the government in Rwanda

198. Pieter Hugo & Susan Dominus, *Portraits of Reconciliation: 20 Years After the Genocide in Rwanda, Reconciliation Still Happens One Encounter at a Time*, N.Y. TIMES MAG. (Apr. 6, 2014), <https://perma.cc/7L2C-QCKK>.

199. *Id.*

200. Some of the wrongdoers had been tried, convicted, and imprisoned. A perpetrator named Nzabamwita is quoted:

I damaged and looted her property. I spent nine and a half years in jail. I had been educated to know good from evil before being released. And when I came home, I thought it would be good to approach the person to whom I did evil deeds and ask for her forgiveness. I told her that I would stand by her, with all of the means at my disposal. My own father was involved in killing her children. When I learned that my parent had behaved wickedly, for that I profoundly begged her pardon, too.

Id.

201. *Id.*

202. Suchitra Vijayan, *Rwanda and the New York Times: On Those Images by Pieter Hugo Pairing Perpetrators and Victims of the 1994 Genocide*, AFRICA IS A COUNTRY (Apr. 25, 2014), <https://perma.cc/FM3T-7GSZ>.

203. See, e.g., Ta-Nehisi Coates, *Why Are Black People So Forgiving?*, ATLANTIC (Oct. 6, 2010), <https://perma.cc/NLJ5-LUHQ>; Sisonke Msimang, *You May Free Apartheid Killers but You Can't Force Their Victims to Forgive*, GUARDIAN (Mar. 11, 2016), <https://perma.cc/KU63-W7JJ>. The lawsuit brought by the family of Steve Biko challenging South Africa's Truth and Reconciliation Commission is one expression of

has recently come out in opposition to the ICC—and has endorsed the withdrawal of African states from the ICC—contributes to suspicion that the claims of forgiveness and reconciliation hide unresolved tensions and even mark impunity for genocide.²⁰⁴

The South Africa TRC and Rwanda *gacaca* process crystallize issues posed by alternatives to adversarial justice from the perspective of international law. Domestic legal systems have often used amnesties to move beyond domestic conflicts, but international scholars have often treated any kind of amnesty as unacceptable.²⁰⁵ Left unanswered is how international law should treat domestic amnesties conditioned on full and truthful participation in a domestic truth and reconciliation process.²⁰⁶ To supply the alternative sufficient to bar ICC action, though, from the perspective of the international law's values, a domestic restorative process should include individualized hearings that could produce punishments to hold the charged individuals to account.

The language of the Rome Statute may imply that the ICC should not treat as sufficient a domestic alternative with a communal quality that is devoted to forgiveness and reconciliation, rather than individual accountability for criminal violations through prosecutions and criminal trials. From the vantage point of “international criminal justice” that uses Western criminal trials as the model, nothing short of an adversarial process—complete with competent defense counsel, prosecutors with integrity, impartial judges, and the possibility of individual sanctions—should suffice to deprive an international forum of authority to proceed.

Yet that vantage point may be too constrained. It ignores the “last resort” approach to international criminal justice informing the ICC. Given the limited international resources and the competing priorities faced by a nation recovering from massive violence, the real alternative may be no response to genocide and gross violations of human rights. Greater acceptance of alternatives to formal criminal prosecution at the local level may be wise, given both the symbolic and real benefits of deferring to domestic and culturally resonant responses to mass violence, and the exigencies that make formal criminal prosecution unavailable in a domestic context. Domestic

tensions over accountability versus forgiveness. See Rebecca Ryan, *Truth and Healing: The Death of Steve Biko in South Africa's Truth Commission Special Report Television Series*, S. AFR. DIG. HIST. J. (2015), <https://perma.cc/ALP4-X4RS>.

204. Coalition for the ICC, *Rwanda Should Lead the Global Fight Against Impunity*, #GLOBALJUSTICE (Apr. 4, 2009), <https://perma.cc/8CGN-8GBY>.

205. See Max Pensky, *Amnesty on Trial: Impunity, Accountability, and the Norms of International Law*, 1 ETHICS & GLOBAL POL., 1, 9–10 (2008). For thoughtful efforts to grapple with the issue see Lisa J. Laplante, *Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes*, 49 VA. J. INT'L L. 915, 918, 926–43 (2009); Diane F. Orentlicher, *Swapping Amnesty for Peace and the Duty to Prosecute Human Rights Crimes*, 3 ILSA J. OF INT'L & COMP. L. 713 (1997); Diane F. Orentlicher, *'Settling Accounts' Revisited: Reconciling Global Norms with Local Agency*, 1 INT'L J. TRANSITIONAL JUST. 10 (2007).

206. See generally Pensky, *supra* note 205; see also Laplante, *supra* note 205, at 926–29, 931, 938–39, 942–43.

proceedings deserve deference by the ICC for another reason. It is of value to each society to take and exercise national ownership of the response, and to be seen as doing so in order to secure respect among other nations. Further, domestic control means domestic design that can reflect cultural understandings, carrying significant meanings to people in the local society.²⁰⁷ Local societies are themselves not singular, and a post-conflict society in particular often has challenges in navigating multiple cultural traditions.²⁰⁸ Local design of the institutional response is more likely to be in touch with these complexities than are international actors.

In practice, nations coping with mass violence have to manage political instability, devise prompt and efficient processes to allow people to put the past behind them, and contend with the absence of sufficient capacity for individualized fair hearings for all those who could be charged following mass violence. These are problems for any country recovering from mass violence, but similar issues likely arise if another nation or the ICC provides an international forum.

Respect for alternatives that advance restorative notions of justice may be especially promising for strengthening the prospects of local peace and perceived legitimacy. Restorative justice—aiming at hearing victims and preserving the record of what happened, while forging grounds for peace and reconciliation—is less at odds with the criminal prosecutorial model adopted by the ICC than many may assume. The ICC itself embraces restorative justice as at least a part of its own goal. Hence, unlike the international trials following World War II and the recent ad hoc tribunals for the former Yugoslavia and Rwanda, the ICC makes provision for substantial involvement by victims in order to support their dignity and empowerment and build a basis for reparations, attuned to calls for restorative justice.²⁰⁹ The Rome Statute requires direct consideration of the views and concerns of victims “in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.”²¹⁰ As participants, not parties, the victims can advise the Court about the scope of investigations and charges, and also raise concerns relevant to their own security, well-being, and desires.²¹¹ Victims have helped to bring sexual violence issues to the fore.²¹² Although the full power of victim participation may not yet be real-

207. Cf. Jaya Ramji-Nogales, *Designing Bespoke Transitional Justice: A Pluralist Process Approach*, 32 MICH. J. INT'L L. 1, 3 (2010).

208. Kristen Campbell, *Reassembling International Justice: The Making of “the Social” in International Criminal Law and Transitional Justice*, 8 INT'L J. TRANSITIONAL JUST. 53, 57 (2013).

209. See Gilbert Bitt & Hakan Friman, *Participation of Victims in the Proceedings*, in THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE (Roy S. Lee ed., 2011).

210. Rome Statute, *supra* note 7, art. 68(3).

211. Mariana Pena & Gaele Carayon, *Is the ICC Making the Most of Victim Participation?*, 7 INT'L J. TRANSITIONAL JUST. 518, 525–26 (2013).

212. *Id.*

ized at the ICC,²¹³ the commitment to victim participation elevates restorative justice concerns within the retributive process of the international criminal justice system. Interpreting the complementarity requirement to advance deference to domestic action should include acknowledgement of and respect for domestic restorative justice initiatives if they—just like domestic prosecutions that fulfill the ICC’s complementarity requirement—are genuine and meaningful efforts to pursue individual accountability, justice, and prevention of future harms.

C. *What If Any Role Should Considerations of Political and Practical Exigency Play?*

Nations emerging from mass violence may resist individualized adversarial criminal justice as a Western imposition, too costly, too time consuming, or inconsistent with the goals of peace and political transition or stability. A government may assert these reasons solely out of fear or self-interest, and yet the scope of potential violations to be investigated, and the challenges in securing and paying for forensic evidence, may make criminal and legal action infeasible.

Nonetheless, the political circumstances may with good reason press against legal action. International action may be necessary where the governing regime may not have changed, or the judiciary and prosecutors may be the same as those in power at the time of the mass atrocity, or where a new regime may be relatively powerless. But what about when a new national regime may have made a deal to dispense with prosecution in order to gain or secure power and stability? Violations may also have occurred over an extended period of time, with reprisals by victims and their families. Distinguishing victims from offenders may be impossible. Assessments of individual responsibility under a rule of law may become unattainable. Negotiated peace or political transition may require letting go of hopes for careful, individualized justice. In such instances, some response other than prosecution may be the best bet for accountability, prevention, peace, and security.

Hence, in crucial respects, even under emerging norms of international human rights law, the duty to prosecute is not absolute. Criminal process, whether domestic or international, is at best a partial response to mass violations of human rights. The ICC has limited resources and accordingly pursues only those most responsible. The Rome Statute also acknowledges that interests of justice, political considerations, and concerns about security, as well as individual criminal liability, matter in responses to gross violations of human rights.²¹⁴ Precisely these shortfalls from an absolute duty to prose-

213. *Id.* at 527–35.

214. *See supra* Section I.

cute open space for other responses, including alternative justice mechanisms.

Domestic actors often must take into account the challenges of negotiating an end to a period of mass atrocity when the perpetrators still retain political or military power, as well as the fragile security situation facing a society emerging from mass violence.²¹⁵ Negotiating peace with armed groups or governments that have committed international crimes may be possible only on the condition of immunity from prosecution and imprisonment—and such negotiation may be necessary to halt current and prevent future hostilities.²¹⁶ The ICC's role over a decade in Colombia suggests a form of complementarity that includes domestic amnesties, reparations, and negotiated peace.²¹⁷ What, if any, implications do these realities have for the ICC's treatment of domestic failures to prosecute? With "peace" and "justice" considerations built into the Rome Statute, the ICC should give at least some deference to a state's choice to pursue alternative justice mechanisms when "necessary to stop a conflict or to secure and maintain a transition from a military regime to a democratic government."²¹⁸

Such considerations need not create exceptions that swallow up the rule of ICC authority to proceed where the domestic nation has not pursued criminal accountability for mass human rights violations. That is why blanket amnesties or amnesties awarded by officials to themselves should not bar ICC action, although "good faith creative alternatives to prosecution [such as] truth commissions granting conditional amnesties" "might qualify."²¹⁹ Restorative justice that vigorously seeks accountability and prevention might do just that.

When domestic amnesties are granted because of fear of reprisals, political pressure, or inadequate resources, the ICC may be wise not to proceed with prosecutions because of the very conditions that prompted the domestic action.²²⁰ In these instances, though, the accurate ground for blocking action in the ICC rests on its assessment of political considerations rather than an

215. See Carlo Nino, *The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina*, 100 YALE L.J. 2619, 2624–30, 2632, 2639–40 (1999); Charles Villa-Vicencio, *Why Perpetrators Should Not Always Be Prosecuted: Where the International Criminal Court and Truth Commissions Meet*, 49 EMORY L.J. 205, 206, 212, 216–17 (2000); Jose Zalaquett, *Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations*, 43 HASTINGS L.J. 1425, 1426–30, 1431, 1438 (1992).

216. See Mahnoush Arsanjani, *The International Criminal Court and National Amnesty Laws*, 93 AM. SOC. INT'L L. PROC. 65, 65 (1999).

217. See *supra* notes 49–50.

218. Robinson, *supra* note 41, at 483, 495; see also Majzub, *supra* note 40, at 251–52; Scharf, *supra* note 90, at 512; Seibert-Fohr, *supra* note 41, at 571.

219. Robinson, *supra* note 41, at 497. Mnookin specifically recommends that the ICC Prosecutor should accept neither unconditional blanket national amnesty nor immunity for a particular leader, negotiated as part of a peace process, as satisfying the domestic nation's duty to pursue justice. See Mnookin, *supra* note 104.

220. A state that grants amnesties without investigation would seem not to preclude ICC jurisdiction, although this issue has not yet been addressed by the ICC.

alternative conception of justice. South Africa conditioned amnesty on truth-telling at the TRC, which at the time seemed consistent with international law, but the silence of the subsequent Rome Statute on this precise issue now casts into doubt whether even amnesties conditioned on truth-telling show sufficient intention and effort by the State to preclude ICC jurisdiction.²²¹ The individualized assessment involved in conditional amnesties might satisfy international law's requirement of individual accountability for gross violations of international human rights.²²² The ICC might well learn from studies about the effects of such amnesties over time. One concludes that amnesties are more likely to be granted where an authoritarian regime negotiates a transition to a democracy and where the authoritarian regime held power for a long time; amnesty may, however, be followed by accountability measures, including trials, and nations using both are likely to see improvement in measures of human rights and democracy.²²³

Even instances of blanket amnesties can be reconsidered over time. A domestic regime, after the passage of time, can override a prior amnesty. The Extraordinary Chambers in the Courts of Cambodia, a special national court assisted by the United Nations in efforts to prosecute individuals for directing the massacres committed by the Khmer Rouge regime, has indicted a prominent leader, even though he had previously received amnesty and pardon.²²⁴ Indeed, the Cambodian tribunal produced convictions for crimes against humanity of former second-in-command Nuon Chea and former head of state Khieu Samphan, now two elderly men, decades after the genocide.²²⁵ Another domestic tribunal might conclude that a prior grant of amnesty was illegal and thereby commit to hold accountable those who committed gross violations of human rights.²²⁶ That was the judgment of the Supreme Court of Pakistan when it rejected an amnesty that had erased charges ranging from corruption to murder against 8,000 people, including President Asif Ali Zardari.²²⁷ Judicial reconsideration is unlikely to occur on the heels of the grant of amnesty in a civil war context. The 2017 negotiated

221. See Juan D. Mendez, *Foreword* to AMNESTY IN THE AGE OF HUMAN RIGHTS ACCOUNTABILITY, *supra* note 83, at xxii, xxiii, xxiv.

222. See *id.* at xxvii; du Bois-Pedain, *Accountability Through Conditional Amnesty*, *supra* note 140, at 257, 261.

223. See Olsen, Payne & Reiter, *supra* note 83, at 345, 346.

224. See Ronald C. Clue, *A Limited Amnesty? Insights from Cambodia*, in AMNESTY IN THE AGE OF HUMAN RIGHTS ACCOUNTABILITY, *supra* note 83, at 291, 307–08.

225. See *Profile: Khmer Rouge leaders Nuon Chea and Khien Samphan*, BBC NEWS (Aug. 6, 2014), <https://perma.cc/433Y-AKDK>. Chea had been pardoned and Samphan offered a pardon; both fought the charges against them and will appeal their convictions. *Id.*

226. See *Pakistan Court Voids Amnesty Shielding Zardari Allies*, BBC NEWS (Dec. 16, 2009). <https://perma.cc/BLZ2-EJS2>. (The Supreme Court of Pakistan declared unconstitutional the National Reconciliation Ordinance that granted amnesty on corruption charges to holders of public office from 1986 to 1999.).

227. See *id.*

peace in Colombia includes apparently intentional ambiguity on this point.²²⁸

Some nations may find a path for investigations or prosecutions for violations not covered by the amnesties.²²⁹ Others may become disillusioned with the lack of truth-telling and reparations.²³⁰ Developments in the nation, including degrees of political stability and sometimes generational shifts, may be necessary for a fresh review of the grant of amnesty for terrible human rights harms. As a nation can develop pathways around amnesty to promote accountability,²³¹ the ICC might be well advised to allow a state the chance to reach a point when it can reconsider amnesties immunizing major figures from responsibility for gross violations of human rights. In the absence of such decisions, however, and after some period of reasonable time, the ICC has to confront the meanings of its authority to proceed—or not to proceed—“in the interests of justice.”²³²

D. *Tentative Conclusions for International Crimes*

The Rome Statute leaves open the question of whether domestic uses of truth commissions and other alternative justice mechanisms suffice to deprive the ICC of the basis for proceeding when it otherwise would have authority to do so. The ICC should not be barred from acting in the face of a blanket amnesty, but conditional amnesties might satisfy the commitment to individual accountability for gross violations of human rights if the conditions include requiring truthful testimony about the person’s role in violent acts. Treating an alternative justice process as preclusive of international criminal process makes most sense where the alternative process does involve naming names and produces individualized assessments—with at least minimal due process—that could produce a sanction, or where the alternative process produces a public report or transparent outcome, and is itself a mechanism for restoring communal trust or building the rule of law domestically.²³³ Where the alternative justice mechanism is chiefly a means for dealing with the practical difficulties of moving beyond violence toward

228. See Amnesty International, *Colombia 2017–2018*, <https://perma.cc/3H4Q-XT4A>.

[T]he law also provided for the possibility that the state would not pursue criminal prosecutions in certain cases—although how this would be implemented was not clear—potentially breaching the obligation of the state to investigate, prosecute and punish grave violations of human rights, undermining the rights of victims to truth and full reparation.

Id.

229. Emily Braid & Naomi Roth-Arriaza, *De Facto and De Jure Amnesty Laws in Central America*, in AMNESTY IN THE AGE OF HUMAN RIGHTS ACCOUNTABILITY, *supra* note 83, at 182, 207–08.

230. Clark, *supra* note 185, at 235 (discussing Uganda).

231. Kathryn Sikkink, *The Age of Accountability: The Global Rise of Individual Criminal Accountability*, in AMNESTY IN THE AGE OF HUMAN RIGHTS ACCOUNTABILITY, *supra* note 83, at 19, 20–21.

232. Rome Statute, *supra* note 7, art. 53(1)(b), 53(2)(b).

233. See Payam Akhvan, *supra* note 10, at 1059 (arguing for some flexibility during times of national transition: “Making the complementarity principle a practical reality requires meaningful engagement with these messy realities.”).

peace and social stability, the grounds of necessity could justify forgoing criminal process. But then the rationale should be recognized as essentially political rather than an alternative form of justice. The current interpretation of the “interests of justice” as a prosecutorial consideration apparently excludes such concerns, and the ICC prosecutors have so interpreted the phrase, but this interpretation leaves political factors to the Court and to the Security Council.²³⁴ This allocation of responsibility has some merit to it, as the Prosecutor’s office seeks to strengthen the institution’s commitment to law and justice, but debates over contrasting meanings of “justice” then will be resolved in part by the Prosecutor. Meanwhile, the political context of the Court and its member states may well warrant deference to domestic processes that depart from international norms of criminal justice.

These conclusions reflect in part the comparison between potential roles for a conception of justice that includes reconciliation and restorative efforts in tackling both international human rights violations and harms occurring in daily life between individuals.²³⁵ Accountability, from this perspective, does not always necessitate international criminal prosecution and may not require conforming to international standards of adversarial process. Yet alternatives may not require forgoing prosecution domestically or internationally, especially as responses evolve over time.²³⁶ An individual who forgives a wrongdoer does not necessarily forgo criminal sanction. Similarly, an alternative justice mechanism aiming at restorative and constructive relationships may not entirely block international criminal prosecutions. And yet, individual acts of forgiveness may be part of a process of engagement with a wrongdoer that would make a criminal process redundant or intrusive or even destructive of an ambitious moral project of interpersonal or communal repair. The differences between international human rights violations and interpersonal harms, however, are substantial, and contribute crucial political and practical considerations pointing, where possible, toward deference and time for national responses to crimes against humanity and other gross violations of human rights. With some deference, the hope is that the ICC and other international efforts contribute to a truly global effort to strengthen responses to mass atrocity.²³⁷ The threat of ICC prosecution could lead to more principled peace deals, but only if coupled with deference.²³⁸ As two scholars note, “the ICC will lose if it is primarily perceived as a court, whereas it will win if it is perceived primarily as a lynchpin in a new global system of justice.”²³⁹ The strong exception should arise where domestic officials show complete inattention or hostility to addressing mas-

234. Rome Statute, *supra* note 7, art. 53(1)(c).

235. Clark, *supra* note 185, at 237.

236. Olsen, Payne & Reiter, *supra* note 83, at 351.

237. This assessment echoes sober assessments of international criminal justice in practice. See Sikink, *supra* note 231, at 40–41.

238. Freeman & Pinsky, *supra* note 154, at 63–64.

239. *Id.* at 63.

sive human rights violations, as is the case when it comes to gender-related human rights violations.²⁴⁰

III. RESTORATIVE JUSTICE ALTERNATIVES AS JUSTICE

International criminal justice has developed substantially since the early 1990s, and elevated formal, adversarial criminal processes. What should be the place of restorative justice and alternative dispute-resolution mechanisms, whether longstanding traditions or new efforts? The question, brought to sharp focus by the complementarity dimension of the ICC, critically presents competing views of what is justice. Restorative justice approaches, emphasizing repair of relationships, restitution, community harmony, and the future more than the past, have long histories in different societies and make clear that adversarial litigation—using formal procedures that focus on the rights of individual defendants, evidentiary records, and appeals—is one choice among others. As many domestic systems provide for restorative justice as an alternative to or supplement to adversarial justice, the ICC’s effort to strengthen domestic justice systems could identify key elements of restorative justice that would satisfy international standards. Domestic processes that provide for gathering people’s experiences, give voice to victims, individualize accountability with opportunities to be heard for those charged with wrongdoing, and produce public reports deserve consideration as sufficient to deprive the ICC of its own power and need to proceed. The inventive idea of complementarity in the Rome Statute holds promise for strengthening multiple avenues of redress and prevention of violence, in international, national, and local settings. Born of necessity because no one institution can respond to all the challenges of violence nor effectively prevent violations, complementarity could strengthen many more genuine justice responses in other settings.²⁴¹

240. See generally Louise Chappell, Rosemary Grey & Emily Waller, *The Gender Justice Shadow of Complementarity: Lessons from the International Criminal Court’s Preliminary Examinations in Guinea and Colombia*, 7 INT’L J. TRANSITIONAL JUST. 455 (2013) (exposing systematic gender bias and indifference to gendered violence in domestic actions under the complementarity provision of the ICC); Louise Chappell, *The Politics of Gender Justice at the ICC: Legacies and Legitimacy*, EJI: TALK! (Dec. 19, 2016), <https://perma.cc/2UX4-ZPCC> (arguing that the ICC’s complementarity regime has produced negative gender outcomes as state parties rejected arguments to include gender-specific rules in the complementarity provisions, negotiators objected to ICC assessing of the gender status of state laws, and the ICC Prosecutor lacked a formal gender justice rule to guide its preliminary investigations).

241. A similar inventive use of local and centralized acknowledgment appears in the new Legacy Museum: From Enslavement to Mass Incarceration in Alabama and National Memorial for Peace and Justice, which opened to the public on April 26, 2018. The memorial reflects years of research into the lynchings of Black people in the United States. Organized by the Equal Justice Institute, led by Bryan Stevenson, the memorial is surrounded by further spaces, “waiting to be claimed and installed in the counties they represent,” and the effort invites “counties across the country to claim their monuments and install them in their permanent homes in the counties they represent.”

Eventually, this process will change the built environment of the Deep South and beyond to more honestly reflect our history. EJI staff are already in conversation with dozens of commu-

nities seeking to claim their monuments. EJI approaches these conversations—and all of our community education work—with thought and care. EJI shares historical and educational material with community members, encourages participation from communities of color, and works with partners to find an appropriate geographic location for each monument to ensure that the process of claiming monuments helps local communities engage with this history in a constructive and meaningful way.

See The National Memorial for Peace and Justice, MUSEUM AND MEMORIAL, <https://perma.cc/263F-JD6K>.

