

# The False Dichotomy of Peace versus Justice and the International Criminal Court

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## Introduction

Allowed to remain at large, the criminals ask for immunity under one form or another as a condition to stopping the violence. They threaten to attack more victims. I call this extortion, I call it blackmail. We cannot yield.<sup>1</sup>

Modern conflicts are increasingly intra-state struggles, rather than state versus state wars. Even when violence spills over borders, guerrilla and terror tactics often predominate. Civilians become direct victims of terror and atrocities or indirect victims of displacement and deprivation. Rebel militias use “hit and run” tactics and attacks against civilians to undermine the dominant power rather than attempt to hold territory. A military solution to such conflicts is unlikely. It is more probable that a current armed conflict will end with a peace deal, not unconditional surrender, despite the international community’s rejection of impunity in principle. As a result, leaders of rebel groups who are also international criminals may gain a seat at the negotiating table rather than in the dock of a criminal court, whether domestic or international. Although it seems that the immediate need for peace will often outweigh calls for justice, the International Criminal Court<sup>2</sup> can further both goals in certain circumstances.<sup>3</sup>

The long-running conflict in Uganda illustrates the problem and potential solution. A vicious rebel group, the Lord’s Resistance Army, has been terrorizing civilians in Uganda for decades. Its favorite tactics include abducting children and turning the girls into sex slaves and the boys into drug-addled child soldiers. Abductees are forced to mutilate, maim, rape, and kill under penalty of death. Over a million people have been displaced into overcrowded, squalid camps where they are still vulnerable to attacks because of insufficient protection by the government, whose forces are also accused of abusing civilians. The Lord’s Resistance Army is willing to put down its arms and end the atrocities. But its price for signing a peace deal includes immunity from the charges made against its leaders by the International Criminal Court (ICC).<sup>4</sup> As the Prosecutor of the ICC points out in the above quote, such demands amount to blackmail and extortion. Yet, can the international community justifiably reject trading peace for impunity, thereby leaving the people of Northern Uganda once again subject to war crimes and crimes against humanity? This essay posits that the international community does not necessarily face an either-or proposition. It can accept a peace deal while promoting some measure of justice.

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<sup>1</sup> ICC, *Address by Mr. Luis Moreno-Ocampo, Nuremberg, 24/25 June 2007, Building a Future on Peace and Justice* at [http://www.icc-cpi.int/library/organs/otp/speeches/LMO\\_nuremberg\\_20070625\\_English.pdf](http://www.icc-cpi.int/library/organs/otp/speeches/LMO_nuremberg_20070625_English.pdf)

<sup>2</sup> See generally Rome Statute of the International Criminal Court, Art. 2, July 1, 2002, 3 THE ROME STATUTE: OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 4 (Antonio Casesse et al, eds., 2002), available at [http://www.un.org/law/icc/statute/english/rome\\_statute\(e\).pdf](http://www.un.org/law/icc/statute/english/rome_statute(e).pdf) [hereinafter Rome Statute].

<sup>3</sup> For an extensive discussion of these issues in the context of Northern Uganda, see Linda M. Keller, *Achieving Peace with Justice: The International Criminal Court and Ugandan Alternative Justice Mechanisms*, 23 CONN. J. INT’L L. \_\_\_\_ (forthcoming Spring 2008).

<sup>4</sup> See generally TIM ALLEN, TRIAL JUSTICE: THE INTERNATIONAL CRIMINAL COURT AND THE LORD’S RESISTANCE ARMY (2006).

At first glance, there is an unavoidable conflict between peace and justice, but this essay contends that this is a false dichotomy. There is a way to achieve both peace and some form of justice for victims like those in Uganda. International criminal prosecution, via tribunals such as the ICC, is not the only means to achieve justice. Yet even commentators who recognize that peace and justice can coexist<sup>5</sup> contest the proper form of, and equilibrium between, mechanisms to achieve peace and justice. This essay explores the challenges of balancing competing interests when the ICC faces a dilemma like that posed by the ongoing peace negotiations in Uganda. The essay examines the statutory bases that would allow the ICC to suspend or drop a case in deference to local nonprosecutorial justice mechanisms. The essay offers a framework to guide the ICC in evaluating local alternatives based on their ability to further both peace and the goals of international criminal justice. The proposed test is applicable not only to Uganda but to any case before the ICC that involves an ongoing peace process.

The proposed solution invokes international treaty law and interpretation, international human rights and customary norms, transitional justice paradigms, and criminal justice theory. The peace versus justice debate is most evident in the competing imperatives of retributive and restorative justice. Pure retributivism would typically require the prosecution of all those culpable for international crimes. Restorative justice, however, would focus on victims' needs, root causes of the conflict, and the reintegration of fighters into society. But neither approach will suffice on its own. The ICC should attempt to harmonize retributive and restorative justice principles. This essay proposes a preliminary theoretical framework to do so, a framework applicable to the inevitable reoccurrence of the peace versus justice debate at the ICC.<sup>6</sup>

Part I of this essay examines the interpretations of the statute creating the ICC that might allow the ICC, either in the form of the Office of the Prosecutor or the judges of the Court, to defer to alternative methods of justice. Specifically, it briefly evaluates four possibilities: (1) the acceptance of a U.N. Security Council request to suspend a prosecution as a threat to international peace; (2) the application of the principle of complementarity to render the ICC case inadmissible; (3) the application of the ICC *ne bis*

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<sup>5</sup> See, e.g., Eric Blumenson, *The Challenge of a Global Standard of Justice*, 44 COLUM. J. TRANSNAT'L L. 801, 824 (2006) (peace versus justice question ignores third alternative of South African model); Mark S. Ellis, *Combating Impunity and Enforcing Accountability as a Way to Promote Peace and Stability*, 2 J. NAT'L SEC. L. & POL'Y 111, 113 (2006) (false choice between peace and justice); Anita Frohlich, *Reconciling Peace with Justice*, 30 SUFFOLK TRANSNAT'L L. REV. 271, 278 (2007) (same); Lisa J. Laplante & Kimberly Theidon, *Transitional Justice in Times of Conflict: Colombia's Ley de Justicia y Paz*, 28 MICH. J. INT'L L. 49, 101 (2006) (balancing peace and justice); Dwight G. Newman, *The Rome Statute, Some Reservations Concerning Amnesties, and a Distributive Problem*, 20 AM. U. INT'L L. REV. 293, 296 (2005) (complementarity between peace and retributive justice); Charles Villa-Vicencio, *The Reek of Cruelty and the Quest for Healing*, 14 J.L. & RELIGION 165 (1999-2000) (restorative and retributive justice are compatible).

<sup>6</sup> OTP, *Report on the activities performed June 2003-June 2006* (Sept. 12, 2006), at [http://www.icc-cpi.int/library/organs/otp/OTP\\_3-year-report-20060914\\_English.pdf](http://www.icc-cpi.int/library/organs/otp/OTP_3-year-report-20060914_English.pdf).

*in idem* provision to block ICC proceedings; and (4) the exercise of prosecutorial discretion.<sup>7</sup>

Part II proposes criteria, based on international criminal justice theory and the literature on transitional justice, to guide the ICC in its determination of whether to defer to negotiated local justice methods. It proposes a threshold requirement of necessity and legitimacy. It then assesses to what extent the negotiated alternatives might further the international criminal justice goals of retribution, deterrence, expressivism, and restorative justice. The presumption of the ICC is for prosecution at the international or domestic level, but if deferral to nonprosecutorial alternatives can further both peace and the purposes of the ICC, then the Court or the Office of the Prosecutor should make an exception. The essay tentatively concludes that the ICC can and should defer to the negotiated alternative mechanisms in certain circumstances. For example, when a guarantee of nonprosecution is required for a peace deal, a truth commission that has the proper mandate and resources could further peace while ensuring some measure of justice. By furthering the overarching objects and purposes of the international criminal justice system, the ICC would preserve its legitimacy and achieve peace with justice.<sup>8</sup>

## I. Statutory Bases for International Criminal Court Deferrals

There are no explicit statutory provisions for deferral to a negotiated amnesty or other alternative justice mechanisms (AJM) such as a truth commission.<sup>9</sup> Nonetheless, the Court or the Office of the Prosecutor (OTP) could interpret the statute to implicitly allow deferral to alternative justice mechanisms negotiated during a peace deal to end a conflict (“negotiated AJM”). There is significant dispute over the interpretation of relevant provisions of the statute, and the ICC has yet to render any decisions on this issue.

At the time of the drafting of the Rome Statute, there was no serious discussion of the compatibility of amnesty or truth commissions with the ICC, apparently because it was clear that agreement would be impossible.<sup>10</sup> According to John Dugard, “[t]here are signs

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<sup>7</sup> For a more extensive discussion of these statutory provisions grounded in the concrete example of the ICC situation in Northern Uganda, see Keller, *supra* note 3, at Part III.

<sup>8</sup> These guidelines are explicated and applied to the proposed Ugandan alternative justice mechanisms including the complex Northern Ugandan Acholi tribal reconciliation ceremony, *mato oput*, in Keller, *supra* note 3, at Part IV.

<sup>9</sup> John Dugard, *Possible Conflicts of Jurisdiction with Truth Commissions*, in *THE ROME STATUTE: OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 700 (Antonio Casesse et al, eds., 2002).

<sup>10</sup> See Darryl Robinson, *Serving the Interests of Justice*, 14 *EUR. J. INT’L L.* 481 (2003) (concluding drafters chose not to debate the issue given that agreement would likely have been impossible and codifying a test for acceptable alternative justice measures would have been unwise); Jessica Gavron, *Amnesties in Light of Developments in International Law and the Establishment of the International Criminal Court*, 51 *ICLQ* 91, 107 (2002) (amnesty seen as so controversial that compromise on a provision unlikely); Ruth Wedgwood, *The International Criminal Court: An American View* 10 *EJIL* 93, 95 (1999) (“Rome skirted the question of amnesties”).

in the Rome Statute that the failure to deal with amnesty was deliberate.”<sup>11</sup> In his view, the international community’s establishment of the ICC proves that it has “decided that justice, in the form of prosecution, must take priority over peace and national reconciliation.”<sup>12</sup> As a result, Dugard concludes that the “wisest course” in most circumstances will be for the ICC to take amnesty into account in mitigation of sentence, rather than as a barrier to ICC prosecution.<sup>13</sup> Because the ICC is “premissed on an aversion to impunity and accountability for the commission of international crimes,” it is argued that its integrity is best preserved by this stance.<sup>14</sup> Yet Dugard also notes that the statute has left the door open to recognizing some nonprosecutorial methods in extreme circumstances.<sup>15</sup> Critics of the failure of the statute to explicitly accommodate amnesties fear that the Prosecutor may “unwittingly wreck fragile agreements to hand-over power or where such arrangements have already been entered into, undermine the authority and credibility of the new democratic regime.”<sup>16</sup>

Many voices from Northern Uganda, for instance, have protested the ICC’s involvement for fear that it will destroy the prospects of a negotiated end to the conflict between the government and the rebel group, the Lord’s Resistance Army (LRA). Specifically, they protested that going forward with arrest warrants against the leaders of the LRA would be fatal to the ongoing Uganda-LRA peace negotiations; the OTP rejected such concerns.<sup>17</sup> Despite the issuance of the warrants, one provision of the proposed peace deal apparently substitutes nonprosecutorial alternatives such as a truth commission<sup>18</sup> and traditional tribal ceremonies for ICC or domestic criminal prosecution.<sup>19</sup>

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<sup>11</sup> Dugard, *supra* note 9, at 701.

<sup>12</sup> *Id.* at 702-03.

<sup>13</sup> *Id.* at 703.

<sup>14</sup> *Id.*

<sup>15</sup> *See id.* at 701 (ICC should take amnesty into account in mitigation of sentence rather than as a bar to prosecution, except in exceptional circumstances where amnesty is subject to judicial or quasi-judicial approval); *see also* Thomas Heth Clark, *The Prosecutor of the International Criminal Court, Amnesties, and the “Interests of Justice”*, 4 WASH. U. GLOBAL STUD. L. REV. 389 (2005) (contenting that while ICC appears to require prosecution, ambiguous provisions leave room for alternative justice schemes in narrow circumstances); Gavron, *supra* note 10, at 108 (although difficult, properly crafted amnesties can be respected by the ICC); Richard J. Goldstone & Nicole Fritz, “*In the Interests of Justice*” and *Independent Referral*, 13 LEIDEN J. INT’L L. 655 (2000) (statute is flexible enough that the prosecutor can defer to an individualized domestic amnesty process like South Africa); Robinson, *supra* note 10, at 481 (while ICC will generally insist on prosecution, alternative mechanisms might be recognized where the process advances accountability and is necessary under the circumstances); Michael P. Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court*, 32 CORNELL INT’L L. J. 507, 522 (1999) (statute does not preclude amnesty as a “bargaining chip” to end armed conflict); Carsten Stahn, *Complementarity, Amnesties and Alternative Forms of Justice*, 3 J. INT’L CRIM. JUST. 695, 708 (2005) (creative ambiguity in statute allows recognition of certain amnesties in exceptional circumstances).

<sup>16</sup> Goldstone & Fritz, *supra* note 15, at 660 (acknowledging fears of critics but countering that Rome Statute is flexible enough to avoid the problem). *But see* John M. Czarnetzky & Ronald J. Rychlak, *An Empire of Law?*, 79 NOTRE DAME L. REV. 55 (2003) (arguing that ICC follows purely legalistic model of justice, a fatal flaw that will lead to renewed conflict in transitional societies by prohibiting alternative means of justice such as truth commissions).

<sup>17</sup> *See* ICC, *Arrest warrants for Joseph Kony, Vincent Otti, Okot Odhiambo, Raska Lukwiya, Dominic Ongwen* at [http://www.icc-cpi.int/cases/UGD/c0105/c0105\\_docAll1.html](http://www.icc-cpi.int/cases/UGD/c0105/c0105_docAll1.html) [hereinafter *Arrest warrants*].

<sup>18</sup> In brief, a truth commission is typically an official investigation established for a limited period of time that looks into a past pattern of abuses. Priscilla B. Hayner’s ground-breaking study identifies five aims of

The Rome Statute might allow *sub rosa* recognition of such negotiated AJM in exceptional circumstances.<sup>20</sup> There are four major possibilities: (1) Security Council deferral (Article 16), requiring the ICC to suspend a prosecution as a threat to international peace; (2) inadmissibility (Article 17), interpreting the principle of complementarity such that the existence of negotiated AJM renders the case inadmissible; (3) *ne bis in idem* (Article 20), treating the AJM as a prior prosecution blocking subsequent ICC proceedings; and (4) prosecutorial discretion (Article 53), allowing the Prosecutor to decline to prosecute in the interests of justice.<sup>21</sup> This Part evaluates the applicability of each article to negotiated AJM in general. As the analysis will show, none of the provisions dictate deferral to AJM, but each might allow it.<sup>22</sup> Yet, as discussed in Part II, the Court and OTP should interpret the statute to allow deferral to local justice only if the AJM also further the standards of international criminal justice, including the underlying theories of retribution, deterrence, expressivism, and restorative justice.

### A. Security Council Request (Article 16)

First, a state that wishes to gain international recognition for a peace deal that replaces ICC prosecution with negotiated AJM may seek an Article 16 deferral. Under the Rome Statute, the Security Council can request that the Court refrain from, or suspend, an investigation or prosecution for twelve months.<sup>23</sup> This request is renewable. It must be enacted by the Council in a resolution “adopted under Chapter VII of the Charter of the United Nations,”<sup>24</sup> i.e., “Action With Respect to Threat to the Peace, Breaches of Peace, and Acts of Aggression.”<sup>25</sup> One commentator has indicated that it is “hard, if not impossible, to contemplate a situation in which refusal to recognize a national amnesty

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truth commissions: (1) clarify and acknowledge past abuses; (2) respond to victims’ needs; (3) further justice and accountability, short of prosecution; (4) investigate institutional responsibility and recommend reforms; and (5) promote peace and reconciliation. PRISCILLA B. HAYNER, *UNSPEAKABLE TRUTHS: FACING THE CHALLENGE OF TRUTH COMMISSIONS* 14, 23 (2002).

<sup>19</sup> Int’l Crisis Grp, *Northern Uganda: Seizing the Opportunity for Peace 5* (Africa Report No. 124, April 26, 2007) [hereinafter *Seizing Opportunity*] (describing apparent agreement to alternative justice mechanisms instead of ICC prosecution).

<sup>20</sup> For a proposal to add a protocol to the statute recognizing amnesties, see ANDREAS O’ SHEA, *AMNESTY FOR CRIME IN INTERNATIONAL LAW AND PRACTICE* (2002).

<sup>21</sup> Rome Statute, *supra* note 2; see also Dugard, *supra* note 9, at 701-02; Carsten Stahn, *Complementarity, Amnesties and Alternative Forms of Justice*, 3 J. INT’L CRIM. JUST. 695, 708 (2005) (also discussing amnesties or pardons under Article 12 and 21) [hereinafter, Stahn, *Complementarity*].

<sup>22</sup> See Newman, *supra* note 5, at 37 (discussing negative implications for ongoing conflict if ICC reads Rome Statute narrowly to reject amnesties).

<sup>23</sup> Rome Statute, *supra* note 2, art. 16 provides: “No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.”

<sup>24</sup> Rome Statute, *supra* note 2, art. 16.

<sup>25</sup> UN Charter, ch. VII.



could constitute a threat to international peace.”<sup>26</sup> Others, however, have argued that the deferral is a viable means to allow alternatives to ICC prosecution.<sup>27</sup>

An Article 16 deferral might be improper where it effectively endorses a breach of a state duty to prosecute international crimes. But while there appears to be a duty to prosecute certain crimes under treaty law, a broader duty based on customary law is questionable. Treaties such as the Genocide Convention, the Geneva Conventions, and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention) provide for a duty to prosecute certain crimes.<sup>28</sup> According to some commentators, state parties cannot grant amnesty for genocide, grave breaches, or torture without violating the respective treaty.<sup>29</sup> The scope of the duty under these treaties, however, does not encompass all international crimes as it excludes war crimes in internal armed conflicts and torture by nonstate actors.<sup>30</sup> For example, the ICC arrest warrants issued against LRA leaders do not charge genocide or grave breaches, but rather war crimes in internal armed conflict and crimes against humanity that are predicated on cruel or inhuman treatment.<sup>31</sup> Uganda has ratified, and has a duty to prosecute under, the Geneva Conventions,<sup>32</sup> the Genocide Convention, and the Torture Convention.<sup>33</sup> Thus, under treaty law, Uganda might have a duty to prosecute some of the crimes charged by the ICC, but not all. Nonetheless, Uganda might have a duty to prosecute all the charged crimes under customary international law.

A custom requiring prosecution of international crimes is emerging but not yet established. There is a general trend away from amnesties<sup>34</sup> and toward accountability. Yet it is disputed whether a firm duty to prosecute binds all states with regard to all international crimes.<sup>35</sup> The lack of state practice seems to preclude a general duty to

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<sup>26</sup> Dugard, *supra* note 9, at 701-02; *see also* Stahn, *Complementarity*, *supra* note 21, at 717 (Article 16 deferral unlikely).

<sup>27</sup> *See, e.g.*, Yasmin Naqvi, *Amnesty for War Crimes*, INT’L REV. OF RED CROSS 592 (Vol 85, No. 851, Sept. 2003) (inclusion of article acknowledges that prosecution might be threat); Robinson, *supra* note 10, at 481 (concluding Security Council might request deferral where “delicate non-prosecutorial truth and reconciliation process is underway”); Jennifer Llewellyn, *A Comment on the Complementarity Jurisdiction of the International Criminal Court*, 24 DALHOUSIE L. J. 192, 216 (2001) (arguing that state wishing to use truth commission process instead of prosecution could ask Security Council to at least temporarily mitigate threat of ICC prosecution).

<sup>28</sup> *See, e.g.*, Dugard, *supra* note 9, at 696.

<sup>29</sup> *Id.* at 697.

<sup>30</sup> *See, e.g.*, Charles P. Trumbull IV, *Giving Amnesties A Second Chance*, 25 BERKELEY J. INT’L L. 283, 291-93 (2007).

<sup>31</sup> ICC, *Arrest warrants* at [http://www.icc-cpi.int/cases/UGD/c0105/c0105\\_docAll1.html](http://www.icc-cpi.int/cases/UGD/c0105/c0105_docAll1.html). Other situations might involve charges of genocide, raising a higher expectation of prosecution.

<sup>32</sup> *See* ICRC Database, *Uganda – Ratifications* at <http://www.icrc.org/ihl.nsf/Pays?ReadForm&c=UG>.

<sup>33</sup> *See* UN Treaty Ratifications at <http://www.bayefsky.com/docs.php/area/ratif/state/179>.

<sup>34</sup> *See, e.g.*, Kristin Henrard, *The Viability of National Amnesties in View of the Increasing Recognition of Individual Criminal Responsibility at International Law*, 8 MSU-DCL J. Int’l L. 595, 646 (1999); Stahn, *Complementarity*, *supra* note 21, at 717 (citing Report of Secretary General).

<sup>35</sup> *Compare* Thomas Hethe Clark, *The Prosecutor of the International Criminal Court, Amnesties, and the “Interests of Justice”*, 4 WASH. U. GLOBAL STUD. L. REV. 389, 389-99 (2005) (asserting that all states must prosecute genocide and grave breaches under customary international law); Robinson, *supra* note 10, at 92 (concluding it is relatively clear that states must prosecute genocide, torture and grave breaches based on

prosecute international crimes.<sup>36</sup> Many states -- and the United Nations -- have either implemented or accepted (explicitly or implicitly) various forms of amnesty for international crimes.<sup>37</sup> Moreover, the prosecution of only the most responsible actors might be sufficient in some circumstances.<sup>38</sup> As a result, it is difficult to conclude that there is a customary duty to prosecute all international crimes. Although there may be an emerging norm requiring prosecution across the board for genocide, war crimes, and crimes against humanity, this assertion is still controversial.<sup>39</sup>

Even if there is a state duty to prosecute, it does not necessarily follow that the ICC must reject an Article 16 deferral request based on a state decision that breaches the duty to prosecute.<sup>40</sup> If an amnesty violates international law, the ICC might not be bound by a deferral request.<sup>41</sup> For example, the ICC might not have to defer where the amnesty covers genocide or grave breaches of the Geneva Conventions.<sup>42</sup> As a result, a state amnesty for such crimes would not require suspension of an investigation or prosecution regardless of a deferral request.<sup>43</sup> But a permissible amnesty (or a desire to avoid conflict with the Security Council) might prompt the ICC to honor an Article 16 deferral request based on a state amnesty. Similarly, an Article 16 deferral might aid countries wishing to use a truth commission process in lieu of prosecution at the ICC.<sup>44</sup>

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treaty and customary law); with John Dugard, *Dealing with Crimes of a Past Regime*, 12 LEIDEN J. OF INT'L L. 1001, 1003 (1999) (emerging duty to prosecute international crimes) [hereinafter Dugard, *Dealing with Crimes*]; O'SHEA, *supra* note 20, at 260 (customary duty does not extend to crimes against humanity); Newman, *supra* note 5, at 314 (no generalized duty to prosecute); Ronald C. Slye, *The Legitimacy of Amnesties under International Law and General Principles of Anglo-American Law*, 43 VA. J. INT'L L. 173, 191, 245 (2002) (contending that state duty for accountability can be met by legitimate amnesty process but excluding those most responsible).

<sup>36</sup> See, e.g., Dugard, *supra* note 9, at 698; Trumbull, *supra* note 30, at 295-99; but cf. O'SHEA, *supra* note 20, at 264 (characterizing state practice as exception to duty).

<sup>37</sup> See Dugard, *supra* note 9, at 698 (referring to successor governments' grant of amnesty to prior regime actors guilty of torture and crimes against humanity, as well as UN endorsement of amnesties such as South Africa's); O'SHEA, *supra* note 20 at 36-70 (discussing prior amnesties).

<sup>38</sup> Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L. J. 2537, 2595-98 (1991); Ronli Sifris, *What Level of Deference Can and Should the International Criminal Court Give to Local Amnesty Programs*, 1 AUSTR. J OF PEACE STUDIES 31, 36 (2006).

<sup>39</sup> Clark, *supra* note 35, at 400, n.55-60 (citing scholarly articles and opinions of human rights bodies); Naqvi, *supra* note 27, at 612 (discussing emerging duty relevant to various crimes); Robinson, *supra* note 10, at 492 (describing persuasive reasons to conclude a duty or emerging duty to prosecute genocide, war crimes and crimes against humanity); Charles Villa-Vicencio, *Why Perpetrators Should Not Always Be Prosecuted*,

<sup>49</sup> EMORY L.J. 205 (2000) (contending state can derogate from duty for truth commission or amnesty where certain criteria met).

<sup>40</sup> See, e.g., Michael P. Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court*, 32 CORNELL INT'L L. J. 507, 522 (1999) (arguing that the ICC should defer prosecution where alternative justice mechanisms are necessary and promote peace and justice).

<sup>41</sup> *Id.* at 523; see also Naqvi, *supra* note 27, at 594 (amnesty must comport with international law for deferral).

<sup>42</sup> Scharf, *supra* note 40, at 523-24 (describing international law requiring prosecution of genocide and grave breaches); see also Stahn, *Complementarity*, *supra* note 21, at 699 (noting Court dilemma over deference to request or reviewing request under international law).

<sup>43</sup> Cf. Gavron, *supra* note 10, at 108.

<sup>44</sup> Llewellyn, *supra* note 27, at 216 (referring to deferral as a "less obvious option" for preserving the ability of states to use truth commissions).



Because of its peace and security mandate, the Security Council might put a prosecution on hold to allow for the implementation of a peace deal. In doing so, however, it risks undermining the ICC and deterrence of human rights violations.<sup>45</sup> Another limiting aspect of the deferral power is its temporary nature: it is unlikely that accused international criminals will surrender based on a short-term guarantee of immunity. In sum, the Security Council should use its deferral power sparingly, only in circumstances where ICC investigation or prosecution fatally threatens a peace deal effecting international peace and security. Moreover, the ICC should not comply with the Security Council request unless it is compatible with the goals of international criminal justice, as discussed in Part II.

### **B. Inadmissibility (Article 17)**

If the Security Council does not request a deferral, the ICC might conclude that the use of negotiated AJM renders the case inadmissible under Article 17.<sup>46</sup> A case is inadmissible if it is being investigated, prosecuted, or has been investigated by a State with jurisdiction, “unless the State is unwilling or unable genuinely to carry out the investigation or prosecution. . . .”<sup>47</sup> Either a State with jurisdiction or the accused might challenge admissibility under Article 17, arguing that the ICC must defer to local justice. Alternatively, the OTP might decline to investigate or prosecute a situation because it is inadmissible under Article 17.<sup>48</sup> As the discussion will show, the ICC is unlikely to hold that negotiated AJM render the case inadmissible, but the statutory language is sufficiently ambiguous to allow such a determination.

The inadmissibility issue is intertwined with the principle of complementarity. Complementarity is the principle that the ICC supplements, but does not supplant, domestic criminal justice systems. If a State with jurisdiction is genuinely willing and able to handle the case in its domestic system, the ICC must defer. The complementarity principle is embodied in Article 17 as supplemented by Articles 18 and 19. Article 17 lays out substantive tests of admissibility, while Article 18 covers preliminary admissibility rulings and Article 19 covers subsequent admissibility determinations. The negotiated AJM might block ICC prosecution either at the time of the OTP’s initial inquiry under Article 18 or during the investigatory or prosecution stage.

First, Article 18 provides that the OTP must notify any State with jurisdiction of a pending investigation and give it an opportunity to displace the ICC. The State has a month to inform the ICC that it is investigating or has investigated certain persons related to the OTP’s investigation and request that the OTP suspend the inquiry. Absent special authorization by the Court, the OTP must defer to the State’s investigation. The OTP may

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<sup>45</sup> Int’l Crisis Grp, *Negotiating Peace and Justice: Considering Accountability and Deterrence in Peace Processes*, (Nuremberg, 26 June 2007) [hereinafter *Negotiating Peace and Justice*].

<sup>46</sup> See Robinson, *supra* note 10, at 499 (despite controversy over allowing truth commission to render case inadmissible, Article 17 left ambiguous to allow for narrow provision for deferral).

<sup>47</sup> Rome Statute, *supra* note 2, Art. 17 (1) (a).

<sup>48</sup> See *id.*, Art. 53 (prosecutorial suspension or termination of investigation or prosecution because case is inadmissible under Article 17).

then ask for updates regarding investigation and prosecution.<sup>49</sup> This implies that the OTP could subsequently challenge the State's assertion of jurisdiction where, for example, a self-imposed, self-serving amnesty results in little investigation and no prosecution.<sup>50</sup> On the other hand, the OTP might not challenge a conditional amnesty process<sup>51</sup> or other negotiated AJM. If there is no request for suspension by a relevant State within the one month time frame, the automatic deferral period ends.

Subsequent to the Article 18 time period, the target of the arrest warrant or a State with jurisdiction over the case may challenge Article 17 admissibility via Article 19. The OTP may also ask the Court to determine admissibility. The Court may also determine admissibility *sua sponte*. While the challenge is pending, the Court would suspend the investigation and presumably any prosecution, although the validity of any arrest warrant would not be affected. If the Court determines that the case is inadmissible, the OTP does not have to drop the case completely. The OTP may ask the Court to review the decision if new facts arise that negate the basis for inadmissibility.<sup>52</sup>

Where a State self-refers a situation on its own territory to the ICC, it appears that the situation is admissible regardless of complementarity concerns. That is, the referring State is presumed "unwilling" or "unable" to prosecute. As a matter of statutory interpretation, however, there is a controversy over whether inaction is sufficient to render a case admissible.<sup>53</sup> Although a full discussion of complementarity is beyond the scope of this essay, a brief identification of the competing interpretations is warranted. The OTP has stated: "There is no impediment to the admissibility of a case before the Court where no State has initiated any investigation."<sup>54</sup> In fact, in some cases "inaction by States is the appropriate course of action."<sup>55</sup> For example, in the wake of intra-state conflict, prosecution by the ICC might be seen as neutral and impartial, in contrast to prosecution by biased state organs.<sup>56</sup> According to the OTP, "[i]n such cases there will be no question of 'unwillingness' or 'inability' under article 17."<sup>57</sup> This interpretation is supported by the decision of the Pre-Trial Chamber to allow the arrest warrants to be issued in the self-referred Ugandan situation<sup>58</sup> and by other expert opinion,<sup>59</sup> although it is not universally accepted.<sup>60</sup>

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<sup>49</sup> *Id.* at Art. 18.

<sup>50</sup> See Goldstone & Fritz, *supra* note 15, at 661-62 (describing prosecutor's task as ascertaining propriety of amnesty process after deferral to state investigation).

<sup>51</sup> See *id.* at 661.

<sup>52</sup> Rome Statute, *supra* note 2, at Art. 19.

<sup>53</sup> See, e.g., Anita Frohlich, *Reconciling Peace with Justice*, 30 SUFFOLK TRANSNAT'L L. REV. 271, 299-300 (2007).

<sup>54</sup> ICC, Office of the Prosecutor, Paper on Some Policy Issues Before the Office of the Prosecutor 5 (Sept. 2003), at [http://www.icc-cpi.int/otp\\_policy.html](http://www.icc-cpi.int/otp_policy.html).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> See ICC, *Arrest warrants for Joseph Kony, Vincent Otti, Okot Odhiambo, Raska Lukwiya, Dominic Ongwen* at [http://www.icc-cpi.int/cases/UGD/c0105/c0105\\_docAll1.html](http://www.icc-cpi.int/cases/UGD/c0105/c0105_docAll1.html) [hereinafter *Arrest warrants*].

<sup>59</sup> See ICC, Xabier Agirre et al, *Informal Expert Paper on The Principle of Complementarity in Practice 7* (2003) at <http://www.icc-cpi.int/otp/complementarity.html> (noting that in inaction scenario there is no need

If state inaction does not suffice, the ICC might examine the provisions of Article 17. Similarly, if a referring State subsequently changes its position and challenges jurisdiction, as Uganda appears likely to do,<sup>61</sup> the ICC must examine Article 17 in its entirety. In addition, a State may assert jurisdiction where the situation on its territory was referred by another party, such as the Security Council. For example, the Security Council referred the situation in Darfur, Sudan, to the ICC; Sudan asserts that its domestic investigations and/or prosecutions render the case inadmissible.<sup>62</sup> This discussion focuses on nonprosecutorial alternatives, but much of its reasoning would apply to domestic prosecution, particularly regarding Article 17(2) and (3).

The ICC could interpret Article 17 very broadly to find that negotiated AJM constitute investigation, prosecution, or decision not to prosecute. Article 17(1) provides that a case is inadmissible where:

- (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
- (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

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to examine unwilling or unable because none of the alternatives under Article 17(1)(a-c) are satisfied). *See also* Payam Akhavan, *The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court*, 99 AM. J. INT'L L. 403, 414 (April 2005) ("An ordinary interpretation of Articles 17(1)(a) and (b) indicates that unwillingness or inability is relevant only when a state has investigated or prosecuted a case; when it has not done so, there is no express requirement of establishing unwillingness or inability as a precondition for the exercise of jurisdiction."); Mohamed M. El Zeidy, *The Ugandan Government Triggers the First Test of the Complementarity Principle*, 5 INT'L CRIM. L. REV. 83, 102-04 (2005) (arguing that inaction should render case admissible by implication, under a logical or liberal interpretation of the statute). This is not to say that state self-referrals should be routine, allowing states to abdicate their duty to prosecute international crimes. *See* ICC, Office of the Prosecutor, *Paper on Some Policy Issues Before the Office of the Prosecutor* 5 (Sept. 2003), at [http://www.icc-cpi.int/otp/otp\\_policy.html](http://www.icc-cpi.int/otp/otp_policy.html) (while there "may be" cases where inaction is appropriate, duty of states to exercise national criminal jurisdiction should be recalled); El Zeidy, *supra*, at 104-05 (state self-referral should be based on legitimate reason such as better due process rights at ICC and should be considered on a case-by-case basis to avoid overloading the ICC).

<sup>60</sup> *See* Manhoush H. Arsanjani & W. Michael Reisman, *The Law-in-Action of the International Criminal Court*, 99 AM. J. INT'L L. 385, 389-97 (2005) (criticizing voluntary referral via inaction of state that is not unwilling or unable to prosecute and concluding Uganda referral fails to satisfy threshold for admissibility under Article 17); William Schabas, *First Prosecutions at the International Criminal Court*, 27 HUM. RTS. L. J. 25, 27-29 (2006) (arguing that self-referral was never intended and Uganda should prosecute the LRA). *But see* Akhavan, *supra* note 59, at 413-15 (arguing even if unwilling/unable analysis were required, Uganda referral is admissible because Uganda is unwilling to prosecute in state court because of amnesty and fear of accusations of political taint and unable to prosecute because it cannot obtain the accused members of LRA).

<sup>61</sup> *See* Keller, *supra* note 3, at Part II. Hybrid or internationalized courts are not proposed in Uganda but might be elsewhere. *See* Carsten Stahn, *The Geometry of Transitional Justice*, 18 LEIDEN J OF INT'L L. 425, 463 (2005) (Article 17 and mixed courts) [hereinafter, Stahn, *Geometry*].

<sup>62</sup> *See, e.g.*, Elizabeth Rubin, *If Not Peace, then Justice*, N. Y. TIMES MAGAZINE (April 2, 2006).

- (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
- (d) The case is not of sufficient gravity to justify further action by the Court.<sup>63</sup>

With regard to Article 17(1) (a) and (b), it is possible that nonprosecutorial AJM could be considered an “investigation” or “prosecution.” For example, a truth commission might consider facts similar to the case before the ICC. Assuming a truth commission has the proper mandate, its process might qualify as an investigation.<sup>64</sup> It is more of a stretch to characterize a truth commission process or other AJM as “prosecution”; the term prosecution usually implies criminal responsibility and exposure to certain types of sanction, particularly incarceration. A traditional Ugandan practice like the *mato oput* reconciliation ceremony, for instance, entails compensation.<sup>65</sup> Compensation does not necessarily bring to mind criminal prosecution, but it might represent social condemnation like a prosecution. Moreover, not all prosecutions lead to incarceration, and there is no reason why prosecution must exclude processes leading to other types of punishment such as reparation.<sup>66</sup> On balance, while it seems that nonprosecutorial AJM would not fall under the ordinary understanding of investigation or prosecution, the Court could interpret the language broadly enough to encompass an investigatory truth commission or a traditional method like *mato oput*.<sup>67</sup>

Similarly, the statute could be interpreted to consider the failure of a State to criminally prosecute the accused as a decision to not prosecute following investigation through AJM.<sup>68</sup> But it might be difficult to characterize a truth commission or traditional ceremony as an investigation and decision not to prosecute where the AJM are adopted through peace negotiations.<sup>69</sup> If the peace deal has already taken prosecution off the table, the decision not to prosecute would not be the result of any investigation; while there

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<sup>63</sup> Rome Statute, *supra* note 2, at Art. 17(1).

<sup>64</sup> William W. Burke-White, *The International Criminal Court and the Future of Legal Accountability*, 10 ILSA J. INT'L & COMP. L. 195, 198 (2003) (truth commission might satisfy investigation); Llewellyn, *supra* note 27, at 203 (arguing that wording of Article 17 might encompass truth commission as “investigation” because there is no specific reference to police or criminal investigation); Stahn, *Complementarity*, *supra* note 21, at 711 (best interpretation of 17(1) includes truth commission investigations).

<sup>65</sup> *Roco Wat I Acoli: Restoring Relationships in Acholi-land: Traditional Approaches to Justice and Reintegration* 55 (Liu Institute for Global Issues, Sept. 2005); see generally Keller, *supra* note 3, at Part II.

<sup>66</sup> The civil law system’s frequent combination of compensation and criminal prosecution also illustrates the lack of strict separation between the two; see, e.g., MARK A. DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW 80-82 (2007); as does the ICC’s embrace of both incarceration and reparations.

<sup>67</sup> See Robinson, *supra* note 10, at 500 (investigation could include truth commission); Scharf, *supra* note 40, at 525 (while state could argue truth commission like that of South Africa constitutes genuine investigation, requirement of intent to bring person to justice might be interpreted to require criminal proceedings); Czarnetzky & Rychlak, *supra* note 16, at 96 n.147 (lead negotiator indicated truth commission might not constitute investigation).

<sup>68</sup> Cf. Cheah Wui Ling, *Forgiveness and Punishment in Post-Conflict Timor*, 10 UCLA J. Int'l L. & Foreign Aff. 297, 320 (2005).

<sup>69</sup> Dugard, *supra* note 9, at 702 (difficult to maintain interpretation of South African-style amnesty as a decision not to prosecute in light of unwillingness to prosecute).

might be a subsequent investigation through the AJM, the investigation is not the basis of the peace accord's pre-determination of nonprosecution. This is likely sufficient to prevent the negotiated AJM from rendering the case inadmissible.<sup>70</sup> It could be argued, however, that the decision not to prosecute is not finalized until the accused has cooperated with the AJM.<sup>71</sup> Yet if a lack of cooperation could lead to prosecution in exceptional cases, the presumption is nonprosecution, even if the AJM reveal heinous crimes. It is therefore possible but implausible to characterize negotiated nonprosecutorial AJM as investigation, prosecution, or decision not to prosecute.

If the Court chooses to interpret Article 17(1) (a) and (b) so that it can defer to local processes in the interests of peace, then the quality of the investigation, prosecution, or decision not to prosecute must be evaluated under Article 17(2) (unwilling to genuinely investigate or prosecute) and (3) (unable). Article 17(2) provides:

2. In order to determine *unwillingness* in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:
  - (a) The proceedings were or are being undertaken or the national decision was made for the *purpose of shielding* the person concerned from *criminal responsibility* for crimes within the jurisdiction of the Court referred to in article 5;
  - (b) There has been an *unjustified delay* in the proceedings which in the circumstances is *inconsistent with an intent to bring the person concerned to justice*;
  - (c) The proceedings were not or are not being conducted *independently or impartially*, and they were or are being conducted in a manner which, in the circumstances, is *inconsistent with an intent to bring the person concerned to justice*.<sup>72</sup>

A State that enters into a peace deal promising nonprosecutorial AJM is probably *unwilling* to investigate or prosecute genuinely.<sup>73</sup> The Court must consider three factors: (1) shielding of accused; (2) delay; and (3) intent to bring to justice.<sup>74</sup> First, in the peace versus justice scenario, the decision to use AJM seems to be for the precise purpose of

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<sup>70</sup> See, e.g., Fröhlich, *supra* note 53, at 309 (contending that wording of Article 17 implies a process where prosecution was a possibility).

<sup>71</sup> See Llewellyn, *supra* note 27, at 204.

<sup>72</sup> Rome Statute, *supra* note 2, Art 17(2) (emphasis added).

<sup>73</sup> See Llewellyn, *supra* note 27, at 204 (concluding that while amnesty and truth commission process might be viewed as barring prosecution, it is more likely that Court would assert jurisdiction given the baseline unwillingness to prosecute implicit in the offer of a conditional amnesty); Christine Van den Wyngaert and Tom Onega, *Ne bis in idem Principle, Including the Issue of Amnesty*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 726 (Antonio Casesse et al, eds, 2002) (“[n]ational amnesties that are meant to shield perpetrators of war crimes, genocide, and crimes against humanity would deserve the same treatment as ‘sham trials’” and would not preclude the ICC from considering the case under Article 17(1) or (2)); Robinson, *supra* note 10, at 499-502 (unlikely conditional amnesty or targeted prosecution would be considered genuine under Article 17).

<sup>74</sup> Due process standards are also required. See Stahn, *Complementarity*, *supra* note 21, at 714.

“shielding the person concerned from criminal responsibility.” Even if there is no blanket self-amnesty,<sup>75</sup> a peace deal that removes the possibility of what would commonly be considered as “criminal” responsibility thereby shields the accused. While a slight possibility of prosecution might exist due to refusal to undergo AJM, the default is nonprosecution and therefore shielding from criminal responsibility. On the other hand, “shielding” might require a bad faith motivation lacking in negotiated AJM.<sup>76</sup> Thus, although the ICC would likely consider the nonprosecutorial AJM to be improper shielding, it could conclude otherwise.

The second “unwillingness” factor of unjustified delay applies where a State drags out the process, rather than announcing that no prosecution will be forthcoming as in negotiated nonprosecutorial AJM. But if the delay in the “proceedings” were interpreted broadly enough to cover negotiated AJM, then the intent to bring to justice would be dispositive.<sup>77</sup>

The third “unwillingness” factor requires the Court to consider the independence or impartiality of the proceedings and the intent to bring the accused to justice. The independence or impartiality of the proceedings might relate to “sham” proceedings brought against an accused despite the fact that acquittal is a foregone conclusion because of state control.<sup>78</sup> The negotiated AJM might be independent or impartial to the extent that the mechanisms and those carrying them out, such as a truth commission and its commissioners, are fair and unbiased. But it seems that these procedures are inconsistent with an intent to bring the accused “to justice.” While there are various conceptions of “justice,” the meaning in this context seems relatively straightforward. “Bringing to justice” more likely means accountability through criminal prosecution and punishment than through restorative justice mechanisms such as a healing ceremony or ritual of forgiveness.<sup>79</sup> There is enough room for interpretation, however, that the Court or OTP could conclude otherwise.

In addition to determining unwillingness, the Court or OTP could determine that the State is *unable* to genuinely investigate, prosecute, or decide not to prosecute. Article 17(3) provides:

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<sup>75</sup> See, e.g., Robinson, *supra* note 10, at 497 (blanket amnesty would never satisfy Article 17).

<sup>76</sup> See Sifris, *supra* note 38, at 42; Stahn, *Complementarity*, *supra* note 21, at 715.

<sup>77</sup> Article 17(2)(b) requires unjustified delay inconsistent with the intent to bring to justice, while (c) also considers intent to bring to justice in the context of proceedings that are inadequately independent or impartial or otherwise inconsistent with an intent to bring the accused to justice.

<sup>78</sup> See Stahn, *Complementarity*, *supra* note 21, at 714. The distinction between this factor and the first factor might be that proceedings that shield a person are more likely to conclude prior to a trial, while proceedings inconsistent with the intent to bring the person to justice include a full-blown show trial.

<sup>79</sup> See Gavron, *supra* note 10, at 111 (concluding that “the term ‘to bring someone to justice’ is usually interpreted in a legal sense”); Llewellyn, *supra* note 27, at 207 (concluding that bringing person to justice will likely require criminal prosecution and probably punishment); Scharf, *supra* note 40, at 525 (requirement of intent to bring person to justice might be interpreted to require criminal proceedings); *but cf.* Slye, *supra* note 35 at 238 (accountable amnesties could bar prosecution).



In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.<sup>80</sup>

In a post-conflict situation, it is entirely possible that that judicial system has collapsed to such an extent that the State is unable to prosecute. Yet if this is true, it seems that a promise of nonprosecution would not weigh very heavily in peace negotiations. It may be more likely that enough of a system would exist or could be created to prosecute the most responsible accused, making nonprosecution an important bargaining chip in a peace deal. For instance, the Uganda-LRA peace deal is predicated on Uganda's agreement to forgo criminal prosecution for alternative measures, not unavailability of the judicial system. In the wake of the agreement, the judicial system, if anything, will improve. The peace deal would increase the ability of the State to obtain the accused, evidence, and testimony. Thus, in Uganda and most situations, the admissibility determination will likely hinge on the (un)willingness of the State to genuinely investigate, prosecute, or decline to prosecute.

Even if a State is unwilling or unable to genuinely investigate or prosecute, the case may be inadmissible under Article 17(1) due to prior prosecution or insufficient gravity. Article 17(1)(c) provides that a case is inadmissible under the principle of *ne bis in idem*, which will be discussed under Article 20 *infra*. Article 17(1)(d) provides that a case is inadmissible if it is not of sufficient gravity. It is unlikely that a challenge on the grounds of gravity would reach the Court.<sup>81</sup> Because of the OTP's limited resources, it is unlikely that a case would sweep too broadly, bringing in allegations of insufficiently grave crimes. It is more likely the OTP will be criticized for refusing to prosecute certain persons or incidents, rather than for going forward with investigations or prosecutions in the face of insufficiently grave crimes of genocide, war crimes or crimes against humanity. Indeed, the OTP has indicated it will focus on those most responsible for crimes. Its investigations to date have been criticized as too narrow.<sup>82</sup>

In sum, the Court or the OTP could choose to interpret Article 17 as encompassing certain types of alternative mechanisms that it deems sufficiently genuine. The Court or the OTP would have to strain to interpret Article 17 such that the negotiated AJM render the case inadmissible. They should not stretch the language of the statute so far unless the AJM meet the standards of international criminal justice, as discussed in the next Part.

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<sup>80</sup> Rome Statute, *supra* note 2.

<sup>81</sup> See Robert D. Sloane, *The Evolving 'Common Law' of Sentencing of the International Criminal Tribunal for Rwanda*, 5 J. INT'L CRIM. JUST. 713, 722 (2007) (gravity rarely significant criteria for international crimes).

<sup>82</sup> See, e.g., Human Rights Watch, *Second War Crimes Suspect to Face Justice in The Hague: Investigation Should Expand to Include Senior Officials in the Region* (New York, October 18, 2007) at [http://hrw.org/english/docs/2007/10/18/global17125\\_txt.htm](http://hrw.org/english/docs/2007/10/18/global17125_txt.htm).

### C. *Ne bis in idem* (Article 20)

The third possible avenue for deferral is Article 20, entitled “*Ne bis in idem*.”<sup>83</sup> “The principle of *ne bis in idem* precludes a person from being tried or punished twice for the same crime.”<sup>84</sup> Article 20 might be interpreted to include non-criminal proceedings such as those before a truth commission, but it is unlikely based on the language of the statute.<sup>85</sup> Article 20 first provides that neither the ICC nor another court can retry an accused for conduct already prosecuted in the ICC.<sup>86</sup> More significantly in the context of deferral to negotiated AJM, domestic prosecution may preclude proceedings at the ICC.

Specifically, with regard to an accused who has undergone proceedings in a different forum prior to the ICC, the statute provides in pertinent part:

3. No person who has been tried by another court for conduct also proscribed under Articles 6, 7 or 8 [genocide, war crimes, and crimes against humanity] shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

- (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
- (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.<sup>87</sup>

The first hurdle to applying this provision to non-criminal proceedings is the reference to another trial before another court. Although the ICC might decide that an amnesty granted after truth-telling before a quasi-judicial body such as in the South African truth and reconciliation process qualifies as a trial before a court,<sup>88</sup> it is unlikely.<sup>89</sup> Similarly, it is unlikely the ICC would equate a traditional proceeding like a tribal

<sup>83</sup> Rome Statute, *supra* note 2, Art. 20.

<sup>84</sup> M. Cherif Bassiouni, 1 THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT 160 (2005).

<sup>85</sup> See, e.g., Dugard, *supra* note 9, at 702; Naqvi *supra* note 27, at 590 (noting that negotiators rejected amnesty in this context).

<sup>86</sup> Rome Statute, *supra* note 2, Art. 20 (1) provides: “Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.” Article 20(2) extends this prohibition to other courts: “No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court.”

<sup>87</sup> *Id.* at Art. 20(3).

<sup>88</sup> See Dugard, *supra* note 9, at 702 (discussing requirement of investigation by quasi-judicial body prior to amnesty under South African Promotion of National Unity and Reconciliation Act).

<sup>89</sup> *Id.*; Gavron, *supra* note 10, at 109 (arguing Article 20 unlikely to refer to truth commission); Llewellyn, *supra* note 27, at 206 (even when considering individualized amnesty process such as South Africa’s, significant differences might make ICC unlikely to consider it as trial before a court); Newman, *supra* note 5, at 318 n.115 (truth commission not trial before another court); Scharf, *supra* note 40, at 525 (truth commission is not a court); Christine Van den Wyngaert and Tom Onega, *Ne bis in idem Principle, Including the Issue of Amnesty*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 726-27 (Antonio Casesse et al, eds, 2002) (asserting that national amnesties do not qualify as judgments and that it is unlikely that truth commission “trial” would qualify as a trial under Article 20).

ceremony (e.g., Uganda’s Acholi reconciliation ceremony known as *mato oput*)<sup>90</sup> with a trial by a court.

Even if a nonprosecutorial alternative is considered a trial by a court, the statutory exceptions will likely preclude the application of Article 20. The accused can still be tried by the ICC if the prior proceedings were designed to shield the person from criminal responsibility for crimes that fall under the statute. For example, conditional amnesty offered via a truth commission process might not have “shielding” as its paramount purpose, but it is an inherent result of the process.<sup>91</sup> In addition, the statute specifically refers to “criminal responsibility,” indicating that other forms of accountability are insufficient to bar prosecution by the ICC.

Moreover, it will be difficult for a nonprosecutorial alternative to avoid falling under the second exception: where the proceedings were not conducted under the norms of due process and were inconsistent with intent to bring the person to justice.<sup>92</sup> As noted in the context of Article 17,<sup>93</sup> the term “justice” might encompass restorative justice mechanisms but “bring to justice” seems to imply criminal responsibility.<sup>94</sup> This is particularly true in this context: for Article 20 to apply, the accused must have been previously “tried” by a “court.” Therefore an accused who benefited from amnesty or underwent noncriminal proceedings would probably be unsuccessful in challenging ICC jurisdiction under the principle of *ne bis in idem*. Nonetheless, the language of the article is sufficiently malleable that the Court or the OTP could rely on Article 20 to defer to negotiated AJM. As discussed in the next Part, it should do so only in limited circumstances.

#### D. Prosecutorial Discretion (Article 53)

According to many commentators, prosecutorial discretion is the most plausible avenue to accommodate negotiated AJM, such as amnesty and/or truth commissions.<sup>95</sup>

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<sup>90</sup> For an extensive discussion of the *mato oput* ceremony and an analysis of its compatibility with ICC prosecution, see Keller, *supra* note 3, at Parts II & III.

<sup>91</sup> Cf. Llewellyn, *supra* note 27, at 207 (recognizing argument that truth commission shields perpetrators is particularly true when dealing with self-amnesty as condition of peaceful transfer of power); *but see* Yav Katshung Joseph, *The Relationship between the International Criminal Court and Truth Commissions* at [http://www.iccnw.org/documents/InterestofJustice\\_JosephYav\\_May05.pdf](http://www.iccnw.org/documents/InterestofJustice_JosephYav_May05.pdf) or at <http://www.lawandsocietysummerinstitutes.org/workshop06/participants/joseph.htm> (goal of South African amnesty not to shield perpetrators but reconciliation based on truth-telling).

<sup>92</sup> See Dugard, *supra* note 9, at 702 (Article 20 argument difficult to sustain in light of requirement of trial by court in manner consistent with intent to bring to justice).

<sup>93</sup> See *supra* note 79 and accompanying text.

<sup>94</sup> See Naomi Roht-Arriaza, *Amnesty and the International Criminal Court*, in INTERNATIONAL CRIMES, PEACE AND HUMAN RIGHTS: THE ROLE OF THE INTERNATIONAL CRIMINAL COURT 79 (Dinah Shelton ed. 2000); Sifris, *supra* note 38, at 42; cf. Stahn, *Complementarity*, *supra* note 21, at 711, 716 (truth commission could satisfy bringing to justice only if it has power to recommend prosecution).

<sup>95</sup> See Dugard, *supra* note 9, at 702 (describing prosecutorial discretion as most plausible possibility for protecting a genuine amnesty); DRUMBL, *supra* note 66, at 142-43 (noting possible deferral to truth commissions or amnesties); Diba Majzub, *Peace or Justice? Amnesties and the International Criminal Court*, 3 MELB. J. INT’L L. 247 (2002) (most likely avenue); Robinson, *supra* note 10, at 486 (most likely

Under Article 53, the OTP can exercise discretion at the investigative or prosecution stage. First, it can decline to initiate an investigation in the interests of justice – even if there is a reasonable basis on the law and facts, and the case is admissible.<sup>96</sup> Second, it can decline to prosecute in the interests of justice after investigating a situation.<sup>97</sup>

Under Article 53(1), the OTP first must find a reasonable basis to proceed with an investigation.<sup>98</sup> The OTP must consider whether: (a) there is a reasonable basis for the existence of a crime(s) within the jurisdiction of the court; (b) the case is admissible under Article 17; and (c) “[t]aking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.”<sup>99</sup>

In the context of negotiated AJM in the aftermath of a brutal conflict, it is likely there would be a reasonable basis to investigate crimes of genocide, war crimes, or crimes against humanity. Article 53(b) refers to the Article 17 admissibility determination, which as discussed *supra*, is unlikely to apply in most negotiated AJM situations. As a result, the remaining “interest of justice” provision is most likely to be the focus of an OTP evaluation of negotiated AJM.<sup>100</sup> The Prosecutor has stated that calls to use his discretion for short term political goals are inconsistent with the Rome Statute,<sup>101</sup> indicating that the current OTP is unlikely to use Article 53(1) to defer to nonprosecutorial AJM for those most responsible for international crimes. In fact, the OTP rejected claims that prosecution of leaders of the LRA would not be in the interests of justice for the people of Northern Uganda.<sup>102</sup> Even so, the “interests of justice” principle should be considered. It is incorporated here in conjunction with the overlapping provisions of Article 53(2).

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point to defer to non-prosecutorial measures); Van den Wyngaert & Onega, *supra* note 89, at 726-27 (concluding that prosecutor’s assessment of interests of justice under Article 53, not Article 20, provides means of accommodating amnesty or truth commission). *But see* Int’l Crisis Grp, *Negotiating Peace and Justice*, *supra* note 45 (Prosecutor’s justice mandate should not include political judgment better left to Security Council); Alexander K.A. Greenawalt, *Justice without Politics? Prosecutorial Discretion and the International Criminal Court*, 39 N.Y.U. J. INT’L L. & POL. 583, 660 (2007) (same); Llewellyn, *supra* note 27, at 217 (deeming prosecutorial discretion cold comfort for states seeking to use truth commissions given the uncertainty that justice will be interpreted broadly enough to cover such an alternative process); Hector Olasolo, *The Prosecutor of the ICC before the Initiation of Investigations: A Quasi-judicial or a Political Body?*, 3 INT’L CRIM. L. REV. 87, 147 (2003) (policy choices should be made by legislators not OTP); Stahn, *Complementarity*, *supra* note 21, at 719 (Article 53 overrated in relevance).

<sup>96</sup> Rome Statute, *supra* note 2, Art. 53 (1).

<sup>97</sup> *Id.* at Art. 53 (2).

<sup>98</sup> *See, e.g.*, ICC Press Release, *Prosecutor of the International Criminal Court Opens an Investigation into Northern Uganda* (July 29, 2004), available at <http://www.icc-cpi.int/press/pressreleases.html>.

<sup>99</sup> Rome Statute, *supra* note 2, Art. 53 (1) (a – c).

<sup>100</sup> *See generally*, ALLEN, *supra* note 4, at 93, 176.

<sup>101</sup> ICC OTP Address by Mr. Luis Moreno-Ocampo, *Nuremberg, 24/25 June 2007, Building a Future on Peace and Justice*.

<sup>102</sup> ALLEN, *supra* note 4, at 116-117 (noting that ICC investigation brought LRA to peace negotiations); Int’l Crisis Grp, *Northern Uganda: Seizing the Opportunity for Peace* 5 (Africa Report No. 124, April 26, 2007) [hereinafter *Seizing Opportunity*] (discussing protests over arrest warrants).

After finding that an investigation should go forward, the OTP can nonetheless decline to *prosecute* based on the interests of justice. Article 53(2) provides that the OTP can conclude that there is not a sufficient basis for prosecution because:

- (a) There is not a sufficient legal or factual basis to seek a warrant or summons under article 58;
- (b) The case is inadmissible under article 17; or
- (c) A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime;<sup>103</sup>

If so, the OTP must notify the Court and the referring party (the State or Security Council).<sup>104</sup>

As with Article 53(1), the first factor is unlikely to be applicable. While under Article 53(2)(a), the OTP will not go forward if there is an inadequate legal or factual basis, it is more likely the negotiated AJM will arise in situations involving those responsible for ICC crimes. Again, the Article 17 determination was discussed above. Even where the OTP has found a sufficient legal/factual basis and admissibility, it may decline to prosecute under Article 53(2)(c).

Where the OTP declines to prosecute based on the interests of justice, the State making the referral can request that the Pre-Trial Chamber review the decision. The Chamber may also review *sua sponte*, and the OTP's decision will be effective only if confirmed by the Pre-Trial Chamber.<sup>105</sup> The OTP may reconsider the decision based on new facts or information.<sup>106</sup> It determines whether prosecution would serve the interests of justice based on specified criteria.<sup>107</sup> Three factors relate to the perpetrator: (1) gravity of the crime the perpetrator allegedly committed; (2) age or infirmity of the alleged perpetrator; and (3) his or her role in the crime.<sup>108</sup> Additional factors include: (4) interests of the victims; and (5) all other circumstances.<sup>109</sup>

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<sup>103</sup> Rome Statute, *supra* note 2, Art. 53(2) (a-c).

<sup>104</sup> *Id.* at Art. 53(2).

<sup>105</sup> Art. 53(3)(a - b) provides:

3. (a) At the request of the State making a referral under article 14 or the Security Council under article 13, paragraph (b), the Pre-Trial Chamber may review a decision of the Prosecutor under paragraph 1 or 2 not to proceed and may request the Prosecutor to reconsider that decision.

(b) In addition, the Pre-Trial Chamber may, on its own initiative, review a decision of the Prosecutor not to proceed if it is based solely on paragraph 1 (c) or 2 (c). In such a case, the decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber.

<sup>106</sup> *Id.* at Art. 53(4).

<sup>107</sup> *Id.* at Art. 53(2)(c).

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

<sup>109</sup> *Id.*

Based on “the interests of justice,” the OTP could forego prosecution in deference to a state’s conditional amnesty and truth commission.<sup>110</sup> The phrase “interests of justice,” however, is so vague as to allow multiple meanings.<sup>111</sup> For example, according to the American Non-Governmental Organizations Coalition for the ICC, the prosecutor should suspend an investigation, but reopen it “once certain stability in a peace agreement is reached or other political problems are eliminated.”<sup>112</sup> Other commentators have asserted that “justice” must *not* include a situation where the ICC threatens the existence of a transitional democratic government.<sup>113</sup> Yet, there is no justice where the perpetrators retain such power and resources as compared to the state that deferral by the ICC means that the criminal receives *de facto* impunity from domestic prosecution.<sup>114</sup> There is arguably no justice where the criminals, particularly those most responsible, go free as a result of a peace deal.

Furthermore, the OTP might never have the discretion to defer to AJM for cases involving genocide or grave breaches in light of the status of international law regarding duty to prosecute.<sup>115</sup> Even if the duty of states to prosecute these crimes is not binding on the ICC, it should weigh against a declination in the interests of justice.<sup>116</sup> Similarly, given the “emerging rule of international law” requiring prosecution of international crimes, the OTP *should* exercise this discretion only in exceptional cases.<sup>117</sup>

For example, the OTP has determined that the peace versus justice issue in Uganda does not constitute such an exceptional circumstance. The current prosecutor has characterized the LRA demands to drop ICC warrants as blackmail and extortion.<sup>118</sup> He

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<sup>110</sup> Dugard, *supra* note 9, at 703 (referring to aspects of Guatemalan and South African alternative justice procedures). *See also* Clark, *supra* note 35, at 390 (2005) (noting that due to prosecutorial discretion, “amnesty-granting programs and alternative justice schemes remain possible, even in situations where there would otherwise appear to be an obligation on the ICC to prosecute criminally”); Declan Roche, *Truth Commissions, Amnesties and the International Criminal Court*, 45 BRIT. J. CRIMINOLOGY 565, 569 (2005) (Article 53 deferral for amnesties that pursue restorative justice). *But see* Stahn, *Complementarity*, *supra* note 21, at 718 (doubting Article 53 justice includes interests of reconciliation or peacemaking, particularly in light of Article 21).

<sup>111</sup> O’ SHEA, *supra* note 20, at 317. *See also* Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT’L L. 510, 543-45 (2003) (proposing guidelines to give meaning to phrase interests of justice) [hereinafter, Danner, *Enhancing Legitimacy*]; Mireille Delmas-Marty, *Interactions between National and International Criminal Law in the Preliminary Phase of Trial at the ICC*, 4 J. INT’L CRIM. J. 2 (2006) (same); Chris Gallavin, *Article 53 of the Rome Statute of the International Criminal Court: In the Interests of Justice?*, 14.2 KING’S COLLEGE L. J. 179 (2003) (same).

<sup>112</sup> John Washburn and Wasana Punyasena, *Interests of Justice Proposals* (AMICC May 2005), at [http://iccnow.org/buildingthecourtnew/issues\\_campaigns.html](http://iccnow.org/buildingthecourtnew/issues_campaigns.html).

<sup>113</sup> Goldstone & Fritz, *supra* note 15, at 662 (“Nor would it be just were the enforcement of prosecution and punishment to evoke dissent sufficiently strong to threaten the existence of a nascent democracy.”).

<sup>114</sup> *Id.* at 662.

<sup>115</sup> *See* Clark, *supra* note 35, at 402 (contending OTP can defer to national alternative proceedings but should not do so for genocide or grave breaches of the Geneva Conventions); Dugard, *supra* note 9, at 703 (asserting that OTP will not defer to amnesty for genocide or grave breaches of the Geneva Conventions).

<sup>116</sup> Gavron, *supra* note 10, at 108.

<sup>117</sup> Dugard, *supra* note 9, at 703.

<sup>118</sup> *See supra* note 1; *see also* Human Rights Watch, *The Meaning of “The Interests of Justice” in Article 53 of the Rome Statute* (Policy Paper, June 2005) at <http://hrw.org/campaigns/icc/docs/ij070505.pdf> (arguing



has stated that the ICC prosecution of crimes in Northern Uganda should go forward for the leaders of the LRA, with lesser perpetrators dealt with via Ugandan measures.<sup>119</sup> Thus, it is unlikely that the “interests of justice” determination would be used to defer to negotiated AJM such as the truth commission or traditional ceremonies proposed in Uganda.

It should be noted that some commentators have argued that the OTP should have declined to seek arrest warrants based on the interests of justice in light of the Uganda-LRA peace negotiations. The main argument is that the interests of victims to peace and security outweigh the need to prosecute.<sup>120</sup> While this is a powerful argument, it is all too easy to oversimplify the desires of the victims for peace over justice. In Uganda, for instance, the interests of the victims are divided, with some favoring peace via amnesty, others demanding justice in the form of prosecution, and still others calling for amnesty followed by prosecution of the leaders.<sup>121</sup> Moreover, the term “victims” could be interpreted in many ways, from direct victims of violence to everyone, given that ICC crimes are considered crimes against the international community. Even if the interests of victims and the need for a negotiated peace might weigh toward declination of prosecution, there are other factors to consider. Given the OTP’s focus on those most responsible for crimes, the factors related to the perpetrator do not generally lean in the favor of declination. Moreover, a determination that the prosecution would not be in the interests of justice because it is prohibitively harmful requires speculation and undermines deterrence.<sup>122</sup> In some circumstances, where the state judiciary is functional but apparently corrupt or biased, it might serve the interests of justice for the case to be prosecuted at the ICC.<sup>123</sup> Nonetheless, the interests of justice is a broad concept capable of various interpretations including those which would support deferral to nonprosecutorial AJM. The OTP, however, should not defer unless deferral furthers both peace and international criminal justice, as discussed in the next Part.

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that interests of victims in peace is unrelated to justice interests of ICC). *But see* ALLEN, *supra* note 4, at 93 (Prosecutor reportedly indicated that suspension of prosecution but not immunity might be possible after peace deal).

<sup>119</sup> ICC, *Address by Mr. Luis Moreno-Ocampo, Nuremberg, 24/25 June 2007, Building a Future on Peace and Justice* at [http://www.icc-cpi.int/library/organs/otp/speeches/LMO\\_nuremberg\\_20070625\\_English.pdf](http://www.icc-cpi.int/library/organs/otp/speeches/LMO_nuremberg_20070625_English.pdf).

<sup>120</sup> *See, e.g.*, Refugee Law Project, *ICC Statement* (July 28, 2004). *But see* Human Rights Watch, *The Meaning of “The Interests of Justice” in Article 53 of the Rome Statute* (Policy Paper, June 2005) at <http://hrw.org/campaigns/icc/docs/ij070505.pdf> (arguing that it would be contrary to object and purpose of ICC for OTP to suspend prosecution under Article 53 due to national amnesty, truth commission or traditional reconciliation methods).

<sup>121</sup> *See Forgotten Voices: A Population-Based Survey on Attitudes about Peace and Justice in Northern Uganda* 1 (ICTJ & Hum. Rts. Ctr., July 2005) [hereinafter *Forgotten Voices*]; *see also* United Nations High Commissioner for Human Rights, *Making Peace Our Own: Victims’ Perceptions of Accountability, Reconciliation and Transitional Justice in Northern Uganda* 49 (UN 2007) at [http://www.ohchr.org/english/docs/northern\\_Uganda\\_august2007.pdf](http://www.ohchr.org/english/docs/northern_Uganda_august2007.pdf) (discussing more recent mixed views within Northern Uganda) [hereinafter *Making Peace*].

<sup>122</sup> Gavron, *supra* note 10, at 110 (while prosecution that might increase violence might not be in interests of justice, “this involves speculating about future events and has the unattractive corollary of turning the deterrence argument on its head”).

<sup>123</sup> *See, e.g.*, El Zeidy, *supra* note 59, at 111-17 (concluding that ICC is better venue due to Ugandan police corruption, weak judicial independence, and inadequate resources).

## II. Guidelines for Deferral to Nonprosecutorial Alternatives

### A. General Framework

The ICC, in the form of the Court or the OTP, needs guidelines for deference to AJM beyond the ambiguous statutory language discussed above. This essay proposes that the ICC should not defer to a domestic nonprosecutorial alternative simply because it furthers peace, however desirable this outcome may be. The AJM must *also* advance the goals of international criminal justice and, in particular, those of the ICC.<sup>124</sup> This Part discusses the most common theoretical bases for international criminal law and proposes criteria for evaluating AJM. There is general agreement that the purpose or mandate of the ICC, at least in theory,<sup>125</sup> includes retribution, deterrence, expressivism,<sup>126</sup> and restorative justice, especially reconciliation.<sup>127</sup> There is also much agreement on the factors to be considered in assessing the validity of AJM such as an amnesty or truth commission. This Part synthesizes the commonly offered factors and situates them within the most pertinent theories of the goals of international criminal law. It then applies these criteria to a frequently-lauded nonprosecutorial alternative, the truth commission. The framework proposed here also offers guidelines that would be applicable to other negotiated AJM such as the traditional reconciliation ceremonies proposed in the Uganda-LRA peace negotiations.<sup>128</sup>

This Part aims to advance the debate over ICC deferral to local justice by combining theory and specific factors to assess validity. By placing previously proposed factors for proper AJM within the justificatory theory that the factor most strongly advances, it attempts to isolate the goals of the ICC and to offer concrete criteria for advancing those goals through deference to AJM. Of course, the theoretical bases for the goals of the ICC overlap,<sup>129</sup> and some of the requirements of proper AJM relate to more than one theory. This Part will cabin the factors to some extent but recognizes that many of the interests of one theory are also concerns of the others. It intends to continue the discussion of solutions for the peace versus justice dilemma, rather than offer the definitive solution through this rubric.

The ICC should not defer solely on the ground that deferral would further peace. Although this is a crucial consideration, the ICC was created with a core prosecutorial

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<sup>124</sup> Cf. Blumenson, *supra* note 5, at 871 (ICC obligation to do justice can give way in certain circumstances, but must mitigate injustice).

<sup>125</sup> As discussed below, there is significant skepticism over international criminal justice's ability to advance these theories in reality.

<sup>126</sup> See, e.g., DRUMBL, *supra* note 66, at 149.

<sup>127</sup> See, e.g., Danner, *Enhancing Legitimacy*, *supra* note 111, at 531 (reconciliation and retribution as ICC mandates); Ralph Henham, *The Philosophical Foundations of International Sentencing*, 1 J. INT'L CRIM. JUST. 64, 80 (2003) (restorative justice and ICC); but cf. DRUMBL, *supra* note 66, at 150 (noting that reconciliation is a laudable objective but one only given rhetorical attention by international tribunals).

<sup>128</sup> See Keller, *supra* note 3 at Part II (describing *mato oput* process).

<sup>129</sup> See, e.g., DRUMBL, *supra* note 66, at 149 (stressing that retribution, deterrence and expressivism are not mutually exclusive).

mandate aimed at ending impunity.<sup>130</sup> It should not defer to nonprosecutorial methods that undercut its *raison d'être* unless the alternative methods can achieve similar aims. The ICC should not judge AJM in a vacuum, attempting to decide whether they are good or bad on the face of it. Rather the ICC should assess them on grounds that fall within its competence, namely, the purported theoretical foundations of international criminal justice.

It should be noted that much of the prior work on amnesties and truth commissions has concluded that certain international crimes must be excluded, based on the state duty to prosecute. Specifically, scholars argue that AJM must not cover those most responsible for crimes of genocide and war crimes in the form of grave breaches, sometimes even all forms of war crimes as well as crimes against humanity.<sup>131</sup> This guideline is not followed here, as it is unrealistic to expect those negotiating an end to a conflict to agree to prosecution for those most responsible for international crimes. Although the idea of ending impunity for the leaders while allowing AJM for lesser perpetrators is attractive, it is often impracticable. For example, it would be of little help for the OTP to repeat its offer to defer to AJM for lesser offenders from the LRA while prosecuting those already named in the warrants because those leaders would never agree to such a deal when they maintain the capability to inflict massive civilian casualties.<sup>132</sup> It is likely that this peace deal dilemma will re-occur in the future, particularly where ICC situations involve ongoing conflict.<sup>133</sup> Therefore, the analysis below draws on the literature's proposed factors for assessing legitimate AJM for all ICC crimes.

The negotiated AJM must be evaluated based on a two-part inquiry: first, whether the AJM meet the threshold requirement of necessity and legitimacy, and second, whether the AJM further the goals of international criminal justice. The threshold test posits that if the proposal to use AJM instead of national or international prosecution is not required by the circumstances or is adopted in bad faith like a blanket self-amnesty, then the ICC should not defer. If replacing prosecution with AJM *is* necessary, then the ICC should consider whether the proposed AJM are also legitimate in terms of popular support. If the negotiated AJM are necessary and legitimate, the ICC should then evaluate whether and to what extent the AJM would further four key theories of international criminal justice underlying the establishment of the ICC: retribution, deterrence, expressivism, and/or restorative justice.<sup>134</sup>

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<sup>130</sup> See, e.g., Blumenson, *supra* note 66, at 819 (institutional objectives of ICC include maintaining legitimacy by going forward with prosecution).

<sup>131</sup> Slye, *supra* note 35, at 245 (no amnesty for those most responsible for war crimes, crimes against humanity or other serious violations of law); William Burke-White, *Reframing Impunity*, 42 Harv. Int'l L. J. 467, 479 (2001) (no amnesty for genocide, grave breaches of the Geneva Conventions, crimes against humanity or torture); Stahn, *Complementarity*, *supra* note 21, at 702, 706 (no recognition of amnesty for genocide or grave breaches or for most responsible).

<sup>132</sup> Louise Parrott, *The Role of the International Criminal Court in Uganda*, 1 AUSTRL. J OF PEACE STUDIES 8, 26 (2006); cf. Sifris, *supra* note 38, at 48 (noting unlikelihood that person in power would negotiate peace if prosecution likely to follow).

<sup>133</sup> See, e.g., Newman, *supra* note 5, at 342.

<sup>134</sup> *Accord Scharf*, *supra* note 40, at 512 (alternative mechanisms encompass prevention, deterrence, punishment and rehabilitation); cf. Miriam J. Aukerman, *Extraordinary Evil, Ordinary Crime*, 15 HARV.

Although there might be other purposes of the ICC,<sup>135</sup> or purposes more readily achieved in practice, these four theoretical bases provide a starting point for crafting a rubric to evaluate whether the ICC should defer.<sup>136</sup> Specifically, they provide a basic framework for exploring the possible mechanisms for deference described above: (1) whether the Court should defer to a potential Security Council request to suspend prosecution under Article 16; (2) whether the ICC should interpret Article 17 broadly enough that a truth commission or traditional process renders the case inadmissible; (3) whether the ICC should interpret Article 20 such that a truth commission or traditional process blocks jurisdiction under the principle of *ne bis in idem*; and (4) whether the OTP should exercise its discretion to decline to prosecute in light of local justice under Article 53. The presumption is for prosecution,<sup>137</sup> but if deferral to negotiated nonprosecutorial AJM can further both peace and the purposes of the ICC, the Court and/or OTP should make an exception in rare circumstances.

## B. Threshold Inquiry

The threshold requirement is twofold: necessity and legitimacy of the AJM.<sup>138</sup> The ICC should not defer to negotiated AJM unless the state's agreement to use AJM instead of prosecution is based on necessity.<sup>139</sup> In short, AJM are necessary in a situation if insistence on accountability measures such as prosecution would end any real chance for peace. As discussed above, there is a state duty to prosecute some or all international crimes. Moreover, there is a trend toward prosecutions for international crimes.<sup>140</sup> Yet, as illustrated by the Ugandan situation, the replacement of ICC prosecution with AJM may be the "make or break" provision in a peace deal. Where the state's agreement to forego national or ICC prosecution seems like a last resort measure necessary to secure the peace, the negotiated AJM meets the first threshold requirement.

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HUM. RTS. J. 39, 94 (2002) (describing how goals of retribution and deterrence favor prosecution while other goals may favor alternative mechanisms in some societies).

<sup>135</sup> See, e.g., Danner, *Enhancing Legitimacy*, *supra* note 111, at 543 n.274 (goals of international prosecutions include truth-telling, punishment, healing victims, rule of law and reconciliation); DRUMBL, *supra* note 66, at 62 (rehabilitation important for child soldiers but incapacitation not seen as central goal); Steven Glickman, *Victims' Justice*, 43 COLUM. J. TRANSNAT'L L. 229, 238 (2004) (six theories including rehabilitation, restitution and rule of law); J. Alex Little, *Balancing Accountability and Victim Autonomy at the International Criminal Court*, 38 GEO. J. INT'L L. 363, 368 (2007) (accountability versus victim autonomy).

<sup>136</sup> Cf. Newman, *supra* note 5, at 354 (calling for theoretical and empirical basis for ICC deferral to amnesties).

<sup>137</sup> See generally LEILA NADYA SADAT, *THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW* 47 (2002).

<sup>138</sup> Another threshold requirement might be ratification status: a state that has ratified the statute might be held to higher standards regarding nonprosecution. See, e.g., Stahn, *Complementarity*, *supra* note 21, at 707.

<sup>139</sup> See Majzub, *supra* note 95, at 276 (avoiding resumption of conflict); Naqvi, *supra* note 27, at 617 (proposing "but for" test); O'SHEA, *supra* note 20, at 85 (amnesty inappropriate unless it is price for peace); Robinson, *supra* note 10, at 497 (necessity based on "irresistible social, economic or political realities"); Scharf, *supra* note 40, at 512 (amnesty as "bargaining tool of last resort").

<sup>140</sup> See Kimberly Hanlon, *Comment: Peace or Justice: Now that Peace is Being Negotiated in Uganda, Will the ICC Still Pursue Justice?*, 14 TULSA J. COMP. & INT'L L. 295, 320 (2007) (UN and EU support for prosecution of Kony).

In addition, the agreement must be legitimate.<sup>141</sup> It must be created by a democratic government or international body, rather than an autocratic government intent on covering up its own international crimes.<sup>142</sup> Its formation and practice must represent the people<sup>143</sup> and adhere to a principle of non-discrimination.<sup>144</sup> It must draw on the input and participation of a broad spectrum of the public, without excluding on the basis of gender, religion, or tribe.<sup>145</sup>

For example, despite Uganda's relatively authoritarian government,<sup>146</sup> it does not seem that the government is adopting AJM to protect itself, unlike, for instance, Idi Amin's establishment of a truth commission in 1970s Uganda.<sup>147</sup> Moreover, although opinion in Uganda is not monolithic, it seems most would support the peace deal. In particular, the use of AJM was initially proposed by Northern Ugandan activists, not the government. In Uganda, therefore, the peace agreement's inclusion of AJM probably stems from the necessity of circumstances and is more likely legitimate than not.<sup>148</sup> Once the ICC determines that the negotiated AJM meet the threshold requirements, the ICC should consider the theoretical bases of international criminal justice.

### C. Advancement of International Criminal Justice

The ICC is apparently predicated on retribution, deterrence, expressivism, and restorative justice.<sup>149</sup> These theories are the most commonly cited underpinnings of international criminal justice despite skepticism about the ability of international criminal tribunals to actually achieve these goals. Mark Drumbl, for example, has shown the limited efficacy of retribution, deterrence, and expressivism in prosecutorial and sentencing practices of previous international tribunals.<sup>150</sup> Others have also criticized international criminal tribunals because they rarely serve retribution or deterrence better

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<sup>141</sup> Cf. DRUMBL, *supra* note 66, at 190 (guidelines for qualified deference to local justice include good faith and democratic legitimacy).

<sup>142</sup> Dugard, *Dealing with Crimes*, *supra* note 35, at 1012 (democratic regime); Goldstone & Fritz, *supra* note 16, at 659 (democratic decision-making); Clark, *supra* note 35, at 409 (same); Naqvi, *supra* note 27, at 620 (legitimate means); O'SHEA, *supra* note 20, at 333 (democratically elected government); Slye, *supra* note 35, at 245 (accountable amnesty should be democratic in its creation); Trumbull, *supra* note 30, at 322 (same); Robinson, *supra* note 10, at 497 (democratic will); Roche, *supra* note 110, at 575 (ideally created by democratic body or referendum); Stahn, *Complimentary*, *supra* note 21, at 707 (presumption against self-amnesties).

<sup>143</sup> See Burke-White, *Reframing Impunity*, *supra* note 131, at 472 (legitimacy of amnesty dependent on creation by liberal government and representative process/application).

<sup>144</sup> See Stahn, *Geometry*, *supra* note 61, at 435; Roche, *supra* note 110, at 575-76.

<sup>145</sup> See Dugard, *Dealing with Crimes*, *supra* note 35, at 1012 (representative body); Villa Vicencio, *supra* note 39, at 210 (2000) (need transparency and support of majority of citizens for policy).

<sup>146</sup> See Keller, *supra* note 3 at Part IV.

<sup>147</sup> See HAYNER, *supra* note 18, at 51-52 (describing ineffective and forgotten 1974 Ugandan truth commission).

<sup>148</sup> For a more detailed discussion, see Keller, *supra* note 3, at Part IV.

<sup>149</sup> See, e.g., DRUMBL, *supra* note 66, at 149 (theoretical underpinnings of ICC include retribution, deterrence and expressivism); Danner, *Enhancing Legitimacy*, *supra* note 111, at 531 (reconciliation and retribution as ICC mandates); Ralph Henham, *The Philosophical Foundations of International Sentencing*, 1 J. INT'L CRIM. JUST. 64, 80 (2003) (restorative justice and ICC).

<sup>150</sup> DRUMBL, *supra* note 66, at 149.



than local justice.<sup>151</sup> As a result, this analysis will not look solely at whether AJM advance the theory. It will evaluate whether AJM further the goals of international criminal justice as well, or as poorly, as ICC prosecution would likely do. Specifically, for each goal of international criminal law, the ICC should consider certain factors. If the negotiated AJM meet most of the enumerated factors to a significant extent, or at least to the same extent as ICC prosecution, then the AJM further this theory -- and the ICC should defer.

This section will examine each of the four theories separately, briefly explaining each theory and how it relates to international criminal justice. It will outline the commonly discussed factors for proper AJM as those factors relate to each theory of international criminal law.<sup>152</sup> The factors will not add up to a model example of the theory, and they might not be a perfect match. The combination of the factors and theory nonetheless offers the ICC guidance in evaluating whether to defer to the negotiated AJM. This section will briefly evaluate how the criteria might apply to a truth commission as one example of negotiated AJM. Similar considerations would apply to other alternatives.<sup>153</sup>

### 1. Retribution

The Preamble of the Rome Statute affirms that “the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and enhancing international cooperation.”<sup>154</sup> The emphasis on prosecution is taken to be retributive.

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<sup>151</sup> See, e.g., Diane Marie Amann, *Group Mentality, Expressivism, and Genocide*, 2 INT'L CRIM. L. REV. 93, 116 (2002) (pointing out that selectivity and randomness undermine international enforcement); Mirko Bagaric and John Morss, *International Sentencing Law*, 6 INT'L CRIM. L. REV. 191, 191 (2006) (contending that general deterrence marginally justifies international criminal sentencing while reconciliation, retribution, rehabilitation fail); Immi Tallgren, *The Sensibility and Sense of International Criminal Law*, 13 EUR. J. INT'L L. 561, 590-94 (2002) (questioning retribution and deterrence); Trumbull, *supra* note 30, at 309 (criticizing deterrence theory).

<sup>152</sup> These criteria are commonly discussed in the context of evaluating amnesties and/or truth commissions. See, e.g., Aukerman, *supra* note 134, at 92-94 (consider context, crimes, culture regarding alternative mechanisms); Burke-White, *supra* note 131, at 469 (legitimacy and scope analysis of amnesties); DRUMBL, *supra* note 66, at 188 (qualified deference); Dugard, *Dealing with Crimes*, *supra* note 35, at 1012 (process and substance requirements for acceptable truth commission); Goldstone & Fritz, *supra* note 16, at 656 (contending prosecutor should accommodate awards of amnesty in the interests of justice “provided that these adhere to internationally prescribed guidelines”); HAYNER, *supra* note 18, at 252 (truth commission criteria of process, product and impact); Henrard, *supra* note 34, at 648 (conditional amnesty with truth commission criteria); Naqvi, *supra* note 27, at 616-17 (criteria for recognition of amnesty for war crimes); Newman, *supra* note 5, at 354 (public goods analysis of amnesties); O'SHEA, *supra* note 20, at 333 (proposing factors for UN agreement to state amnesty); Robinson, *supra* note 10 at 497 (necessity exception for certain amnesties); Roche, *supra* note 110, at 575 (criteria for legitimate truth commission); Scharf, *supra* note 40, at 526 (offering six considerations regarding amnesty); Slye, *supra* note 35, at 245 (legitimate amnesties have accountability, truth, participation of victims, and reparations); Stahn, *Complementarity*, *supra* note 21, at 695 (guidelines for permissible amnesties or pardons); Trumbull, *supra* note 30, at 283 (balancing test for recognizing amnesties); Villa-Vicencio, *supra* note 39, at 216 (building on Paul van Zyl's criteria for exceptions to duty to prosecute); Gwen K. Young, *All the Truth and As Much Justice As Possible*, 9 U.C. DAVIS J. INT'L L. & POL'Y 209 (2003) (amnesty only if investigation, prosecution, and justice).

<sup>153</sup> For a more extensive evaluation of the proposed truth commission and *mato oput* process in the Uganda-LRA peace deal, see Keller, *supra* note 3, at Part IV.

<sup>154</sup> Rome Statute, *supra* note 2, at Preamble ¶ 4.



Retribution typically justifies prosecution and punishment based on individual culpability: a person is prosecuted and punished because he deserves it.<sup>155</sup> “Retribution requires proportionality between the gravity of the offense and the severity of sanction.”<sup>156</sup> Retribution is generally linked to criminal prosecution, but its concern with individual culpability and proportional punishment might be furthered by alternative measures.<sup>157</sup>

First, the AJM must provide accurate individual assessment of culpability.<sup>158</sup> The AJM could include an extensive investigation to establish culpability or provide incentives for perpetrators to admit culpability. An effective investigation would require an independent body with adequate resources, time frame, and power.<sup>159</sup> For example, a truth commission with subpoena powers and adequate staffing might investigate the accused.<sup>160</sup> Or a truth commission might provide the forum for the perpetrator to confess in exchange for amnesty, as in the South African truth and reconciliation process.<sup>161</sup> The full disclosure process would likely require admission of responsibility by the perpetrator under threat of prosecution for nondisclosure.<sup>162</sup> Either model would require some form of due process<sup>163</sup> for the accused including defenses like duress,<sup>164</sup> which would mitigate or eliminate individual responsibility. The conditional nonprosecution model might provide more incentives to take responsibility than a criminal prosecution. It might also encompass more individuals than could be independently investigated by either a less robust truth commission or the OTP, where the investigation would focus on the leaders. Thus, a truth commission process can be created to satisfy the first concern of establishing individual culpability.

Second, the AJM might further retribution if they provide some form of just punishment short of incarceration.<sup>165</sup> Whatever the form of punishment, it must not violate international law. For example, a traditional process that includes the giving of a girl as

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<sup>155</sup> See, e.g., DRUMBL, *supra* note 66, at 15, 150; O’SHEA, *supra* note 20, at 79.

<sup>156</sup> DRUMBL, *supra* note 66, at 154; see also Bagaric & Morss, *supra* note 151, at 221.

<sup>157</sup> This conception rejects strict retributivism, as described by Professor Blumenson, which requires prosecution. See Blumenson, *supra* note 5, at 834.

<sup>158</sup> See Scharf, *supra* note 40, at 526 (individual responsibility of perpetrators).

<sup>159</sup> See generally, HAYNER, *supra* note 18; Henrard, *supra* note 34, at 627 (fact-finding rationale for truth commission).

<sup>160</sup> See, e.g., HAYNER, *supra* note 18, at 131.

<sup>161</sup> See, e.g., *id.* at 40-45; see also O’SHEA, *supra* note 20 at 334 (proper amnesty should be granted after public disclosure of truth).

<sup>162</sup> See, e.g., HAYNER, *supra* note 18, at 40-41; Stahn, *Geometry*, *supra* note 61, at 433 (necessity of judicial system to carry out last-resort prosecutions); Villa Vicencio, *supra* note 39, at 209 (necessity of threat of prosecution for South African process).

<sup>163</sup> See Aukerman, *supra* note 134, at 49; Blumenson, *supra* note 5, at 867; HAYNER, *supra* note 18 at 129; But see Kevin Jon Heller, *The Shadow Side of Complementarity*, 17 CRIM. L. FORUM 255, 259 (2006) (arguing that ICC statute needs to be amended to protect defendants’ rights in domestic proceedings).

<sup>164</sup> Cf. Markus D. Dubber, *Legitimizing Penal Law*, 28 CARDOZO L. REV. 2597, 2609 (2007) (discussing right to defenses based on capacity).

<sup>165</sup> Cf. Dan Markel, *The Justice of Amnesty?*, 49 U. TORONTO L. J. 389, 431 (1999) (punishment does not need to be through pain or incarceration, but proportionality relates to conveyance of disaffirmation of act rather than gravity of crime, ruling out shaming); Charles Villa-Vicencio, *The Reek of Cruelty and the Quest for Healing*, 14 J.L. & RELIGION 165, 174 (1999-2000) (citing Jean Hampton’s conception of punishment).

compensation will not be acceptable.<sup>166</sup> Similarly, capital punishment is not an option, let alone a punishment approaching an “eye for an eye” calculus, which would violate human rights standards.<sup>167</sup> But other forms of punishment commonly included in nonprosecutorial<sup>168</sup> models of accountability might suffice: community service, fines, reparations, shaming, removal from office, etc.<sup>169</sup>

Such alternative forms of punishment must also be consistent with the principle of proportionality. It is likely that the alternative punishment would be insufficient punishment,<sup>170</sup> thereby failing the proportionality test. But this is not necessarily a fatal shortcoming. The potential punishment under the ICC (a maximum term of thirty years, with life imprisonment for extremely grave and depraved crimes)<sup>171</sup> is likely insufficient as well.<sup>172</sup> Arguably, no term of incarceration could be proportional to an international crime like genocide.<sup>173</sup> Since neither AJM nor the ICC mete out proportional punishment, AJM that approach proportionality might suffice when compared to a similarly ineffective punishment under the ICC. If the negotiated AJM fall woefully short of even the ICC’s disproportionately weak response, then they would not suffice.

It is likely that a truth commission would fall short of satisfying the proportionality requirement by the same—or possibly even a greater—extent as ICC prosecution. An alternative punishment offered by a truth commission, such as shaming, is typically seen as lesser punishment than incarceration;<sup>174</sup> it would therefore be even further out of proportion with the gravity and scope of international crimes than an ICC sentence. On the other hand, shaming from the immediate community might carry greater weight than a jail sentence imposed by a distant international tribunal.<sup>175</sup> This is particularly true when the prisoner would be incarcerated in an internationally-approved prison, where conditions may far exceed local standards of living, let alone of imprisonment.<sup>176</sup> Thus, the Western

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<sup>166</sup> See, e.g., DRUMBL, *supra* note 66, at 192 (describing Pashtunwali, code of conduct of Afghanistan’s Pashtun region); cf. Alisa Tang, *Afghan Girls Traded for Debts, Blood Feuds*, USA Today at [http://www.usatoday.com/news/world/2007-07-09-afghan-girls\\_N.htm](http://www.usatoday.com/news/world/2007-07-09-afghan-girls_N.htm)

<sup>167</sup> Cf. DRUMBL, *supra* note 66, at 156.

<sup>168</sup> Some of these alternate punishments are used within the Rome Statute (e.g., fines imposed in conjunction with prison sentences) or state criminal justice systems, but are generally considered lesser punishment.

<sup>169</sup> See, e.g., Robinson, *supra* note 10, at 498; Scharf, *supra* note 40, at 527.

<sup>170</sup> Proportionality also means the lack of excessive punishment, which is generally not at issue for ICC crimes given their gravity.

<sup>171</sup> Rome Statute, *supra* note 2, at Art. 77.

<sup>172</sup> See, e.g., Aukerman, *supra* note 134, at 62 (limitations of retributive prosecution); Blumenson, *supra* note 5, at 841 (same).

<sup>173</sup> But see Raquel Aldana-Pindell, *In Vindication of Justiciable Victims’ Rights for States-Sponsored Crimes*, 35 VAND. J. TRANSNAT’L L. 1399, 1450 (2002) (proportionality requires scaled punishment but not ideal relationship between a crime and its punishment).

<sup>174</sup> See, e.g., David Gray, *An Excuse-Centered Approach to Transitional Justice*, 74 FORDHAM L. REV. 2621, 2689 (2006).

<sup>175</sup> DRUMBL, *supra* note 66, at 161.

<sup>176</sup> *Id.* at 16; see ALLEN, *supra* note 4, at 135 (quoting Acholi leader as saying that Kony should be in the community among those whom had suffered, not air-conditioned prison); Glickman, *supra* note 135, at 253 n.90 (noting superior living conditions including health care); Hanlon, *supra* note 140, at 323 (quoting Ugandan criticism of superior ICC prison conditions).

emphasis on incarceration may exaggerate the inadequacy of alternative forms of punishment that might be imposed by a truth commission. But on balance, it seems more likely that the truth commission process will be perceived as offering lesser punishment to entice the parties to enter a peace agreement, thereby failing proportionality.<sup>177</sup>

Furthermore, the mere fact that extraordinary crimes are treated via AJM while ordinary murder is prosecuted undermines retribution.<sup>178</sup> Yet there are strong arguments that international prosecution already fails retributive principles, particularly proportionality. Although there would be significant difficulties, certain AJM might match international criminal prosecutions in terms of furthering retribution to a similar extent.

Moreover, the ICC should consider a variation on basic retributivism. Eric Blumenson contends that “victim-conscious retribution” does a better job of explaining international criminal justice.<sup>179</sup> In his conception of retribution, victims play a central role although the focus remains on culpability and desert.<sup>180</sup> Victim-centered retribution requires a broader investigation, going beyond individuals to institutions responsible for the conflict. Specifically, it requires acknowledgement of the victim via public condemnation of the act. Similarly, the victim’s suffering must be repudiated through recognition of the victim, participation of the victim in the process, and reparations.<sup>181</sup> Under this theory of retribution, punishment short of incarceration, such as moral condemnation and internal accountability, will suffice. Moral condemnation takes the form of public disgrace, stigma, and censure. Internal accountability refers to confession and recognition of guilt by the accused.<sup>182</sup>

A robust truth commission can achieve the goals of victim-conscious retribution more readily than criminal prosecution. A truth commission process is typically designed to investigate the roots of the conflict. It often incorporates victim participation in the form of victim testimony in public or private hearings or even victim questioning of accused. A truth commission might recommend or determine reparations. Further, the public nature of the truth commission’s work, whether in public hearings<sup>183</sup> or a published report, would constitute moral condemnation. A truth commission with conditional nonprosecution would encourage internal accountability in the form of confessions with full disclosure in return for immunity from prosecution. Thus, AJM such as a robust truth commission seem better-suited to victim-conscious retribution than ICC prosecution.

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<sup>177</sup> See Aukerman, *supra* note 134, at 57 (alternative mechanisms even less proportional than prosecution).

<sup>178</sup> DRUMBL, *supra* note 66, at 154.

<sup>179</sup> See Blumenson, *supra* note 5, at 838. Along with retributivism, consequentialist and pluralist reasons support Blumenson’s conclusion that the ICC could accept a model like South Africa’s process. *Id.* at 860.

<sup>180</sup> See *id.* at 838.

<sup>181</sup> *Id.* at 862-63.

<sup>182</sup> *Id.* at 868-69.

<sup>183</sup> See, e.g., Slye, *supra* note 35, at 245 (public process or acknowledgement).

## 2. Deterrence

The Preamble to the Rome Statute also states that the parties to the treaty are “[d]etermined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.”<sup>184</sup> Again, the emphasis is on holding perpetrators accountable, apparently for both retributive reasons and the deterrent effect. Deterrence is a consequentialist theory: prosecution and punishment are justified because they have the effect or consequence of preventing future crimes. Deterrence can be specific (preventing reoffending by the accused) or general (preventing offenses by others). The ICC’s main goal is general deterrence.<sup>185</sup> By ending impunity, the ICC will make others less likely to commit international crimes. Again, while criminal prosecution and punishment in the form of incarceration is typical, it is possible that AJM could further the goal of deterrence.

Deterrence requires some sort of punishment or credible threat of punishment<sup>186</sup> as well as publicity for the outcome of the process. For example, a truth commission report must be publicized to a broader audience in order to pose a deterrent. The difficulties inherent in determining the actual deterrent effect of criminal prosecution are writ large in AJM. To create fear, the threatened “punishment” must be perceived as significant suffering. It is not clear whether alternative punishments would have teeth within the local community or within the (would-be) offender population, let alone the international community. Even if the AJM fail to further deterrence, however, they might match ICC prosecution in their inadequacy or be justified on other preventive grounds.

For instance, although negotiated AJM are likely to be perceived as less onerous than criminal prosecution, deterrence might still be furthered through AJM by increasing the certainty of punishment.<sup>187</sup> While the stigma of a punishment might be diminished if it becomes routine, it is possible to reach a happy medium between exemplary prosecutions (posing little deterrence because of selectivity) and over-application (removing the stigma of the punishment). AJM offer the ability to reach more than the select few, but preserve the stigma of punishment by incorporating local beliefs and customs as accountability measures for a larger number of offenders.

If a truth commission, for example, provides a credible threat of suffering of some sort, then it would further specific deterrence by discouraging repeat offenses by perpetrators. Indeed, the end of the conflict itself will decrease the likelihood of additional atrocities. But deterrence is typically fear-based: the offender is specifically deterred where he fears the consequences of the criminal justice system or AJM so much that he will not re-offend. True believers who undergo AJM only because it was required through a peace deal are unlikely to be discouraged from committing further crimes because of the

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<sup>184</sup> Rome Statute, *supra* note 2, at Preamble ¶ 5.

<sup>185</sup> DRUMBL, *supra* note 66, at 16.

<sup>186</sup> See Tom Syring, *Truth versus Justice*, 12 INT’L LEGAL THEORY 143, 204 (2006).

<sup>187</sup> See Aukerman, *supra* note 134, at 69; Bagaric and Morss, *supra* note 151, at 249.

suffering inflicted via a truth commission.<sup>188</sup> On the other hand, rank and file militia members might be “scared straight” and deterred from future crimes.<sup>189</sup> Thus, there is limited but real potential for specific deterrence, particularly for lesser perpetrators.

Similarly, there is potential for general deterrence. At the least, ICC deferral on the condition of a robust accountability mechanism might send the signal that while rebel groups can bargain for promises of nonprosecution, they cannot escape all forms of accountability. A truth commission or traditional process that is perceived as having teeth might pose a measurable threat to would-be international criminals. While international criminal prosecutions are rare and tend to focus on those most responsible,<sup>190</sup> AJM could ratchet up the likelihood that would-be perpetrators of all sorts would face accountability, thereby discouraging them from committing offenses.

On the other hand, ICC deferral to AJM might substantially undermine deterrence if the consequences of AJM are perceived as a slap on the wrist. The punishment imposed by a truth commission might not be seen as substantial suffering to be avoided, even within the local community.<sup>191</sup> It is possible (and disturbing) that the message received by other rebel leaders or would-be insurgents is to commit as many atrocities as possible, in order to create a situation so desperate that trading justice for peace becomes an option at the negotiating table. For instance, an ICC deferral to the Uganda-LRA peace accord’s AJM might encourage rebel groups to commit international crimes on such a wide scale or of such senseless brutality that they have the leverage to bargain for weak AJM rather than criminal prosecution.

Although deterrence is seen as a goal of international criminal prosecutions, there is a fundamental disconnect between the assumptions underlying deterrence and the character of international criminals that undermines the deterrent impact of both prosecutorial and nonprosecutorial methods.<sup>192</sup> Deterrence requires a rational actor making calculated decisions based, at least in part, on the likelihood of actions such as ICC prosecution or AJM. As is true in domestic criminal law, there is little empirical proof that those who commit the most heinous crimes think about the consequences.<sup>193</sup> A rebel leader might well consider the threat of ICC prosecution while negotiating an end to a conflict with a state party to the ICC. But there is little reason to believe that the likelihood of capture and

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<sup>188</sup> They are also unlikely to be significantly affected by a long prison term in a relatively comfortable prison cell, but a long term of incarceration would have a more significant incapacitation effect than AJM. Interestingly, incapacitation is rarely discussed as a reason for international prosecutions. DRUMBL, *supra* note 66, at 62.

<sup>189</sup> Aukerman, *supra* note 134, at 69-70.

<sup>190</sup> Domestic prosecution of international criminals is also rare. See HAYNER, *supra* note 18, at 89.

<sup>191</sup> Cf. Aldana-Pindell, *supra* note 173, at 1561-62 (arguing that alternative sanctions have little if any deterrent effect).

<sup>192</sup> See generally, DRUMBL, *supra* note 66, at 17, 171; Robert D. Sloane, *The Expressive Capacity of International Punishment*, 43 STAN. J. INT’L L. 39, 72 (2007) (noting rational actor model of deterrence even more suspect in international than domestic context).

<sup>193</sup> See Aukerman, *supra* note 134, at 64, 68; Leila Nadya Sadat, *Exile, Amnesty and International Law*, 81 NOTRE DAME L. REV. 955, 999 (2006).

accountability is a motivating factor at earlier stages of a violent insurgency, when leaders are more likely focused on staying alive and amassing power.<sup>194</sup> Similarly, where the criminals are leaders of a state, there is little reason to believe that they expect to fall out of power and into the hands of an international tribunal. Thus, it is possible that neither ICC prosecution nor AJM would deter such actors.

Overall, the assessment of deterrence is necessarily opaque. Both international criminal prosecution and AJM appear to fall short. Yet an alternative approach might be marginally more successful in deterring the rank in file by increasing the certainty of some form of punishment. Thus, the adoption of AJM seems to further deterrence to the same if not a slightly greater extent than limited international criminal prosecution, although the deterrent impact is slight in either case.

The Preamble, however, refers to prevention in general not merely deterrence. Other preventive effects might result from AJM. For example, a truth commission process might bring out not only the roots of the conflict but also recommend reforms<sup>195</sup> that deprive former rebel leaders of a rallying cry, thereby making future crimes less likely. Other negotiated AJM might also help to eradicate the causes of conflict, thereby displacing the seeds of another conflict. Similarly, the official acknowledgement of past abuses might have a preventive effect.<sup>196</sup> Moreover, negotiated AJM like a traditional reconciliation ceremony might reintegrate offenders into the community, decreasing the likelihood that they would re-offend. While the deterrent impact of both prosecution and negotiated AJM are likely to be slight, negotiated AJM might further the goals of prevention in more effective ways than ICC prosecution.

### 3. Expressivism

Several scholars have argued for an expressivist function for international criminal law in addition to retribution and deterrence.<sup>197</sup> For example, Diane Marie Amann contends that expressivism best justifies international criminal justice.<sup>198</sup> According to Amann, “[e]xpressivism comprises a complex of theories that focus on the expressive function of a governmental action, a deed.”<sup>199</sup> The message received by the audience is the key. It typically needs to be issued by a respected voice of authority and the moral message generally consistent with societal values.

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<sup>194</sup> See, e.g., DRUMBL, *supra* note 66, at 171-73; Int’l Crisis Grp, *Negotiating Peace and Justice*, *supra* note 45.

<sup>195</sup> See HAYNER, *supra* note 18, at 55.

<sup>196</sup> See Henrard, *supra* note 34, at 637; Roche, *supra* note 110, at 569.

<sup>197</sup> See DRUMBL, *supra* note 66, at 52 (describing ICC preamble as expressivist); Ralph Henham, *Some Issues for Sentencing in the International Criminal Court*, 52 INT’L & COMP. L. QUARTERLY 81, 111(2003) (significance of expressivism in ICC); cf. Slone, *supra* note 192, at 75 (moral educative model).

<sup>198</sup> Amann, *supra* note 151, at 117. See also DRUMBL, *supra* note 66, at 17 (concluding expressivism has stronger potential than deterrence and retribution).

<sup>199</sup> Amann, *supra* note 151, at 118.



Expressivism is sometimes conceived of as part of retribution<sup>200</sup> or at least as overlapping with it.<sup>201</sup> The thrust of a retributive message might be that the perpetrator deserved punishment or, on some retributive theories, that the victim did not deserve the offender's disrespect. Still, retribution generally does not *require* any message to be sent or received. Expressivism, however, typically requires that the audience receive the message and absorb its meaning; that the conduct of the actor was wrong.<sup>202</sup>

For example, the existence of the ICC, its actual prosecutions, and its potential punishment might have expressive value in that they signal moral condemnation.<sup>203</sup> While the mere promulgation of a condemnatory statement initially may help inculcate moral values in society, pronouncements that have no negative consequences would eventually undermine it.<sup>204</sup> Thus, although the ICC's creation might have sent messages of condemnation regarding international crimes, its expressivist value may decrease if there is continued impunity. The end of impunity would normally come in the form of prosecution, but there is no categorical reason why AJM cannot have an expressivist function as well. In fact, AJM have the potential to further the goals of expressivism substantially.<sup>205</sup> To judge the capacity for AJM to express moral condemnation of actions, the ICC should consider whether the AJM further truth-telling, create a record of history, and disseminate that record.<sup>206</sup>

A truth commission can be an effective avenue for a broad inquiry into the past and for truth-telling.<sup>207</sup> With the proper mandate and powers, a truth commission could write an authoritative history of the conflict. While it might be difficult if not impossible to detail all of the international crimes committed in a major armed conflict, a truth commission could give the big picture of the situation and offer representative cases. It could also propose reforms to prevent future conflict. The report should be publicized widely, through various media and institutions. In doing so, the truth commission would denounce the acts described within the report to inculcate values of respect for human rights in society.<sup>208</sup>

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<sup>200</sup> Ralph Henham, *The Philosophical Foundations of International Sentencing*, 1 J. INT'L CRIM. JUST. 64, 76 (2003) (denunciatory aspect of retribution); Aldana-Pindell, *supra* note 173, at 1470 (placing expressivism under retribution).

<sup>201</sup> See DRUMBL, *supra* note 66, at 61.

<sup>202</sup> The consequentialist message of deterrence, by contrast, is aimed at creating fear.

<sup>203</sup> See Amann, *supra* note 151, at 120 (describing expressive function of penal statutes and punishment).

<sup>204</sup> See *id.* (noting that condemnatory pronouncements that carry no consequences may cultivate a norm but must be followed by effective enforcement).

<sup>205</sup> DRUMBL, *supra* note 66, at 176 (for expressivism, alternative forms of accountability may be equal or superior to criminal prosecutions).

<sup>206</sup> Cf. Aukerman, *supra* note 134, at 85 (truth commissions and communication); Roche, *supra* note 110, at 569 (truth commissions' role in recording truth).

<sup>207</sup> See, e.g., Villa-Vicencio, *supra* note 39, at 214 (superiority of truth commissions in establishing the truth of past).

<sup>208</sup> Aukerman, *supra* note 134, at 90-91 (potential for truth commissions to communicate moral consensus); Aldana-Pindell, *supra* note 200, at 1474 (same).

The message of condemnation might be muffled to some extent, however, unless it is accompanied by harsh punishment.<sup>209</sup> Although Western criminal justice skews toward incarceration, other types of punishment can give credibility to condemnatory messages. Moreover, within the local communities, participation in AJM might be seen as a more meaningful punishment. A rebel leader like the LRA's Joseph Kony, stripped of his power, confessing before a truth commission, might provide a powerful message of censure. By contrast, the expressivist message from Kony's ICC prosecution might be diluted by a long, distant, criminal trial followed by incarceration in an air-conditioned prison cell, with plentiful food and medical care.<sup>210</sup> This is particularly true because Kony would likely plead not guilty and never admit to responsibility or remorse via a criminal trial. Thus, negotiated AJM such as a robust truth commission would likely advance expressivism to a similar if not greater extent than ICC prosecution.

#### 4. Restorative Justice

Finally, the Rome Statute also encompasses restorative justice, particularly its goal of reconciliation. Restorative justice's emphasis on victim participation and redress is embodied in the greater role for victims within the ICC. For instance, victims are not limited to a role as witnesses, but may participate in the proceedings, from the preliminary inquiry to appeal.<sup>211</sup> Victims are also eligible for reparations such as restitution, compensation, and rehabilitation.<sup>212</sup> The unprecedented involvement of victims in the proceedings and in seeking reparations<sup>213</sup> at an international tribunal reflects a growing concern for restorative justice.<sup>214</sup> Restorative justice is often linked to truth commissions and other AJM, indicating that AJM will likely advance its aims. To do so, the AJM should take steps to reconcile victims and perpetrators, to reintegrate former rebels, and to restore the bonds within broader society.<sup>215</sup>

A truth commission, for example, can achieve restorative justice, including reconciliation, as well as if not more than ICC prosecution.<sup>216</sup> Reconciliation between victims and perpetrators often starts with truth-telling and investigation of the roots of the conflict.<sup>217</sup> Reconciliation would typically require that the process "name names" or

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<sup>209</sup> Cf. Amann, *supra* note 209, at 120 (noting that condemnatory pronouncements that carry no consequences should be followed by effective enforcement).

<sup>210</sup> See *supra* note 176.

<sup>211</sup> See Rome Statute, *supra* note 2, at Arts. 53, 68, 82.

<sup>212</sup> *Id.* at Art. 75, 79. See generally Linda M. Keller, *Seeking Justice at the International Criminal Court: Victims' Reparations*, 29 T. JEFFERSON L. REV. 189 (2007).

<sup>213</sup> ICC, *The Role of the Trust Fund for Victims and Its Relation with the Registry of the International Criminal Court* (Press Kit No.:pids.008.2004-EN, 22 April 2004).

<sup>214</sup> See DRUMBL, *supra* note 66, at 53, 124 (noting ICC takes restorative initiatives more seriously, although limited in ability to further them).

<sup>215</sup> See Stahn, *Geometry*, *supra* note 61, at 434 (designing truth commissions aimed at reintegration).

<sup>216</sup> See Aukerman, *supra* note 134, at 73-75 (describing advantages of truth commissions in truth-telling, recording past, moral consensus). *But see* Aldana-Pindell, *supra* note 173, at 1438 (contending that victims prefer limited truth of criminal process to more lenient truth commission).

<sup>217</sup> See, e.g., HAYNER, *supra* note 18, at 72.

otherwise identify perpetrators while also allowing for victim participation.<sup>218</sup> The accused should be treated fairly,<sup>219</sup> in a way that models inclusiveness.<sup>220</sup> Perpetrators should acknowledge the harm caused, as should the state. Victims, even those whose perpetrators are unidentified, should have some opportunity to participate in the process.<sup>221</sup> All victims should be treated with respect and offered support throughout and after the process in order to avoid retraumatization.<sup>222</sup>

Victims would ideally be given full redress for past harm, whether physical or psychological injury or social, economic, or political injustices.<sup>223</sup> It is a prerequisite to reconciliation and restoration that basic security and economic needs be provided for, where feasible.<sup>224</sup> Both victims and former rebels need support so that they can reintegrate into society. The process should work to restore society as a whole, including recognition of harms and proposals for reform.<sup>225</sup> The dangers of exacerbating tensions within society should be considered and mitigated to the extent possible.<sup>226</sup>

If the above criteria are kept in mind, a truth commission or other AJM could further not only restorative justice but also expressivism, prevention, and retribution. The properly crafted process must still enjoy the support of the people. As a result, care must be taken to modify the processes to advance international criminal justice without losing the local, nonprosecutorial nature of the AJM. While requirements such as those based on due process principles will add a layer of prosecution-like qualities to a truth commission, the requirements should not overwhelm the alternative nature of the AJM. For example, the broad inquiry and truth-telling of the truth commission would not be found in a prosecutorial approach. These distinctions should be preserved to protect the alternative nature of properly designed AJM, which must still meet the above requirements.<sup>227</sup>

Returning to the two-part inquiry for AJM compliance with international justice standards, the threshold issue must first be satisfied. Generally speaking, AJM such as a truth commission designed to satisfy the requirements described above would likely satisfy restorative justice and expressivism. They would likely be generally ineffective at achieving deterrence and basic retribution, but they do further victim-conscious retribution. Moreover, AJM's probable failings in terms of classic retribution and deterrence are at least to some extent matched by the inadequacy of international criminal prosecution in

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<sup>218</sup> *Id.* at 127; Robinson, *supra* note 10, at 498.

<sup>219</sup> Dugard, *Dealing with Crimes*, *supra* note 35, at 1012 (name names so long as accused have right to challenge); Roche, *supra* note 110, at 573 (fairness to offenders necessary for reconciliation).

<sup>220</sup> Roche, *supra* note 110, at 574.

<sup>221</sup> See Henrard, *supra* note 34, at 648.

<sup>222</sup> See HAYNER, *supra* note 18, at 135-49; Making Peace, *supra* note 121, at 48.

<sup>223</sup> See HAYNER, *supra* note 18, at 170-171; Roche, *supra* note 110, at 572, 578.

<sup>224</sup> HAYNER, *supra* note 18, at 81; Ellen A. Waldman, *Healing Hearts or Righting Wrongs: A Meditation of the Goals of Restorative Justice*, 25 HAMLIN J. PUB. L. & POL'Y 355, 367 (2004).

<sup>225</sup> Aukerman, *supra* note 134, at 81-82 (discussing advantages of truth commission for restorative justice); Roche, *supra* note 110, at 579 (wider reform measures).

<sup>226</sup> See Henrard, *supra* note 34, at 639.

<sup>227</sup> My thanks to Prof. Mark Drumbl for emphasizing the risk of inadvertently internationalizing alternative mechanisms via commonly required factors.

furthering these goals. The shortcomings of ICC proportionality and deterrent impact are arguably as significant as AJM if the AJM have strong local support. Thus, the negotiated AJM might constitute an improvement over ICC prosecution in advancing victim-conscious retribution, expressivism, and restorative justice while not falling that much farther short than the ICC in furthering retribution and deterrence. In these circumstances, the Court or OTP should seriously consider deferral to AJM. There are caveats: in order to further the respective goals of international criminal justice, the truth commission or other AJM must have the qualities discussed above. By requiring that the AJM meet these criteria, the ICC will preserve its credibility as an institution created to promote an end to impunity and will influence domestic measures to ensure substantial, if nonprosecutorial, accountability.

## Conclusion

The peace versus justice dilemma will continue to arise as peace negotiations go forward between states and insurgencies that cannot be defeated militarily. For example, the ability of the LRA to terrorize civilians in Northern Uganda has gained it a seat at the negotiating table with Uganda, where the LRA demands nonprosecutorial alternatives as a condition of peace. The ICC's institutional mandate is to prosecute or to facilitate prosecution at the national level. Yet the statute of the ICC is sufficiently ambiguous to allow the ICC to defer to nonprosecutorial alternatives in extreme circumstances.

The mechanisms by which the ICC could defer depend on the situation. The Court might be faced with a request to suspend the case from the Security Council (Article 16). The Court or Prosecutor might consider whether the alternative process blocks the ICC case due to inadmissibility (Article 17) or under the principle of *ne bis in idem* (Article 20). Finally, the Prosecutor, with the acquiescence of the Court, might decide not to investigate or prosecute as a matter of discretion (Article 53). In interpreting these provisions, the ICC should not only consider statutory interpretation but also assess the AJM. First, it should evaluate whether nonprosecutorial AJM are necessary and legitimate. If so, the relevant entity of the ICC should examine whether the negotiated AJM advance the goals of international criminal justice. Where the AJM further retribution, deterrence, expressivism, and/or restorative justice to a similar extent as international prosecution, it should defer. In this way, the ICC might ensure that there is at least some measure of accountability for international criminals, without blocking peace initiatives vital to ending mass killings and other atrocities.