

ACHIEVING PEACE WITH JUSTICE: THE INTERNATIONAL CRIMINAL COURT AND UGANDAN ALTERNATIVE JUSTICE MECHANISMS

*Linda M. Keller**

TABLE OF CONTENTS

INTRODUCTION	210
I. BACKGROUND ON UGANDA - LRA CONFLICT & THE INTERNATIONAL CRIMINAL COURT	213
II. UGANDAN ALTERNATIVE JUSTICE MECHANISMS (AJM)	223
III. ICC AVENUES FOR DEFERRAL TO AJM	237
A. Security Council Request (Article 16).....	239
B. Ne Bis In Idem (Article 20).....	244
C. Prosecutorial Discretion (Article 53).....	246
D. Inadmissibility (Article 17)	251
IV. PRINCIPLED GUIDELINES FOR DEFERRAL	259
A. General Framework	259
B. Threshold Inquiry	262
C. Advancement of International Criminal Justice	265
1. Retribution	266
2. Deterrence	270
3. Expressivism	273
4. Restorative Justice	275
CONCLUSION.....	278

* Linda M. Keller, Associate Professor of Law, Thomas Jefferson School of Law; B.A., University of Richmond, 1993; J.D., Yale Law School, 1996. The author would like to thank Professors Mark Drumbl and Beth Van Schaak for their insightful comments on earlier drafts of this piece. The author is grateful to all the members of the TJSL writing group, particularly Professors Deven Desai and Anders Kaye, for their helpful feedback. Thanks also to Nicholas Walbridge of the Hague Justice Portal for his comments. An essay based on this article, *The False Dichotomy of Peace versus Justice and the International Criminal Court*, will be published in the Hague Justice Journal, available through the Hague Justice Portal at www.haguejusticeportal.net (in English with French translation).

INTRODUCTION

[A]llowed 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.¹

Modern conflicts are increasingly intra-state struggles, rather than clearly delineated international conflicts. Even when violence spills over borders, guerrilla and terror tactics predominate. Civilians frequently bear the brunt of the fighting, as direct victims of atrocities or indirect victims of displacement and deprivation. Insurgencies often use hit and run tactics and attacks against civilians to undermine the dominant power rather than attempt to hold substantial territory. As a result, a military solution to conflict is less likely. It is probable that many current armed conflicts will end not with unconditional surrender, but with peace deals containing compromises over accountability, despite the international community's rejection of impunity in principle. Thus, international criminals 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 can further both goals in certain circumstances.

The long-running conflict in Uganda illustrates the problem and potential solution. A vicious rebel group, the Lord's Resistance Army (LRA), 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. Millions of families 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 rapes and killings of civilians. The LRA claims that it is now 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).² 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 subject to LRA atrocities?

1. Luis Moreno-Ocampo, Prosecutor, Int'l Criminal Court, Address at Nuremberg: Building a Future on Peace and Justice (June 24-25, 2007), available at http://www.icc-cpi.int/library/organs/otp/speeches/LMO_nuremberg_20070625_English.pdf (citation omitted).

2. See generally TIM ALLEN, TRIAL JUSTICE: THE INTERNATIONAL CRIMINAL COURT AND THE LORD'S RESISTANCE ARMY (Zed Books 2006) (discussing Joseph Kony's founding of the LRA).

To end an ongoing armed conflict, painful choices must be made in a context of fear and uncertainty.³ The history of the Uganda-LRA conflict and its peace process can serve as an archetype for modern internal armed conflicts and thus guide future inquiries. Uganda's situation exemplifies a low-level conflict of long duration, where the insurgent group is incapable of overthrowing the government, but more than capable of massacring and mutilating innocent civilians. Specifically, the apparent peace versus justice impasse exists in Uganda because the LRA will not sign a peace deal and disarm until ICC warrants for its leaders are withdrawn, while the government will not ask the ICC to withdraw warrants until after the LRA signs the peace deal and demobilizes.⁴ Uganda's President Museveni asked the ICC to prosecute the LRA, then promised the LRA immunity from ICC prosecution.⁵ The ICC undoubtedly wants to preserve its credibility and legitimacy by resisting pressure to drop the case, but does not want to be blamed for causing further deaths and atrocities.⁶

At first glance, there is an unavoidable conflict between peace and justice, but this article posits 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 coexist⁷ contest the proper form of, and equilibrium between, mechanisms to achieve peace and justice. This article focuses on the challenges of balancing competing interests in the context of a case already in the preliminary stages of the ICC. As such, it explores the statutory bases that would allow the ICC to suspend or drop a case in deference to local nonprosecutorial justice mechanisms. The article offers a framework to guide the ICC in evaluating local alternatives based

3. See, e.g., Eric Blumenson, *The Challenge of a Global Standard of Justice: Peace Pluralism, and Punishment at the International Criminal Court*, 44 COLUM. J. TRANSNAT'L L. 801, 829 (2006) (discussing uncertain impact of ICC prosecution on peace talks).

4. Samuel Okiror Egadu, *Museveni Wants LRA Warrants - For Now*, INST. WAR & PEACE REPORTING, ANN. REP. NO. 123, July 25, 2007, available at http://iwpr.net/?p=acr&s=f&o=337394&apc_state=heniacrb69329ede086b2e0bdd625e7161bd4b9.

5. See, e.g., Ronli Sifris, *What Level of Deference Can and Should the International Criminal Court Give to Local Amnesty Programs?*, 1 AUSTL. J. OF PEACE STUD. 31, 45 (2006).

6. Francis Kwera & Skye Wheeler, *Uganda rebel Kony delays signing peace deal*, Reuters, Apr. 10, 2008, available at <http://www.alertnet.org/thenews/newsdesk/L10816623.htm>.

7. See, e.g., Blumenson, *supra* note 3 at 871 (posing 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 – The Role of International War Crimes Tribunals*, 2 J. NAT'L SEC. L. & POL'Y 111, 113 (2006) (arguing false choice between peace and justice); Anita Fröhlich, *Reconciling Peace with Justice: A Cooperative Division of Labor*, 30 SUFFOLK TRANSNAT'L L. REV. 271, 278 (2007) (showing false conflict of peace and justice); 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) (describing how peace and justice are intertwined); Dwight G. Newman, *The Rome Statute, Some Reservations Concerning Amnesties, and a Distributive Problem*, 20 AM. U. INT'L L. REV. 293, 296 (2005) (discussing complementarity between peace and retributive justice); and Charles Villa-Vicencio, *The Reek of Cruelty and the Quest for Healing – Where Retributive and Restorative Justice Meet*, 14 J.L. & RELIGION 165 (1999-2000) [hereinafter Villa-Vicencio, *Reek of Cruelty*] (arguing restorative and retributive are justice compatible).

on their ability to further both peace and the goals of international criminal justice. Although informed by the Uganda-LRA conflict, the proposed test is applicable to any case before the ICC that might involve a negotiated settlement to an ongoing conflict.

The proposed solution to these dilemmas 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 illustrated by the competing imperatives of retributive and restorative justice. In the Ugandan context, pure retributivism would typically require the prosecution of all those culpable for international crimes during the more than twenty-year conflict. Restorative justice, however, would focus on victims' needs, root causes of the conflict, and the reintegration of the rebels into Ugandan society. But neither approach will suffice alone. This article will explore the dilemma as situated in Uganda, specifically, the proposed solution reached during peace negotiations, and its compatibility with the ICC's potential prosecution of leaders of the LRA as a case study. It therefore offers a solution to a pressing problem at the ICC: how the Prosecutor and/or the Court should respond to calls to drop the arrest warrants against international criminals in favor of Ugandan alternative justice mechanisms. It also proposes a theoretical framework to apply to the inevitable reoccurrence of the peace versus justice debate at the ICC.⁸

Part I of this article describes the genesis of two conflicts -- the armed conflict between the LRA and Uganda, and the resulting friction between international prosecution and local justice. It explains the emergence of the LRA, the development of the peace process, and the proposed peace deal (as of April 11, 2008) in order to illustrate the tension between peace and justice in the form of international prosecution. Part II explores in detail the Ugandan alternative justice mechanisms, focusing on a possible truth commission and a traditional reconciliation ceremony known as *mato oput*.⁹ Part III examines the interpretations of the statute creating the ICC (the Rome Statute) 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 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 ICC double jeopardy provision to block ICC proceedings; (3) the exercise of prosecutorial discretion; and (4) the application of the principle of complementarity to render the ICC case inadmissible.

8. Office of the Prosecutor, Int'l Criminal Court, *Report on the activities performed June 2003-June 2006*, (Sept. 12, 2006), available at http://www.icc-cpi.int/library/organs/otp/OTP_3-year-report-20060914_English.pdf [hereinafter *OTP 3-Year Report*].

9. For a discussion of the implications of a Uganda-LRA peace deal promising amnesty, see for example Kathleen Ellen MacMillan, Note, *The Practicability of Amnesty as a Non-Prosecutory Alternative in Post-Conflict Uganda*, 6 CARDOZO PUB. L. POL'Y & ETHICS J. 199, 235 (2007) (arguing that "amnesty should be seriously considered as a potentially indispensable part of a transitional justice plan" in Uganda).

Part IV 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 alternative nonprosecutorial methods. It elucidates the proposed standards by applying these criteria to the Ugandan situation, evaluating whether Uganda's adoption of alternative methods meets the threshold requirement of necessity and legitimacy. It then assesses to what extent the Ugandan alternatives 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 in Uganda can further both peace and the purposes of the ICC, the ICC should make an exception. Part IV concludes that the ICC should defer to the proposed Ugandan alternative mechanisms if the truth commission has the proper mandate and resources and if the traditional *mato oput* process is properly adapted to deal with the current conflict in a nondiscriminatory manner. By furthering the overarching objects and purposes of the international criminal justice system, the ICC would preserve its legitimacy while allowing peace efforts to come to fruition.

I. BACKGROUND ON UGANDA - LRA CONFLICT & THE INTERNATIONAL CRIMINAL COURT

The Uganda-LRA violence illustrates the type of conflict prevalent today: a predominantly intra-state conflict featuring massive civilian casualties and ending in a negotiated settlement. It also exemplifies the potential tension between the ICC and peace processes, both created to end the suffering of people. The LRA is a small rebel group that controls no territory and has little credibility as a legitimate voice for the grievances of Northern Ugandans.¹⁰ Yet it can inflict further atrocities on civilian populations and thereby demand concessions in a peace deal. As a result, the LRA's demands for immunity from prosecution may profoundly influence the practice or policies of ICC entities. How did a seemingly straightforward self-referral by Uganda, promising cooperation and an uncomplicated test case for the ICC,¹¹ lead to a crisis at the ICC? This section will briefly describe the LRA and the ICC, and explain how the two have collided to create an apparently insurmountable conflict. Subsequent sections will lay out how the apparent peace versus justice dilemma can be resolved.

The LRA is notorious for its kidnapping of children, many of whom are forced to become fighters and/or sex slaves for the LRA.¹² They are often forced to kill other kidnapped children who try to escape, and to mutilate, rape, torture, and even

10. SVERKER FINNSTRÖM, *LIVING WITH BAD SURROUNDINGS: WAR AND EXISTENTIAL UNCERTAINTY IN ACHOLILAND, NORTHERN UGANDA* 317 (Upsalla 2003) (describing lack of legitimacy of LRA regarding reform in Uganda).

11. J. Alex Little, *Balancing Accountability and Victim Autonomy at the International Criminal Court*, 38 *GEO. J. INT'L L.* 363, 373 (2007).

12. ALLEN, *supra* note 2, at 42, 60-71 (describing abduction as key strategy while noting that there is little data to support the commonly-cited statistic that 85% of the LRA are abducted children).

kill their own families.¹³ There is a purpose to such horrific tactics: “Some [abductees] are required to perform atrocities against civilians in order to punish them for accepting President Museveni’s rule, demonstrate their loyalty and make it difficult for them to return home because of the fear of reprisals.”¹⁴ To forestall this fate, thousands of children have become “night commuters” – children who walk miles from rural areas to urban centers where they seek shelter in schools, bus stations, or on the streets to avoid being kidnapped from home or from displaced persons camps.¹⁵ Over a million people, a disturbingly large proportion of the population in Northern Uganda,¹⁶ live in squalid internally displaced persons (IDP) camps.¹⁷

Joseph Kony is the founder and spiritual leader of the LRA.¹⁸ He has attempted to justify his tactics, including terrible mutilations. During previous peace talks, Kony stated: “If you picked up an arrow against us and we ended up cutting off the hand you used, who is to blame? You report us with your mouth, and we cut off your lips. Who is to blame? It is you! The Bible says that if your hand, eye or mouth is at fault, it should be cut off.”¹⁹ Kony’s statement reveals that “terror has been a strategy of choice” rather than the result of a deranged and therefore unaccountable mind.²⁰

Despite the LRA’s lack of legitimacy, the Ugandan government has repeatedly entered into peace talks with the group. The government is responding to the LRA’s ability to launch horrific attacks against civilians, which has led activists to push for compromise rather than a military response.²¹ The LRA claims to want to overthrow the government and establish rule based on the 10 Commandments, but its platform beyond that is disputed. Many sources indicate that, until the recent peace talks, the LRA had little or no discernible political agenda.²² Others note that the LRA has sporadically announced its demands, including statements calling for national unity and more power to the North.²³ The ongoing peace process gives the

13. *Id.*

14. *Id.* at 42.

15. *Id.* at 54-55 (describing April 2004 survey showing 20,000 night commuters in Gulu town alone).

16. Int’l Crisis Group, *Northern Uganda Peace Process: The Need to Maintain Momentum*, AFRICA BRIEFING NO. 46, Sept. 14, 2007, available at <http://www.crisisgroup.org/home/index.cfm?id=5078>, [hereinafter *Need to Maintain Momentum*] (detailing 1.5 million displaced).

17. See ALLEN, *supra* note 2, at 53-60.

18. *Id.* at 31.

19. *Id.* at 42.

20. *Id.* at 44.

21. See *id.* at 78-81.

22. FINNSTRÖM, *supra* note 10, at 49-72 (discussing disconnect between media and government portrayals of LRA and the LRA’s long history of political manifestos).

23. ALLEN, *supra* note 2, at 43; see FINNSTRÖM, *supra* note 10, at 149-50 (giving examples of demands).

LRA a forum for making such demands, regardless of its dubious standing for such advocacy.²⁴

The latest peace process followed years of conflict, fleeting cease-fires, and fruitless negotiations. As late as 2003, the U.N. Under-Secretary General for Humanitarian Affairs, Jan Egeland, called the situation in Northern Uganda “one of the worst” and “the most forgotten” humanitarian crisis in the world.²⁵ After years of neglect, the international community started paying attention, pressuring President Museveni to end the conflict. In response, Museveni made an effort to improve the military campaign against the LRA and softened his stance against peace talks and amnesty.²⁶ The Acholi tribe²⁷ of Northern Uganda, which is most connected to the LRA but also its most frequent victim, succeeded in obtaining amnesty legislation in 1999.²⁸ The act provides for amnesty and a reintegration package for any rebels fighting against the government.²⁹ Although the act was relatively unsuccessful at first, thousands of LRA members had applied by mid-2004 – but the numbers dropped off after that.³⁰ Subsequent increases in Ugandan military activity and LRA atrocities show the limits of the amnesty.³¹

Despite the Amnesty Act and intermittent peace talks with the LRA,³² Museveni asked the ICC to investigate and prosecute the LRA in December 2003.³³ The ICC was created by the Rome Statute, which entered into force on July 1, 2002.³⁴ It has jurisdiction over the crime of genocide, crimes against humanity, war

24. FINNSTRÖM, *supra* note 10, at 317 (discussing that although many Acholi agree with LRA complaints about government’s failings, “this is not to say that people back the LRM/A, or that the LRM/A is an organisation they think is capable of realising its promises”); cf. Office of the High Commissioner for Human Rights, *Making Peace Our Own: Victims’ Perceptions of Accountability, Reconciliation and Transitional Justice in Northern Uganda*, available at http://www.ohchr.org/english/docs/northern_Uganda_august2007.pdf [hereinafter OHCHR, *Making Peace*] (describing skepticism about negotiators).

25. *Sudan-Uganda: Jungle boost for peace process*, IRIN, Nov. 17, 2006, available at <http://www.irinnews.org/Report.aspx?ReportId=47150> (recalling 2003 statement of Egeland describing Northern Uganda as “the most forgotten humanitarian crisis in the world”); *Uganda: Senior UN official pledges more humanitarian assistance for the north*, IRIN, Nov. 10, 2003, available at <http://www.irinnews.org/Report.aspx?ReportId=61591> (calling northern Uganda “one of the world’s worst humanitarian crises”).

26. ALLEN, *supra* note 2, at 74; FINNSTRÖM, *supra* note 10, at 127. There are no conditions on the amnesty, such as disclosure or remorse. *Id.*

27. See ALLEN, *supra* note 2, at 26 (discussing classification of Acholi and other populations as ‘tribes’).

28. See *id.* at 74; Amnesty Act 2000, Laws of Uganda vol. XII ch. 294, available at http://c-r.org/our-work/accord/northern-uganda/documents/2000_Jan_The_Amnesty_Act.doc.

29. ALLEN, *supra* note 2, at 74.

30. *Id.* at 75-76.

31. See, e.g., *id.* at 76 (describing possible reasons why amnesty was not the sole answer).

32. *Id.* at 78-82 (describing peace talks from 2003 to 2005).

33. *Id.* at 82 (explaining that referral was made in December of 2003 but not announced until January 2004).

34. Rome Statute of the International Criminal Court, art. 2, July 17, 1998, available at http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_English.pdf [hereinafter Rome Statute].

crimes, and the crime of aggression.³⁵ “That atrocities have happened in northern Uganda is well established. . . .”³⁶ The Office of the Prosecutor (OTP) investigated all crimes within Northern Uganda.³⁷ Although government officials have been accused of international crimes,³⁸ the OTP investigation eventually focused on the LRA due to the greater gravity of its crimes.³⁹

The ICC has “jurisdiction over the most serious crimes of concern to the international community as a whole,”⁴⁰ but it does not implement universal jurisdiction. Instead, it is complementary to national criminal jurisdiction. The ICC must defer to state jurisdiction over alleged crimes, unless the state is unwilling or unable to genuinely investigate or prosecute.⁴¹ With regard to the situation in Northern Uganda, the ICC initially was not concerned with possible deferral, because Uganda itself had referred the situation to the ICC.⁴² At the time, Museveni specifically indicated that the Amnesty Act would be amended to exclude top LRA commanders, removing any conflict between international prosecution and domestic law.⁴³ But Museveni subsequently intimated that he would give the LRA immunity. In November, 2004, Museveni implied that the government might ask the ICC to drop charges against the LRA leaders if they agreed to Ugandan alternative justice mechanisms.⁴⁴ The implicit offer became explicit after peace negotiations resumed in earnest in 2006.⁴⁵

Even prior to the reinvigorated peace talks, the ICC investigation was controversial. The OTP determined that there was sufficient evidence to open a formal investigation in July 2004.⁴⁶ While many international organizations hailed Uganda’s referral to the ICC,⁴⁷ the reaction within Uganda was not as enthusiastic.

35. *Id.* at art. 5. Aggression is an inoperative crime due to lack of agreement on a definition.

36. ALLEN, *supra* note 2, at 3, 82-83 (noting that UNICEF had suggested ICC prosecution against the LRA in 1998).

37. *See OTP 3-Year Report, supra* note 8, at 2 (discussing the admission of cases).

38. ALLEN, *supra* note 2, at 82.

39. *See id.* at 193-94.

40. Rome Statute, *supra* note 34, pmbl.

41. *Id.* at art. 17.

42. *See* ICC, FACTS AND PROCEDURE REGARDING THE SITUATION IN UGANDA, Basic Information No. ICC20051410.056.1-E, 1 (Oct. 14, 2005), *available at* http://www.icc-cpi.int/library/cases/ICC_20051410-056-1_English.pdf.

43. *See, e.g.*, Press Release, ICC, President of Uganda refers situation concerning the Lord’s Resistance Army (LRA) to the ICC (Jan. 29, 2004), *available at* <http://www.icc-cpi.int/press/pressreleases/16.html> [hereinafter Uganda Referral].

44. *See* Int’l Crisis Group, *Peace in Northern Uganda?* 12-13 (Africa Briefing No. 41, Sept. 13, 2006), *available at* http://www.crisisgroup.org/library/documents/africa/central_africa/b041_peace_in_northern_uganda.pdf [hereinafter *Peace in Northern Uganda*].

45. *See, e.g.*, 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, 296 (2007).

46. Press Release, ICC, Prosecutor of the International Criminal Court Opens an Investigation into Northern Uganda (July 29, 2004), *available at* <http://www.icc-cpi.int/press/pressreleases/33.html> [hereinafter ICC, Prosecutor Opens Investigation].

47. *See* ALLEN, *supra* note 2, at 83.

Some aid organizations feared increased LRA violence against abducted children, who might be potential witnesses.⁴⁸ The Ugandan Amnesty Commission and Betty Bigombe, Uganda's heroic peace mediator with the LRA, both opposed the referral because of its likely detrimental impact on prospects for peace.⁴⁹ Similar opposition was voiced by other local actors, particularly the Acholi Religious Leaders Peace Initiative.⁵⁰ But some opponents have since conceded that ICC involvement actually encouraged the peace negotiations, by putting pressure on the LRA and its supporters in Sudan.⁵¹ Even if the ICC brought the LRA to the table, however, its decision to issue arrest warrants risked stopping the talks cold.

Despite the risk, the OTP sought and was granted arrest warrants against five top commanders of the LRA, including Kony.⁵² The warrants, which were unsealed in October, 2005, charge several counts of war crimes and crimes against humanity.⁵³ No arrest warrants have been issued against non-LRA accused, such as members of the Ugandan government or military.⁵⁴ In response, the LRA declared that it would not finalize a deal until the ICC warrants were withdrawn.⁵⁵ Uganda eventually agreed to ask the ICC to withdraw the warrants if the LRA agreed to alternative justice measures and completed the peace process. The LRA, despite its initial reluctance,⁵⁶ apparently agreed on June 29, 2007.⁵⁷

48. *Id.* at 83-84.

49. *Id.* at 186-87; Adrian Di Giovanni, *The Prospect of ICC Reparations in the Case Concerning Northern Uganda*, 2 J. INT'L L. & INT'L REL. 25, 36 (2006).

50. ALLEN, *supra* note 2, at 85, 186.

51. *Id.* at 116.

52. See generally ICC No 02/04-01/05, Warrant of Arrest (Aug. 7, 2005), available at http://www.icc-cpi.int/cases/UGD/c0105/c0105_docAll1.html [hereinafter Arrest Warrants] (including the arrest warrants for Kony, Otti, Odhiambo, Lukwiya and Ongwen). See also Decision to Terminate the Proceedings Against Raska Lukwiya, Prosecutor v. Kony et al. (July 11, 2007), available at http://www.icc-cpi.int/library/cases/ICC-02-04-01-05-248_English.pdf (discussing that the ICC terminated proceedings against Lukwiya after confirming his death); Submission of Information Regarding Vincent Otti, Prosecutor v. Kony et al. (Nov. 8, 2007) (noting OTP's continuing investigation into media reports that Otti was killed on Kony's orders).

53. See ALLEN, *supra* note 2, at 183-84. Although there has also been cross-border violence in Sudan, the Democratic Republic of the Congo, and most recently the Central African Republic, the crimes alleged in the warrants occurred in Uganda, particularly Northern Uganda. Arrest Warrants, *supra* note 52.

54. The lack of arrest warrants for the government officials prompted accusations of OTP partiality and even collusion with the Ugandan government. See, e.g., William Schabas, *First Prosecutions at the International Criminal Court*, 27 HUM. RTS. L. J. 25, 31 (2006) (arguing prosecutor solicited self-referral from Uganda in exchange for implicit or explicit promise to prosecute only LRA).

55. See, e.g., *Museveni rejects Hague LRA trial*, BBC NEWS, Mar. 12, 2008, available at <http://news.bbc.co.uk/2/hi/africa/7291274.stm> ("The LRA insists that the war crimes indictments are lifted before signing a deal to end the long, brutal conflict.").

56. See Int'l Crisis Group, *Northern Uganda: Seizing the Opportunity for Peace* 5, AFRICA REPORT NO. 124, April 26, 2007, available at http://www.crisisgroup.org/library/documents/africa/central_africa/124_northern_uganda_seizing_the_opportunity_for_peace.pdf [hereinafter *Seizing Opportunity*].

57. *Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement*, June 29, 2007 (Juba, Sudan), available at http://www.usip.org/pubs/usipeace_briefings/2008/accountability_reconciliation.pdf [hereinafter *Agreement on Accountability & Reconciliation*].

The June 2007 Agreement on Accountability and Reconciliation⁵⁸ provides for alternative mechanisms including traditional justice ceremonies, such as *mato oput* by the Acholi, a tribe that has protested the ICC warrants; other tribe-based mechanisms include the Langi Kayo Chuk system and the Iteso one Aliuc.⁵⁹ It also refers to a body, apparently a truth and reconciliation commission, to examine the need for accountability on both sides in the conflict.⁶⁰ Investigations would lead to accountability, but penalties would apparently be mitigated based on status (women or children), gravity of crime, and the need for reconciliation and rehabilitation.⁶¹ Reparations would also be covered, including “rehabilitation, restitution, compensation, guarantees of non-recurrence, apologies, memorials and commemorations.”⁶² The Ugandan government would have to pass legislation to implement the agreement.⁶³ Prior legislation includes an amnesty act, from which the top leaders of the LRA have purportedly been excluded.⁶⁴

The initial agreement seemed to break the prior impasse of the talks, but uncertainty remained over its interpretation. The focus of commentators was on the traditional justice mechanisms.⁶⁵ Yet on the face of it, the agreement requires formal criminal or civil justice proceedings against LRA leaders,⁶⁶ which seems to indicate domestic criminal prosecution. On the other hand, the LRA has repeatedly rejected criminal prosecution. In addition, the Ugandan government has indicated that traditional justice like *mato oput* would suffice.⁶⁷ Regardless, the agreement would require Uganda to remove the possibility of ICC prosecution in favor of Ugandan proceedings, but it is not clear whether the government will take any steps prior to the LRA’s full surrender and demobilization.⁶⁸

The agreement contemplated consultations with victims regarding an alternative to the ICC.⁶⁹ The one-month process stretched to three months, with subsequent negotiations to nail down the details planned for Fall 2007.⁷⁰ During

58. *Id.*

59. *See id.*; Frank Nyakairu, *LRA to Consult Victims on Accountability*, DAILY MONITOR (Uganda), June 13, 2007, available at http://www.monitor.co.ug/artman/publish/news/LRA_to_consult_victims_on_accountability.shtml.

60. Henry Mukasa, *LRA, Gov't Agree on Criminals*, THE NEW VISION (Uganda), June 13, 2007, available at <http://www.newvision.co.ug/D/8/13/570389?highlight&q=LRA,%20Government%20Agree%20on%20Criminals>; Hanlon, *supra* note 45, at 330.

61. *Uganda: LRA talks reach agreement on accountability*, IRIN, June 20, 2007, available at <http://irinnews.org/Report.aspx?ReportId=73010>.

62. *Id.*; *see generally*, e.g., Linda M. Keller, *Seeking Justice at the International Criminal Court: Victims' Reparations*, 29 T. JEFFERSON L. REV. 189 (2007) (discussing these types of reparations, particularly under the Rome Statute).

63. Mukasa, *supra* note 60.

64. Uganda Referral, *supra* note 43 (describing Museveni’s intention to exclude LRA leadership from the amnesty); Newman, *supra* note 7, at 340-42 (discussing exclusion of top leaders).

65. *See, e.g.*, Mukasa, *supra* note 60.

66. *Agreement on Accountability & Reconciliation*, *supra* note 57, at para. 4.1.

67. *Need to Maintain Momentum*, *supra* note 16, at 3.

68. Egadu, *supra* note 4.

69. *See* Nyakairu, *supra* note 59.

70. *Need to Maintain Momentum*, *supra* note 16, at 4.

this time, further reports emerged that confirmed the agreement on traditional justice for the LRA rather than ICC or domestic prosecution.⁷¹ Accordingly, the LRA asked Uganda to pass legislation to establish an “alternative traditional justice system” capable of meeting the requirements of the ICC statute and therefore leading the ICC to defer to Ugandan jurisdiction.⁷²

After the period of consultations ended, the parties negotiated an annexure to the prior agreement.⁷³ The new agreement, however, raises as many questions as it answers regarding the exact shape of the alternative justice measures.⁷⁴ The annexure first provides for a truth commission, although it does not use that term.⁷⁵ Second, it provides that a new division of the High Court of Uganda be created to try those alleged to have committed serious crimes.⁷⁶ “Prosecutions shall focus on individuals alleged to have planned or carried out widespread, systematic, or serious attacks directed against civilians or who are alleged to have committed grave breaches of the Geneva Conventions.”⁷⁷

But based on a plain reading of the annexure, it is not clear that there will be any criminal prosecutions. Although the High Court is “to try” individuals accused of serious crimes, the legislation envisioned creating this special division of the court “may provide for [*inter alia*] . . . recognition of traditional and community justice processes in proceedings.”⁷⁸ The Government undertakes to ensure that serious crimes are “addressed by the special Division of the High Court; traditional justice mechanisms; and any other alternative justice mechanisms established under the principal agreement. . . .”⁷⁹ This implies that those accused of the most serious crimes, such as Kony and the other LRA leaders indicted by the ICC, might face traditional justice (such as *mato oput*) rather than criminal prosecution. Moreover, the annexure does not address punishment, besides a reference to reparations as a general matter.⁸⁰ The original agreement’s reference to “alternative penalties and

71. See, e.g., Paul Harera & Grace Matsiko, *LRA Asks Government to Legalise Traditional Justice*, MONITOR ONLINE (Uganda), June 22, 2007, http://www.monitor.co.ug/artman/publish/news/LRA_asks_government_to_legalise_traditional_justice.shtml (last visited Mar. 11, 2008).

72. *Id.*

73. *Annexure to the Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord’s Resistance Army/Movement*, Feb. 19, 2008 (Juba, Sudan), available at http://www.usip.org/pubs/usipeace_briefings/2008/accountability_reconciliation_annex.pdf [hereinafter *Annexure to Agreement on Accountability & Reconciliation*].

74. Cf. Report by the Registrar on the Execution of the “Request for Information from the Republic of Uganda on the Status of Execution of the Warrants of Arrest”, Mar. 28, 2008, Annex 2, available at <http://www.icc-cpi.int/library/cases/ICC-02-04-01-05-286-Anx2-ENG.pdf> (noting that government intends to form task force to figure out the details of implementing the agreement and annex).

75. *Annexure to Agreement on Accountability & Reconciliation*, *supra* note 73, at 4.

76. *Id.* at 7.

77. *Id.* at 14.

78. *Id.* at 9(e).

79. *Id.* at 23.

80. *Id.* at 16-18.

sanctions"⁸¹ indicates that even if there are criminal prosecutions, criminal punishment might be lacking.

The necessary legislation⁸² to create the special division of the High Court might never be passed. First, Amnesty International notes that Uganda has yet to pass the proposed legislation implementing the Rome Statute of the ICC, calling into question its ability to legislate the creation of a new High Court division.⁸³ It also argues that the annexure fails to justify the creation of a new entity, which will lead to further delays; if enacted, the legislation following the annexure would adopt overly restrictive definitions of the crimes and would not ensure fair trials or adequate punishment.⁸⁴ In addition, there is a history of interference by the President with the judiciary, such that Museveni could influence the interpretation of the annexure so that the reference to traditional justice under the High Court division will indicate nonprosecution.⁸⁵

Indeed, President Museveni stated as recently as March 12, 2008 that Kony and other LRA accused will be prosecuted under a system of traditional justice.⁸⁶ He explained that the community of victims had asked for traditional justice, which he explained as compensatory rather than retributive or punitive.⁸⁷ Museveni noted that the request for ICC intervention came when the LRA was outside Ugandan territory. According to Reuter's, Museveni elaborated:

If the rebels returned to Uganda, "what we have said in the agreement is that instead of using this formal Western type of justice we are going to use the traditional justice, a traditional blood settlement mechanism," he said. Under this system, someone who has "committed a mistake" asks for forgiveness and pays some compensation, he said. "That settles their accountability." "In that case, we can approach the ICC and say, yes, those people who we have brought to your attention have now come (back) ... Therefore we ask you to withdraw our complaint." If they opted for the traditional settlement, Kony and the other LRA leaders would avoid prison, he said.⁸⁸

81. Agreement on Accountability and Reconciliation, *supra* note 57, at para. 6.3.

82. See, e.g., Lominda Afedraru, *Uganda lacks laws to prosecute LRA rebels*, Monitor (Kampala), April 6, 2008, available at <http://allafrica.com/stories/200804070227.html>.

83. Amnesty International, *Uganda: Agreement and Annex on Accountability and Reconciliation Falls Short of a Comprehensive Plan to End Impunity* 11, AFR 59/001/2008 (Mar. 2008), available at [http://www.reliefweb.int/rw/RWFiles2008.nsf/FilesByRWDocUnidFilename/LRON-7CTEZN-full_report.pdf/\\$File/full_report.pdf](http://www.reliefweb.int/rw/RWFiles2008.nsf/FilesByRWDocUnidFilename/LRON-7CTEZN-full_report.pdf/$File/full_report.pdf) [hereinafter Amnesty International].

84. *Id.* at 15-18.

85. *Id.* at 15.

86. David Stringer, *Uganda: Rebels Will Face Trial at Home*, ASSOCIATED PRESS, Mar. 12, 2008, available at http://www.boston.com/news/world/africa/articles/2008/03/11/uganda_rebels_will_face_trial_at_home/.

87. *Id.*

88. Adrian Croft, *Uganda offers "blood settlement" to LRA rebels*, Reuters, Mar. 12, 2008, available at <http://africa.reuters.com/business/news/usnBAN225057.html>.

Based on Museveni's statements, it appears that "the LRA suspects will not be tried before the new special division of the High Court at all, but instead will submit to a traditional alternative procedure."⁸⁹

The final peace deal, incorporating the agreement and annexure described above, was originally to be signed in March, 2008. After delaying the signing repeatedly, Kony asked "for clarification" about the annexure, particularly regarding the use of courts and traditional justice.⁹⁰ The LRA's chief negotiator subsequently resigned, or was fired, by Kony.⁹¹ Kony raised additional demands, calling for financial and security guarantees.⁹² The chair of the talks nevertheless expressed hope that the deal would be signed in the near future.⁹³ By the time this article is published, the peace deal may be signed. However, Kony has repeatedly used talks as a delaying tactic to rebuild in the past.⁹⁴ "It is distinctly possible" that the LRA delegation is merely buying time, for example, until Sudanese support for the LRA re-emerges.⁹⁵

Even if the peace agreement is signed by both sides, the LRA will have a month to assemble and presumably disarm in Sudan prior to returning to Uganda.⁹⁶ Yet the stalemate may continue: the lead LRA negotiator has said, "The LRA has offered all it could but we shall not disarm before the U.N. or the ICC stop investigations and prosecution of our leader."⁹⁷ In addition, there are rumors that the signing was postponed because Kony had moved his contingent of forces to the Central African Republic, in violation of prior agreements.⁹⁸

While the outcome of the negotiations is unknown at the time of the writing of this article (April 11, 2008), it seems plausible to expect that if the LRA disarm and surrender to Uganda, they will face traditional justice as promised by Museveni. Indeed, Kony himself has stated that "he would only face traditional justice ceremonies in northern Uganda."⁹⁹ Thus, Kony and other LRA leaders will likely face a truth commission and/or tribal justice such as *mato oput*, instead of prosecution. Regardless of the specifics of the final peace plan, the detailed examination of specific alternative justice mechanisms like a truth commission and

89. Amnesty International, *supra* note 83, at 7.

90. Kwera & Wheeler, *supra* note 6.

91. Francis Kwera, *Top negotiator for Uganda rebel Kony says he quit*, Reuters, Apr. 10, 2008, available at <http://www.alertnet.org/thenews/newsdesk/WAL070402.htm>.

92. Reuters Africa, *Uganda rebel Kony "worried about security, finances"*, Reuters, Apr. 11, 2008, available at <http://africa.reuters.com/wire/news/usnL11413705.html>.

93. Mark Tran et al., *Ugandan rebel leader fails to sign peace deal*, Guardian, Apr. 11, 2008, available at <http://www.guardian.co.uk/world/2008/apr/11/uganda>.

94. *Seizing Opportunity*, *supra* note 56, at 10.

95. *Id.* at 11.

96. Katy Glassborow & Peter Eichstaedt, *Ugandan Rebels to Appeal ICC Warrants*, INST. WAR & PEACE REPORTING, June 19, 2007, available at http://www.iwpr.net/?p=acr&s=f&o=343316&apc_state=henh.

97. Frank Nyakairu, *Will Juba Peace End Pain in North?*, The Monitor (Kampala), Apr. 6, 2008, available at <http://allafrica.com/stories/200804050142.html>.

98. *Id.*

99. Columbus Onoo, *Refugees Grow Impatient*, INST. WAR & PEACE REPORTING, Apr. 8, 2008, available at <http://www.reliefweb.int/rw/rwb.nsf/db900sid/ASIN-7DHNGD?OpenDocument>.

mato oput will offer a concrete basis for an exploration of how nonprosecutorial alternatives might fit under the Rome Statute.

It is not clear how the Ugandan government will attempt to remove the ICC warrants, as there is no provision enabling withdrawal of a state referral.¹⁰⁰ Nonetheless, in June 2007, the Ugandan government indicated that it will “engage” the ICC after the conclusion of a comprehensive peace agreement.¹⁰¹ But the ICC has apparently already refused to suspend the arrest warrants.¹⁰² Moreover, it seems unlikely that the OTP will do so in the future.¹⁰³ In a June 2007 address, the current prosecutor, Luis Moreno-Ocampo, implied that the ICC would not give in to LRA blackmail and extortion.¹⁰⁴ He stated that proposals “asking the Prosecution to use its discretionary powers to adjust to situations on the ground, to indict or withdraw indictments according to short term political goals . . . calling for amnesties, the granting of immunities” are not consistent with the Rome Statute.¹⁰⁵ He stated that arrest warrants “must be implemented.”¹⁰⁶ He noted that “other national mechanisms can be useful for the other combatants.”¹⁰⁷ Thus, while the OTP would defer to Ugandan preferences for lesser perpetrators, it is unlikely that the OTP will drop the warrants against Kony and other leaders on its own initiative.¹⁰⁸ As recently as March, 2008, Moreno-Ocampo refused to meet with representatives of the LRA and reiterated his refusal to drop the warrants.¹⁰⁹ He also expressed concern that the LRA was using negotiations as a ploy for time, while continuing to fight and to abduct children.¹¹⁰ He has reportedly implied that further charges might be forthcoming based on recent atrocities.¹¹¹

Although there is no formal mechanism in the statute for a withdrawal of the referral, Uganda could effectively block the ICC prosecution by simply refusing to arrest or surrender Kony and the other indicted LRA leaders, thereby breaching its duties under the Rome Statute and opening Uganda to possible penalties under the

100. Cf. Adel Maged, *Withdrawal of Referrals - A Serious Challenge to the Function of the ICC*, 6 INT'L CRIM L. REV. 419, 422 (2006) (arguing that state can withdraw based on sovereignty, but without effect on ICC jurisdiction).

101. *Uganda: Government to Seek Review of ICC Indictments Against LRA Leaders*, IRIN, June 21, 2007, available at <http://www.irinnews.org/Report.aspx?ReportId=72861>.

102. La Cour pénale internationale ne retirera pas le mandat d'arrêt contre le chef de la LRA [The International Penal Court Will Not Withdraw the Warrant for Arrest Against the Chief of the LRA], *Jeune Afrique*, June 15, 2007 (Fr.), available at http://www.jeuneafrique.com/pays/ouganda/article_depeche.asp?art_cle=XIN70027lacouarlale0.

103. See Sifris, *supra* note 5, at 46.

104. See Moreno-Ocampo, *supra* note 1.

105. *Id.*

106. *Id.*

107. *Id.*

108. The prosecutor may not have the authority to drop the prosecution now. See *infra* Part III.

109. Nora Boustany, *Ugandan rebel reaches out to International Court*, WASH. POST, Mar. 19, 2008, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/03/18/AR2008031803054.html>.

110. *Id.*

111. Milton Allimadi, *ICC: No deal LRA*, Black Star News, Feb. 28, 2008, available at <http://www.blackstarnews.com/?c=122&a=4276>.

treaty.¹¹² In addition, it could urge the international community, in the form of the ICC or U.N. Security Council, to take steps to effectively suspend or eliminate the ICC prosecutions in favor of Ugandan alternatives. To do so, the relevant entities of the ICC would need to interpret the statute broadly and to determine that the Ugandan nonprosecutorial alternatives sufficiently further the goals of the ICC. The next Part explores the Ugandan alternative in detail to provide the foundation for the statutory analysis in Part III.

II. UGANDAN ALTERNATIVE JUSTICE MECHANISMS (AJM)

“Whereas in Uganda the ICC Prosecutor seeks justice through criminal prosecutions, victim communities seek justice through peace and traditional reintegration ceremonies.”¹¹³ The proposed Ugandan Alternative Justice Mechanisms (AJM) apparently include a truth commission and traditional justice, particularly the Acholi *mato oput* process.¹¹⁴ Because the parameters of the proposed Ugandan truth commission are unclear, this Part will only briefly outline the typical features of a truth commission. While others have referred to Acholi traditional justice in general terms, this Part will explore the Acholi *mato oput* ritual in depth. It explores difficulties with the presumption that the Acholi support the use of *mato oput* and with the adaptation of *mato oput* to the current conflict, providing the basis for the evaluation of ICC deferral to AJM in the next parts.

The peace deal apparently includes the formation of a truth commission. Others have explored truth commissions in depth, work that this article will draw on in Part IV. 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.¹¹⁵ Priscilla B. Hayner’s ground-breaking study of truth commissions identifies five aims: (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.¹¹⁶ A truth commission’s success depends on its mandate, resources, and personnel.¹¹⁷ Because the Uganda – LRA peace deal does not spell out the parameters of a proposed truth commission, the analysis below will offer guidance based on a range of possibilities.

In addition to the truth commission, the proposed peace deal includes traditional justice. This section will first describe the Acholi relationship to the

112. See Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT’L L. 510, 529 (2003) (discussing penalty of reporting State breach to Assembly of States Parties).

113. MARK A. DRUMBL, *ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW* 136 (2007) (citing Jeffrey Gettleman, *Uganda Peace Hinges on Amnesty for Brutality*, N.Y. TIMES, Sept. 15, 2006, at A1).

114. See *supra* Part I.

115. PRISCILLA B. HAYNER, *UNSPEAKABLE TRUTHS: FACING THE CHALLENGE OF TRUTH COMMISSIONS* 14 (2002).

116. *Id.* at 24.

117. See *id.* at 23.

conflict, then examine the alleged Acholi desire to use *mato oput* to end the conflict. After discussing the problematic nature of the presumption that the Acholi support AJM, this section highlights the culture of the Acholi as it relates to AJM. It then explores the *mato oput* process and its potential to deal with LRA atrocities and governmental abuses.

The Acholi tribe¹¹⁸ in Northern Uganda has a complex and unusual relationship to the conflict. First, Kony purportedly initially fought the government on behalf of the neglected North, particularly the persecuted Acholi.¹¹⁹ The long-standing North-South divide¹²⁰ goes back to the loss of Acholi control of the military government and fighting between Acholi insurgencies and Museveni's National Resistance Army.¹²¹ Second, many members of the LRA are Acholi. But many Acholi have been kidnapped and coerced into joining the LRA literally on penalty of death. Particularly in the later years of the conflict, Kony turned on the Acholi, especially traditional leaders, punishing them for their lack of support.¹²² The LRA – often made up of Acholi abducted children -- committed numerous atrocities aimed squarely at the Acholi.¹²³ Thus, the Acholi are, for lack of a better word, conflicted. They support the LRA to the extent that it raises grievances against the government. But they abhor the tactics of the LRA and want their children to return home, regardless of their actions while with the LRA. One eighteen-year-old female student expressed the contradictory emotions to anthropologist Sverker Finnstrom: "I do not support the rebels, nor am I supporting the government. . . I

118. See generally ALLEN, *supra* note 2, at 26 (discussing classification of Acholi and other populations as 'tribes'); FINNSTRÖM, *supra* note 10, at 54-59 (tracing the ethnological history of the Acholi in addition to their tribal policies under colonial and subsequent administrations).

119. See, e.g., ALLEN, *supra* note 2, at 68 (recounting former LRA abductee's description of Kony: "He told us to be strong hearted and fight for the freedom of Acholi people. It's our duty to free the Acholi whose land will be taken away by Museveni.").

120. See, e.g., FINNSTRÖM, *supra* note 10, at 96-112 (tracing evolution of regional conflict, particularly Northern versus other regions).

121. See *id.* at 261-62; see also Int'l Crisis Group, *Northern Uganda: Understanding and Solving the Conflict*, AFRICA REPORT NO. 77, Apr. 14, 2004 at 2-6 (describing North-South divide and emergence of LRA insurgency). For an extensive discussion of the various guerilla groups beginning in 1981 with a guerrilla war started by Museveni and the National Resistance Movement/Army in central Uganda, see FINNSTRÖM, *supra* note 10, at 100-12. In addition, see ALLEN, *supra* note 2, at 31, for a brief discussion of the emergence of "spirit mediums . . . as military commanders" leading to Kony's LRA.

122. See, e.g., ALLEN, *supra* note 2, at 68 (quoting captured LRA member that "the [LRA] commanders said the Acholi people were stubborn and did not want to support their movement since they encouraged their children to escape when they are abducted. So they had to kill them to make them learn."); FINNSTRÖM, *supra* note 10, at 274, 282-88 (describing LRA targeting of traditions and traditional leaders of Acholi and claiming that Kony received, then lost, a blessing from elders to fight Museveni).

123. Refugee Law Project, *Peace First, Justice Later: Traditional Justice in Northern Uganda* [WORKING PAPER NO. 17], at 30 (2005) [hereinafter RLP, *Peace First*]; Amy Colleen Finnegan, *A Memorable Process in a Forgotten War: Forgiveness Within Northern Uganda* 69 (Feb. 11, 2005) (unpublished Master's thesis, Tufts University) (on file with the Fletcher School for Law and Diplomacy, Tufts University), available at <http://fletcher.tufts.edu/research/2005/Finnegan.pdf>.

am just in a dilemma. I would like to support the rebels, but they are killing my people."¹²⁴

As noted above, the Acholi, or at least the most vocal and elite of the tribe,¹²⁵ have protested the ICC investigation of the LRA. Acholi leaders traveled to The Hague to unsuccessfully urge the OTP to drop the investigation for fear that it would drive Kony deeper into the bush – along with their children – and doom any peace deal.¹²⁶ The stated view of the Acholi is that traditional methods should be used rather than ICC (or other) prosecution.¹²⁷ The professed values of the Acholi elevate forgiveness and reconciliation over the punishment of retributive justice.¹²⁸

There are several problems with the presumption that the Acholi wholeheartedly favor traditional restorative justice rather than retribution via prosecution. First, not all Ugandan victims are Acholi – other Northern tribes have different traditions,¹²⁹ and some favor prosecution over their own tribal practices.¹³⁰ Second, not all Acholi support traditional methods.¹³¹ Many favor prosecution -- now or later. Some victims do not want to reconcile with offenders, and prefer prosecution and incarceration or even summary execution. Reconciliation and reintegration places very difficult burdens on Acholi victims, who are asked to

124. FINNSTRÖM, *supra* note 10, at 37.

125. See, e.g., ALLEN, *supra* note 2, at 132 (describing purported consensus for traditional justice as product of religious and Acholi leaders); OHCHR, *Making Peace*, *supra* note 24, at 49 (noting an inaccurate perception that there is widespread opposition to prosecution).

126. See ALLEN, *supra* note 2, at 178.

127. *But see id.* at 131 (noting that translation problems may call into question statements regarding forgiveness and reconciliation).

128. See Refugee Law Project, *Whose Justice? Perceptions of Uganda's Amnesty Act 2000* 9, 23 (Working Paper No. 15, 2005), available at <http://www.refugeelawproject.org/resources/papers/workingpapers/RLP.WP15.pdf> [hereinafter RLP, *Whose Justice?*] (discussing reasons for supporting amnesty, including pragmatic desire to end conflict); Finnegan, *supra* note 123, at 32 (describing Acholi embrace of forgiveness as source of pride); Erin Baines, *Alice's Story: Cultural and Spiritual Dimensions of Reconciliation in Northern Uganda* 4 (Liu Institute for Global Issues, Field Notes No. 1, Feb. 2006), available at <http://www.ligi.ubc.ca/?p2=/modules/liu/publications/view.jsp&id=20> [hereinafter Baines, *Alice's Story*] (“The practice of Acholi justice is restorative, seeking to rebuild social relationships through a process of truth telling, compensation and ritual.”).

129. See generally Stephen Arthur Lamony, *Approaching National Reconciliation in Uganda: Perspectives on Applicable Justice Systems* (Uganda Coal. for the Int'l Criminal Court, Working Paper, 2007), available at http://www.iccnw.org/documents/ApproachingNationalReconciliationInUganda_07aug13.pdf.

130. See, e.g., ALLEN, *supra* note 2, at 167 (describing many Acholi, and particularly Madi, Teso and Langi, as dismissive of so-called Acholi justice); OHCHR, *Making Peace*, *supra* note 24, at 53 (highlighting skepticism in Langi and Iteso over traditional practices).

131. See, e.g., Patrick Okino, *No Consensus in North on War Crimes Justice* (Inst. for War & Peace Reporting, AFRICA REPORT NO. 117, June 2007), available at http://www.iwpr.net/?p=acr&s=f&o=336354&apc_state=henpacr (concluding it is “impossible” to determine “what proportion of people in the north want the ICC to press on with its warrants and bring Kony and his men to justice in The Hague, and how many want the LRA to be forgiven after going through traditional reconciliation rituals”); Int'l Crisis Group, *A Strategy for Ending Northern Uganda's Crisis* 9 (Africa Briefing No. 35, Jan. 2006), available at <http://www.crisisgroup.org/home/index.cfm?id=3864&l=1> (“Ugandans have mixed opinions about the appropriate mechanisms but many believe that ending the war should take priority.”).

“welcome home” those who butchered their family and maimed them.¹³² While there is often sympathy for those who were abducted, some victims have “admitted that they are unwilling to accept former combatants back regardless of whether or not they were abducted.”¹³³ One elderly woman indicated that abductees should be disowned and killed for killing on Kony’s orders.¹³⁴ “It is naïve to believe that the Acholi people have a traditional reconciliation process that will magically make everyone forgive each other.”¹³⁵ Other victims have expressed a desire for peace at any cost, but with future prosecution once the conflict is over.¹³⁶ According to the International Crisis Group, even within the Acholi culture, “[t]raditional reconciliation ceremonies receive tepid support in part because they are insufficient to the scale and nature of the conflict.”¹³⁷

These first two concerns are illustrated in a widely-cited 2005 survey of Northern Ugandans.¹³⁸ The survey analyzed data from four northern districts.¹³⁹ The districts contain both Acholi and non-Acholi victims.¹⁴⁰ The survey revealed a disparity between Acholi and other Northern Ugandans regarding prosecution. For example, the majority of respondents (76%) indicated that perpetrators of abuses should be held accountable, with non-Acholi districts holding this belief more prevalently.¹⁴¹ When asked about accountability, the most common response (66%) was punishment, i.e., trial and imprisonment/execution.¹⁴² Again, the non-Acholi districts supported prosecution and punishment more strongly than the Acholi districts, which were more likely to support reconciliation and reintegration.¹⁴³ When asked about whether those who committed abuses should be tried in a judicial system, a majority of all districts said yes: 67-76% in Acholi districts; 86-

132. RLP, *Peace First*, *supra* note 123, at 30; *cf.* OHCHR, *Making Peace*, *supra* note 24, at 30 (noting how forgiveness often comes reluctantly and for pragmatic reasons).

133. RLP, *Peace First*, *supra* note 123, at 33.

134. *Id.* (noting anger toward perpetrators).

135. Joyce Neu, *Briefing on the Conflict in Uganda: Hope for a Negotiated Solution* 16 (Joan B. Kroc Inst. for Peace & Justice, June 2005), available at [http://peace.sandiego.edu/reports/articles/PDF/JN%20remarks%205-30-05%20\(2\)%5B1%5D.pdf](http://peace.sandiego.edu/reports/articles/PDF/JN%20remarks%205-30-05%20(2)%5B1%5D.pdf) (noting that the U.S. should not “romanticize the Acholi people - they are not superhuman and will not forget or forgive easily”); OHCHR, *Making Peace*, *supra* note 24, at 28 (discussing misleading view of Acholi as “inherently forgiving and reconciliatory”).

136. Phuong Pham et al., *Forgotten Voices: A Population-Based Survey on Attitudes about Peace and Justice in Northern Uganda* 34 (Int’l Center for Transitional Justice & Human Rights Ctr., July 2005), available at <http://www.ictj.org/images/content/1/2/127.pdf> [hereinafter Pham et al., *Forgotten Voices*] (describing survey results where vast majority of those who believed justice would endanger peace still supported pursuing justice in future, after peace is established or within a year or two).

137. *Peace in Northern Uganda*, *supra* note 44, at 16.

138. Pham et al., *Forgotten Voices*, *supra* note 136, at 1; *see also* OHCHR, *Making Peace*, *supra* note 24, at 49 (discussing more recent mixed views within Northern Uganda).

139. Pham et al., *Forgotten Voices*, *supra* note 136, at 10 (noting that due to resource and security constraints, the survey is representative at the district, but not necessarily regional or national level).

140. *Id.* at 10-12, 20.

141. *Id.* at 26.

142. *Id.*

143. *Id.*

90% in non-Acholi districts.¹⁴⁴ This result seems to contradict the relatively high number of Acholi district respondents who favored amnesty, but might instead reflect a natural, familial preference. Respondents might support amnesty for their children who were abducted into the LRA, but support prosecution as a general matter. Similarly, respondents might also support amnesty for the rank and file, but desire prosecution for the leaders.¹⁴⁵

The apparent contradiction might also reveal misunderstanding of the legal effect of amnesty or a desire for eventual prosecution after amnesty, as indicated above.¹⁴⁶ While lawyers would see this attitude as an improper bait and switch, it might be natural for victims to desire a sequencing of peace and justice: peace first, via amnesty if necessary, followed by eventual prosecution once the situation is secure enough for trials. This would not be unprecedented in international criminal justice, as illustrated by the fate of Charles Taylor. After he was given asylum in exchange for relinquishing power in Liberia, Taylor lived comfortably in Nigeria until Nigeria granted Liberia's request for his transfer to the Special Court for Sierra Leone. Nigeria was praised by the Security Council for both its willingness to grant Taylor asylum in the interests of peace and to give Taylor to the court in the interests of justice.¹⁴⁷ It remains to be seen whether this example will have negative repercussions for future peace negotiations, as noted in Part III.¹⁴⁸

The 2005 Northern Ugandan survey also offered the choice of "peace with amnesty" or "peace with trials and punishment."¹⁴⁹ The Acholi were more likely to choose peace with amnesty (56%) over non-Acholi (39%), compared to peace with trials and punishment (Acholi 44% versus non-Acholi 61%).¹⁵⁰ But overall it seems that "the people of northern Uganda want both peace and punishment of the LRA's leadership."¹⁵¹ Even Acholi who objected to trials tended to do so because of the perceived ineffectiveness of Ugandan courts rather than in principle.¹⁵²

Yet, both Acholi and non-Acholi seek outcomes that are more likely achieved via AJM than through ICC prosecution. Acholi and non-Acholi respondents agree about what perpetrators who received amnesty would need to do to be reintegrated

144. *Id.* at 33.

145. *See id.* at 40; OHCHR, *Making Peace*, *supra* note 24, at 49 (noting that amnesty generally supported for lesser perpetrators, particularly children of community).

146. *See* Pham et al., *Forgotten Voices*, *supra* note 136, at 30.

147. S.C. Res. 1688, pmb., U.N. Doc. S/RES/1688 (June 16, 2006) [hereinafter U.N. Resolution 1688] ("expressing its appreciation" to Nigeria for facilitating removal of Taylor from Liberia by previously offering him asylum and for facilitating the transfer of Taylor to the Special Court for Sierra Leone).

148. *See supra* Part III.A (discussing whether promise of temporary suspension of prosecution under Article 16 would be trusted given prior revocations of amnesty).

149. Pham et al., *Forgotten Voices*, *supra* note 136, at 33.

150. *Id.* at 33; OHCHR, *Making Peace*, *supra* note 24, at 48.

151. *Peace in Northern Uganda*, *supra* note 44, at 16; OHCHR, *Making Peace*, *supra* note 24, at 49 (mixed response to amnesty, driven by pragmatic concerns); *cf.* DRUMBL, *supra* note 113, at 41-44 (noting victims' desire for integrated responses).

152. OHCHR, *Making Peace*, *supra* note 24, at 50.

into the community.¹⁵³ A majority in all districts required an apology (53-62%), with confession a close second in Gulu, Kitgum, and Lira (39-42%).¹⁵⁴ A large majority of respondents (81%) wanted an opportunity to tell their stories.¹⁵⁵ A smaller majority (58%) also indicated a preference for reparations, particularly in the form of financial compensation and in a communal fashion.¹⁵⁶

An August 2007 qualitative study of Northern Ugandan opinion found that respondents across the region identified truth and compensation as necessary objectives.¹⁵⁷ Non-Acholi Northern Ugandans who did not support amnesty tended to support a conditional amnesty, requiring truth-telling.¹⁵⁸ This data indicates that AJM is supported, but not necessarily to the exclusion of prosecution. It might be impossible, however, to craft a peace deal that encompasses both because the LRA is demanding impunity from prosecution.

It seems that attitudes in Northern Uganda shifted toward greater acceptance of nonprosecutorial alternatives as the peace process has progressed.¹⁵⁹ While most respondents to a more recent 2007 survey still favor accountability, there is an increased willingness to compromise “for the sake of peace” especially as it pertains to the LRA.¹⁶⁰ The authors of the report, which updates the 2005 survey discussed above, attribute the shift to the current peace process and media programs.¹⁶¹ The percentage of respondents favoring prosecution and imprisonment or death dropped from 66% in 2005 to 41% in 2007.¹⁶² Nonetheless, there are still strong beliefs in favor of accountability. For example, a majority (59%) agreed that LRA leaders should be put on trial.¹⁶³ Yet many still support amnesty if it is necessary for peace. The simultaneous support for accountability and amnesty could reflect a desire for the peace process to go forward, a distinction between LRA leaders and the rank and file, or simply a divide within respondents who are not certain of the best way to promote lasting peace.¹⁶⁴ As the surveys discussed above indicate, there are mixed opinions regarding AJM even among the Acholi.

153. Pham et al., *Forgotten Voices*, *supra* note 136, at 29.

154. *Id.*

155. *Id.* at 35. *But see* Erin Baines, *The Cooling of Hearts: Community Truth-Telling in Acholi-land* 10-11 (Liu Institute for Global Issues, July 2007), *available at* http://www.liu.xplorex.com/sites/liu/files/Publications/JRP/July2007_JRP_CoolingofHearts.pdf (showing the reluctance of victims for public hearings).

156. Pham et al., *Forgotten Voices*, *supra* note 136, at 36, 39.

157. OHCHR, *Making Peace*, *supra* note 24, at 47.

158. *Id.* at 49.

159. Phuong Pham et al., *When the War Ends: A Population-Based Survey on Attitudes about Peace, Justice, and Social Reconstruction in Northern Uganda* 34 (Human Rights Center, Payson Center for International Development, International Center for Transitional Justice, Dec. 2007), *available at* [http://www.reliefweb.int/rw/RWFFiles2007.nsf/FilesByRWDocUnidFilename/EMAE-79ZSZP-full_report.pdf/\\$File/full_report.pdf](http://www.reliefweb.int/rw/RWFFiles2007.nsf/FilesByRWDocUnidFilename/EMAE-79ZSZP-full_report.pdf/$File/full_report.pdf).

160. *Id.* at 3, 34.

161. *Id.* at 34.

162. *Id.* at 35.

163. *Id.* at 34.

164. *Id.* at 4-5.

The third problem with a purported Acholi preference for traditional justice is that one could conceive of the victims very broadly. Direct victims include not only the Acholi and other Northern Ugandan tribes but also those in neighboring countries who have been victims of LRA attacks. Indirect victims include all of Uganda and indeed the entire world; international crimes are thought of as crimes against the international community as a whole. The general trend in the international community is for prosecution.¹⁶⁵

Finally there is also an apparent lack of agreement over whether traditional methods are feasible given the circumstances, as will be discussed further below. That said, for the sake of clarity and consistency with the latest promises made by Uganda in the peace process, this article will evaluate the Acholi traditional justice mechanism of *mato oput*. The analysis of *mato oput* will also illustrate the potential compatibility of traditional justice ceremonies with the ICC. The concerns regarding the representativeness of the Acholi mechanisms will be pertinent when analyzing whether the ICC should defer to the proposed AJM.

Acholi culture and traditions support AJM. The communal nature of Acholi society means that the unity of the clan is paramount.¹⁶⁶ Members are expected to work together for the good of society.¹⁶⁷ Bad actors bring upon themselves “*cen*,” an angry spirit that enters the physical body and seeks appeasement in the form of a sacrifice or compensation and reconciliation where a death has occurred.¹⁶⁸ An individual must undergo a ritual to rid himself and his family or clan of the bad spirits.¹⁶⁹ The traditional belief in *cen* carries through to today.¹⁷⁰ Thus, an individual’s crime has repercussions for the entire community. As a result, Acholi traditional justice aims at restoring the social harmony rather than imposing punishment.¹⁷¹ Individual responsibility, however, is crucial to Acholi ceremonies. The perpetrator must take responsibility by voluntarily confessing.¹⁷² Only then can the tribe establish the facts and determine adequate compensation against the offender’s clan.¹⁷³ Shame is a powerful component of Acholi justice, seen as

165. See *infra* Part III.

166. See *Roco Wat I Acoli: Restoring Relationships in Acholi-land: Traditional Approaches to Justice and Reintegration* (Liu Institute for Global Issues), Sept. 2005, at 10 [hereinafter *Roco Wat I Acoli*] (“Historically, the good health and happiness of the Acholi individual was always situated in the context of the harmony and well-being of the clan.”); Finnegan, *supra* note 123, at 67 (describing communal nature of life of Acholi).

167. *Id.*

168. *Roco Wat I Acoli*, *supra* note 166, at 12; see also FINNSTRÖM, *supra* note 10, at 218 (describing *Cen* as a “ghostly vengeance”) (internal quotations omitted).

169. *Roco Wat I Acoli*, *supra* note 166, at 12-13 (outlining the various rituals that the Acholi may perform to appease *cen*); see also FINNSTRÖM, *supra* note 10, at 296-98 (discussing rituals performed by two Acholi clans due to “bad omens,” that brought misfortune to each clan).

170. This belief in *cen* “does not mean that understanding of empirical causality is absent, but that explanations for misfortunes tend to be pluralistic.” ALLEN, *supra* note 2, at 31. For example, a mother who understands that her child died of malaria might turn to spiritual beliefs to explain why her child died as opposed to another’s child. *Id.*

171. *Roco Wat I Acoli*, *supra* note 166, at 16.

172. *Id.* at 14.

173. *Id.* at 15.

punishment for wrongdoing and motivation for avoiding wrongs.¹⁷⁴ The cultural emphasis on the community, however, has been sorely tested by colonialism, modernization, and the ongoing conflict. In one 2005 report, most of those interviewed “argued that the spirit of communalism that characterized Acholi domains in the past has been replaced with that of individualism.”¹⁷⁵ Nonetheless, traditional rituals still seem to hold value for many Acholi.¹⁷⁶

There are several ceremonies that are traditionally practiced by the Acholi.¹⁷⁷ *Mato oput* is the main ceremony discussed as alternative justice for Kony and other LRA members, particularly those sought by ICC arrest warrants.¹⁷⁸ *Mato oput* (drinking the bitter herb or root) is traditionally used to resolve inter-clan disputes, such as the killing of one clan member by a person of another clan.¹⁷⁹ *Mato oput* must not be reduced to a mere drinking of a bitter brew.¹⁸⁰ *Mato oput* is, in fact, “both a process and a ritual ceremony to restore relationships between clans in the case of intentional murder or an accidental killing.”¹⁸¹

Mato oput is “a long and sophisticated process that begins by separating the affected clans, mediation to establish the ‘truth’ and payment of compensation according to by-laws.”¹⁸² “Reconciliation . . . must be preceded by peace talks and conflict settlement.”¹⁸³ The process often stretches into years if not decades; it takes time for elders to mediate the conflict, for the perpetrator to come to acknowledge his responsibility, and for him (and his family/clan) to raise the necessary compensation.¹⁸⁴ The *mato oput* ceremony itself is an elaborate ritual beginning with the symbolic beating of a stick, signifying acceptance of guilt by the perpetrator for the killing.¹⁸⁵ Next, each clan provides an animal for slaughter, traditionally a sheep and a goat representing the two parties to the conflict.¹⁸⁶ The animals are slaughtered and mixed together to symbolize the coming together of

174. *Id.* at 14; RLP, *Peace First*, *supra* note 123, at 13.

175. *Roco Wat I Acoli*, *supra* note 166, at 21.

176. Pham et al., *Forgotten Voices*, *supra* note 136, at 52.

177. *See id.* at 26-30 (listing various cleansing and reconciliation ceremonies).

178. Baines, *Alice’s Story*, *supra* note 128, at 10 (describing cleansing ceremonies as first step culminating in *mato oput*); *Peace in Northern Uganda*, *supra* note 44, at 16 (describing *mato oput* as “most commonly advocated ceremony”); *Roco Wat I Acoli*, *supra* note 166, at 66. For example, ceremonies include *gomo tong*, also known as “bending of the spears,” an inter-clan reconciliation ritual which apparently has not been carried out since the 1980s, and *nyouo tong gweno*, a cleansing ceremony traditionally used to welcome home anyone who has been away for a significant period of time. *Roco Wat I Acoli*, *supra* note 166, at 26, 29; *see also* ALLEN, *supra* note 2, at 132-33 (noting the different uses of the *gomo tong* and *mato oput* ceremonies); RLP, *Peace First*, *supra* note 123, at 24, 28 (discussing when the *nyouo tong gweno* and *mato oput* ceremonies are performed by the Acholi).

179. RLP, *Peace First*, *supra* note 123, at 24.

180. *See* FINNSTRÖM, *supra* note 10, at 291 (describing *mato oput* as a “complex and sophisticated” ritual).

181. *Roco Wat I Acoli*, *supra* note 166, at 74. The practice of *mato oput* differs across clans within the Acholi. *Id.* at 65-66.

182. *Id.* at 54.

183. FINNSTRÖM, *supra* note 10, at 302.

184. *Roco Wat I Acoli*, *supra* note 166, at 55.

185. *Id.* at 57-58 (providing a comprehensive outline of the *Mato oput* ceremony).

186. *Id.*

the two parties.¹⁸⁷ The parties, or representatives thereof, then partake of symbolic food and drink in an elaborate sequence of events, including drinking of the bitter root.¹⁸⁸

The process is not final until the perpetrator has admitted his motivations and expressed remorse, 'truth' in terms of the factual circumstances has been established, and compensation has been paid. Moreover, according to some elders, *mato oput* is not complete until the victim's life has been replaced with a new one – in the form of a child. Historically, the offending clan would give a young girl to the victim's clan for marriage, with the child of that marriage named for the victim.¹⁸⁹ This practice has been modified to the giving of cows or money as brideprice for the recipient's woman of choice. The first-born child of this marriage must still be named after the victim.¹⁹⁰

With regard to the LRA, the process might be accelerated if the peace deal covers mediation and compensation.¹⁹¹ The mediation process must include all the relevant actors to establish an accepted truth.¹⁹² It appears that the reconciliation would be between not only the LRA and its victims, but also "between the LRA and the [Acholi] Elders who reportedly turned their backs on Kony."¹⁹³ The government and its forces might also need to be included. Traditional *mato oput* therefore must be modified to meet the needs of post-conflict reconciliation. Perhaps as a result of this realization, a truth commission has been mentioned as a supplement to traditional rituals. In other words, the *mato oput* process might be restricted to individual violations rather than wider truths regarding the conflict, which would be dealt with by the truth commission.

But even this more limited version of *mato oput* might not be feasible.¹⁹⁴ The bottom line is that these ceremonies were never intended to deal with mass atrocities.¹⁹⁵ They are traditionally aimed at inter-clan incidents up to simple murder.¹⁹⁶ Furthermore, killings during times of war traditionally did not require *mato oput*.¹⁹⁷ Acholi elders are divided over whether *mato oput* could be modified

187. *Id.*

188. *Id.*

189. *Id.* at 56.

190. *Id.*

191. If not, there must be neutral mediators capable of gaining the trust of the LRA, its victims, and perhaps Acholi elders.

192. See *Roco Wat I Acoli*, *supra* note 166, at 61 (stating that the mediation process of the *mato oput* is limited when the ceremony does "not involve all relevant family members; thus resulting in different interpretations of the truth and leaving some individuals unsatisfied with the process and end results").

193. *Id.* at 52.

194. See Pham et al., *Forgotten Voices*, *supra* note 136, at 52 (summarizing the "grounds on which the application and relevance of ceremonies such as the *Mato Oput* are contested" for post-conflict reconciliation).

195. *See id.*

196. RLP, *Peace First*, *supra* note 123, at 24.

197. *Roco Wat I Acoli*, *supra* note 166, at 55 n. 167; *see also* FINNSTRÖM, *supra* note 10, at 280-81 (inferring that murders resulting from a "legitimate war" do not warrant *mato oput* if the murderer

to the current conflict.¹⁹⁸ One objection, that *mato oput* cannot reconcile parties so long as the conflict is ongoing,¹⁹⁹ would be removed by the peace deal. The other, more significant, obstacle is that *mato oput* does not fit the crimes committed in this conflict.²⁰⁰

The disconnect between the traditional *mato oput* process and the current facts on the ground primarily stems from (1) the complexity of perpetrators and victim relationships; (2) the legitimacy of the traditions themselves, which might be permanently weakened by the conflict; and the necessity of (3) true remorse and (4) adequate compensation.²⁰¹ Nevertheless, “many argue that these traditional mechanisms constitute important channels for reconciliation and can and should be adapted.”²⁰² If so, the disconnect must be understood and eliminated, or at least minimized.

The first obstacle to adapting *mato oput* for the current situation is the unprecedented complexity of perpetrators and victims needing reconciliation. The ceremonies require victims and offenders to come together. But in the current conflict, many victims do not know their attackers.²⁰³ “Without the victim’s identity, the perpetrator is unable to: first, confess his/her crimes; second, ask for forgiveness from the victim’s clan; or third, pay compensation to the victim’s clan.”²⁰⁴ Moreover, LRA perpetrators are often members of the same clan, even of the same family, which contradicts the historical use of *mato oput*.²⁰⁵ At the other end of the spectrum, victim and perpetrator are not even Acholi, calling into question the ability to use traditional Acholi mechanisms.²⁰⁶

The inability to identify perpetrator and victim also impedes the required establishment of the “facts” of the incident. Even in a “simple” case of murder, the truth is often disputed. For example, a 2005 ceremony for a 1977 killing led to dissatisfaction over the establishment of the facts of the killing, although there was agreement on the perpetrator. A troubling aspect of the disagreement involved gender discrimination, in that the sister of the victim was not sufficiently involved in the process.²⁰⁷ This relates to a broader issue: the process of *mato oput* often

properly completes a ritual called lameleket because the “killer and the spirit of the killed agreed to the act of killing”).

198. *Id.* at 74.

199. *Roco Wat I Acoli*, *supra* note 166, at 55 n. 167.

200. *Id.*

201. Pham et al., *Forgotten Voices*, *supra* note 136, at 52.

202. *Id.*

203. RLP, *Peace First*, *supra* note 123, at 14; *see* Pham et al., *Forgotten Voices*, *supra* note 136, at 52.

204. *Roco Wat I Acoli*, *supra* note 166, at 66.

205. *See* RLP, *Peace First*, *supra* note 123, at 14.

206. *See Roco Wat I Acoli*, *supra* note 166, at 67 (discussing other cultural groups with distinct non-Acholi belief systems within the LRA and the Ugandan forces); HEIDI ROSE ET AL., LIU INST. FOR GLOBAL ISSUES, NORTHERN UGANDA-HUMAN SECURITY UPDATE 10 (2005), http://www.ligi.ubc.ca/sites/liu/files/Publications/HSUpdate-Northern_UgandaMay05.pdf (noting that atrocities of LRA involve families and clans from across Northern Uganda, including districts where *mato oput* is not practiced).

207. *See Roco Wat I Acoli*, *supra* note 166, at 62.

excludes women.²⁰⁸ Given the vast violence against women during the conflict, this exclusion must be given careful thought. While some women accept or perhaps approve of *mato oput*'s traditional place as men's work,²⁰⁹ continued exclusion of women may undermine widespread reconciliation.

Furthermore, it is difficult for victims and offenders to come together when many offenders are considered less culpable because they acted under orders or under coercion.²¹⁰ Abducted LRA children are both victims and victimizers. As a result, "it is difficult to disentangle and distinguish victims from perpetrators" -- a problem because *mato oput* requires "clear identification and consent of the two parties and clans involved"²¹¹ According to some, the lesser culpability of child soldiers or others following orders means that "reconciliation would depend on the desire of the commanders [of the LRA] or institutions [Ugandan military] who authorized these atrocities to reconcile and admit responsibility for their orders" rather than on individual desire to partake in *mato oput*.²¹² *Mato oput*'s requirement of taking responsibility and admitting remorse would have to adapt, particularly in the case of abductees coerced into crimes. For example, there might be individual *mato oput* ceremonies for child abductees on a local level and a final, large *mato oput* between groups including the LRA, the Acholi, and the government.²¹³

The second problem with adapting *mato oput* is that even if the victims and accused are identifiable and willing participants, the traditions themselves have atrophied and perhaps lack legitimacy.²¹⁴ The conflict has detrimentally affected the use of traditional justice. For instance, there is often no suitable place to hold the ceremonies -- traditional villages have been replaced by sprawling IDP camps²¹⁵ made up of various tribes.²¹⁶ The requirement of providing a cow or goat may be too much for impoverished internally displaced Acholi.²¹⁷ While security

208. *Id.* at 64-65; *Peace in Northern Uganda*, *supra* note 44, at 16 ("[T]he minor role for women [in *mato oput*] marginalises female victims while reinforcing rigid male hierarchies."); Press Release, Women's Initiatives for Gender Justice, Perspectives and Experiences of Women in Northern Uganda in the ICC (Nov. 23, 2004), <http://www.peacewomen.org/resources/Uganda/WomenUgandaICC.html> [hereinafter *Peace Women*] (describing the inability of Northern Ugandan religious, cultural and NGO leaders to explain how traditional Acholi justice would work for female victims of sexual violence).

209. *See Roco Wat I Acoli*, *supra* note 166, at 65.

210. *See, e.g.,* FINNSTRÖM, *supra* note 10, at 298.

211. ROSE ET AL., *supra* note 206, at 10; *see* DRUMBL, *supra* note 113, at 176 (noting that ability of traditional mechanisms to recognize suffering of child soldiers might be beneficial).

212. *Roco Wat I Acoli*, *supra* note 166, at 67; OHCHR, *Making Peace*, *supra* note 24, at 30-31 (discussing strong need for group reconciliation).

213. Finnegan, *supra* note 123, at 44.

214. *See* Pham et al., *Forgotten Voices*, *supra* note 136, at 52; FINNSTRÖM, *supra* note 10, at 201.

215. *See* ALLEN, *supra* note 2, at 53-60 (discussing internally displaced camps); FINNSTRÖM, *supra* note 10, at 183 (same).

216. RLP, *Peace First*, *supra* note 123, at 26; ALLEN, *supra* note 2, at 155.

217. *See* RLP, *Peace First*, *supra* note 123, at 26-28; Baines, *Alice's Story*, *supra* note 128, at 7 (describing prohibitive cost of compensation and reconciliation ceremony).

improvements might allow the Acholi to gather in groups to perform ceremonies, there might be long-term effects of displacement.²¹⁸

The extended displacement and inability to perform ceremonies have atrophied the cultural significance of such ceremonies.²¹⁹ The ceremonies may have less meaning for modern Acholi, especially children.²²⁰ On the other hand, many Acholi are able to explain ceremonies and their significance within the culture.²²¹ In one survey of four northern districts, a majority of respondents in Acholi areas was familiar with traditional justice.²²² A more recent survey, however, found that Acholi respondents were less familiar with traditional practices due to greater cultural dislocation.²²³ Nonetheless, adaptation might allow traditions to remain feasible and meaningful. For example, ceremonies like *mato oput* are supposedly being performed to reintegrate groups of ex-combatants in various towns; participants have reported finding the process significant, although it is difficult to tell whether it has widespread acceptance.²²⁴ Some contend that even though the ceremonies have not been practiced, “there remains a common understanding of the meanings and symbolism behind them.”²²⁵ Others contend that such ceremonies have been practiced during the conflict, pointing to examples as recent as 2005, although the killings were not related to the conflict.²²⁶ Proponents of adapting *mato oput* blame the war for changing traditions, implying that the traditions would resume once peace is attained.²²⁷ Yet it is possible that the Acholi, like other displaced persons, will remain in or near camps, in particular for the aid upon which they have come to depend in the absence of opportunities to grow food or work.²²⁸

Third, even if the required space and participants are available, the ceremonies require “acknowledgement and truth telling” as a “vital part” of the process.²²⁹

218. RLP, *Peace First*, *supra* note 123, at 27-28.

219. See generally ANGELA VEALE & AKI STAVROU, INST. FOR SECURITY STUDIES, VIOLENCE, RECONCILIATION AND IDENTITY 41-42, 47 (2003), <http://www.iss.co.za> (follow “Publications” hyperlink; then follow “Monographs” hyperlink; then follow “01 Nov 2003: Monograph No 92” hyperlink) (last visited Apr. 26, 2008) (describing how conflict has “broken down the very fabric of Acholi society” and “undermined traditional customs” to the extent that they are no longer followed).

220. RLP, *Peace First*, *supra* note 123, at 27-28.

221. See Joanna R. Quinn, *Sophisticated Discourse: Why and How the Acholi of Northern Uganda Are Talking about International Criminal Law* 13-14 (2006), <http://www.cpsa-acsp.ca/papers-2006/Quinn-Sophisticated.pdf> (last visited Apr. 26, 2008).

222. Pham et al., *Forgotten Voices*, *supra* note 136, at 40. *Contra Peace Women*, *supra* note 208 (noting that few were aware of the traditional system of justice).

223. OHCHR, *Making Peace*, *supra* note 24, at 52.

224. See RLP, *Peace First*, *supra* note 123, at 28-29; but see *Roco Wat I Acoli*, *supra* note 166, at 69-70 (noting that there are rumors but no documented cases of *mato oput* involving former LRA).

225. RLP, *Peace First*, *supra* note 123, at 25.

226. See FINNSTRÖM, *supra* note 10, at 296-98 (citing examples of *mato oput* process from 1998-2000 used for accidental or unintentional killings, not related to the conflict); see also *Roco Wat I Acoli*, *supra* note 166, at 62 (discussing 2005 *mato oput* process for 1977 killing).

227. RLP, *Peace First*, *supra* note 123, at 26-27.

228. Cf. ALLEN, *supra* note 2, at 171-72 (discussing urbanization effect of newer camps).

229. Joanna R. Quinn, *Customary Mechanisms and the International Criminal Court: The Case of Uganda* 8 (2006), <http://www.cpsa-acsp.ca/papers-2006/Quinn-Customary.pdf> [hereinafter Quinn, *Customary Mechanisms*]; see also *Roco Wat I Acoli*, *supra* note 166, at 52 (need for admission of guilt).

Participants, up to and including Kony, must acknowledge their wrongs and account for their actions.²³⁰ It is unlikely that many LRA leaders would do so willingly or sincerely. Kony believes the LRA atrocities were justified, undermining a key part of *mato oput*.²³¹ He has refused to release abducted women and children during peace negotiations, claiming that they are family rather than victims.²³²

A confession forced upon the accused, however, would be seen as meaningless;²³³ offenders must be “legitimately willing to repent and admit their guilt.”²³⁴ The traditionally long process of *mato oput*, spanning years or decades, reflects the time needed for the truth to unfold and the perpetrators to come to repentance.²³⁵ This relates to the belief in *cen*, the bad spirit that will not leave until the perpetrator makes amends.²³⁶ As one Acholi put it, “Lack of confession is not the problem because those that refuse to confess will be followed by the consequences of their actions, and they will have to confess eventually.”²³⁷

A decade-long process does not seem feasible, nor does it seem realistic that Kony will repudiate his belief in his just cause. While Kony seems to believe in Acholi spirits like *cen*, he has also stated that the Holy Spirit communicates through him.²³⁸ In fact, the LRA practices ceremonies similar to Acholi rituals to cleanse newcomers and returning fighters of their *cen* before entering an LRA base.²³⁹ The threat of *cen* is also used to coerce new members of the LRA to kill.²⁴⁰ It is unlikely that Kony and other leaders would genuinely embrace a complete reversal in their belief system. Thus, it is difficult to see how a revised *mato oput* process would circumvent the problem of the recalcitrant and unrepentant perpetrator. According to many Acholi, Kony could “go through reconciliation and thereafter return to normal life, but only if he wants it in his heart . . .”²⁴¹

Fourth, the Acholi require compensation prior to reconciliation ceremonies.²⁴² Compensation is difficult if the perpetrator is unknown.²⁴³ Moreover, new

and forgiveness in Acholi justice); RLP, *Whose Justice?*, *supra* note 128, at 26-27 (acknowledgment of guilt and reparation).

230. Cf. Joanna R. Quinn, *Beyond Truth Commissions: Indigenous Reconciliation in Uganda* 10 (on file with author) (reconciliation based on admission of wrongdoing and compensation).

231. See Hanlon, *supra* note 45, at 308; Quinn, *supra* note 229, at 13; *Roco Wat I Acoli*, *supra* note 166, at 52.

232. See *Need to Maintain Momentum*, *supra* note 16, at 6.

233. See OHCHR, *Making Peace*, *supra* note 24, at 27 (discussing dissatisfaction with prior public acknowledgements lacking true remorse).

234. *Roco Wat I Acoli*, *supra* note 166, at 68.

235. *Id.*

236. See VEALE & STAVROU, *supra* note 219, at 47 (describing *cen* as integral concept to *mato oput*); see also *Roco Wat I Acoli*, *supra* note 166, at 12 (describing *cen*).

237. *Roco Wat I Acoli*, *supra* note 166, at 68.

238. *Id.* at 49-50.

239. *Id.* at 50; ALLEN, *supra* note 2, at 164.

240. ALLEN, *supra* note 2, at 69 (describing returnee’s account of being given choice between killing or being possessed by *cen*, unable to ever return home).

241. FINNSTRÖM, *supra* note 10, at 299.

242. RLP, *Peace First*, *supra* note 123, at 39.

compensation scales are needed for the new crimes.²⁴⁴ Given the brutality, depravity, and scale of the atrocities, it might be impossible to compensate for the crimes.²⁴⁵ Even in a case study of a single murder, there was great division over the amount of compensation warranted and confusion over what was actually paid.²⁴⁶ Of course, the giving of brideprice and naming of children after the victims, as discussed above, might also become dauntingly difficult given the number of victims and complex nature of the conflict. In addition, according to some accounts, compensation requires reintegration of the offender into the community, meaning that Kony would need to live among the Acholi and pay back his debt to the tribe.²⁴⁷ But it is unlikely that Kony would be welcomed by his victims or that the Ugandan government would allow him to reinsert himself among the Acholi.

Moreover, it is doubtful that the LRA rank and file has any resources.²⁴⁸ Even Kony and other leaders would likely emerge from the bush without assets, save for those provided by Uganda or the international community as part of the peace deal. The international community might fund the compensation for *mato oput*, provided donors could be found. It would be far less meaningful, however, and undermine the process in the same way that a forced confession would.²⁴⁹

Finally, there is currently confusion over the ceremonies, with some calling any tradition "*mato oput*" and others confusing the various ceremonies.²⁵⁰ This could be remedied by codifying the procedures in a way that comports with international human rights (e.g., due process standards).²⁵¹ But this risks turning traditional Acholi ceremonies into products of the elite, or worse, the government, which is mistrusted by the Northern population.²⁵² Therefore, local community involvement is required in shaping and carrying out traditional justice.²⁵³ In brief, cultural leaders would need the trust of victims, perpetrators, neighboring communities, indeed the whole country, prior to initiating a process of traditional justice.²⁵⁴

In light of the difficulties of adapting *mato oput* to mass atrocities, it might best serve as a complement to prosecution. Acholi traditional justice has often been

243. It would be possible to establish a compensation pool funded by perpetrators of crimes against unknown victims, which could be tapped by victims who cannot identify their attackers.

244. See *Roco Wat I Acoli*, *supra* note 166, at 67.

245. *Id.*

246. See *id.* at 62-63.

247. See RLP, *Peace First*, *supra* note 123, at 15.

248. See OHCHR, *Making Peace*, *supra* note 24, at 47.

249. See *Roco Wat I Acoli*, *supra* note 166, at 68.

250. ALLEN, *supra* note 2, at 134.

251. RLP, *Peace First*, *supra* note 123, at 42-48 (discussing human rights standards).

252. Compare OHCHR, *Making Peace*, *supra* note 24, at 53 (discussing concern over manipulation of local practices), and DRUMBL, *supra* note 113, at 92-94, 145 (discussing troubled adaptation of traditional gacaca to genocide gacaca tribunals and noting reports that Acholi parliamentarians have drafted legislation to impose additional penalties through *mato oput* processes), with *Need to Maintain Momentum*, *supra* note 16 (noting the extreme difficulty of obtaining LRA agreement to credible prosecution and punishment).

253. RLP, *Peace First*, *supra* note 123, at 49.

254. See *Roco Wat I Acoli*, *supra* note 166, at 70.

initially preempted by state prosecution and punishment. After the end of one's jail sentence, for example, traditional ceremonies may be performed.²⁵⁵ The belief in *cen* is central to this layered justice – a person convicted of a crime will be subject to *cen* until the truth is told and reconciliation can occur.²⁵⁶ Thus, AJM could take place after or along side prosecution. The problem with this approach, of course, is that the sticking point for the LRA is the potential for prosecution. It is doubtful that Kony and his cronies will leave the bush for the promise of AJM with prosecution and punishment. Therefore, it is necessary to determine under what circumstances the ICC should defer to nonprosecutorial AJM in Uganda.

III. ICC AVENUES FOR DEFERRAL TO AJM

The Rome Statute is silent regarding amnesty or other alternative justice mechanisms such as truth commissions.²⁵⁷ Nonetheless, the Court or the Office of the Prosecutor (OTP) could interpret the statute to implicitly allow deferral to Ugandan 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.²⁵⁸ According to John Dugard, “[t]here are signs in the Rome Statute that the failure to deal with amnesty was deliberate.”²⁵⁹ 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.”²⁶⁰ 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.²⁶¹ 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.²⁶² Yet Dugard also notes that the statute has left the door

255. See RLP, *Peace First*, *supra* note 123, at 25; FINNSTRÖM, *supra* note 10, at 297 (describing ritual following release from prison).

256. *Roco Wat I Acoli*, *supra* note 166, at 19.

257. John Dugard, *Possible Conflicts of Jurisdiction with Truth Commissions*, in 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 693, 700 (Antonio Casesse et al. eds., 2002) [hereinafter Dugard, *Conflicts of Jurisdiction*].

258. See Jessica Gavron, *Amnesties in Light of Developments in International Law and the Establishment of the International Criminal Court*, 51 INT'L & COMP. L. Q. 91, 107 (2002) (noting that amnesty was seen as so controversial that compromise was unlikely); Darryl Robinson, *Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court*, 14 EUR. J. INT'L L. 481, 483 (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); Ruth Wedgwood, *The International Criminal Court: An American View*, 10 EUR. J. INT'L L. 93, 95 (1999) (“Rome skirted the question of amnesties.”).

259. Dugard, *Conflicts of Jurisdiction*, *supra* note 257, at 701.

260. *Id.* at 702.

261. *Id.* at 703.

262. *Id.*

open to recognizing some nonprosecutorial methods in extreme circumstances.²⁶³ Critics of the failure of the statute to explicitly accommodate amnesties fear that the OTP 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.”²⁶⁴

The statute might allow *sub rosa* recognition of amnesty or other alternative justice mechanisms (AJM) in exceptional circumstances.²⁶⁵ There are four major possibilities: (1) Security Council deferral (Article 16), requiring the ICC to suspend the Ugandan prosecution as a threat to international peace; (2) *ne bis in idem* (Article 20), treating the Ugandan AJM as prior prosecution blocking subsequent ICC proceedings; (3) prosecutorial discretion (Article 53), allowing the Prosecutor to decline to prosecute in the interests of justice; and (4) inadmissibility (Article 17), interpreting the principle of complementarity such that the Ugandan AJM render the case inadmissible.²⁶⁶ This Part evaluates the applicability of each article to AJM in general, then further elucidates the analysis by applying the provisions to the Ugandan truth commission and *mato oput*. While many commentators predict that Article 53’s prosecutorial discretion is the most likely avenue, it is more likely at this point that Uganda and/or the LRA accused will utilize Article 17’s inadmissibility standard²⁶⁷ or possibly Article 16’s deferral

263. See *id.* at 700 (discussing that 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 Hethe Clark, *The Prosecutor of the International Criminal Court, Amnesties, and the “Interests of Justice”*: Striking a Delicate Balance, 4 WASH. U. GLOBAL STUD. L. REV. 389, 414 (2005) (contending that while ICC appears to require prosecution, ambiguous provisions leave room for alternative justice schemes in narrow circumstances); Gavron, *supra* note 258, at 108 (mentioning that although difficult, properly crafted amnesties can be respected by the ICC); Richard J. Goldstone & Nicole Fritz, *In the Interests of Justice’ and Independent Referral: The ICC Prosecutor’s Unprecedented Powers*, 13 LEIDEN J. INT’L L. 655, 660 (2000) (concluding that the statute is flexible enough that the prosecutor can defer to an individualized domestic amnesty process, like in South Africa); Robinson, *supra* note 258, at 484 (noting that 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, 508 (1999) (determining that the statute does not preclude amnesty as a “bargaining chip” to end armed conflict); Carsten Stahn, *Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretive Guidelines for the International Criminal Court*, 3 J. INT’L CRIM. JUST. 695, 708-09 (2005) [hereinafter Stahn, *Complementarity*] (discussing the creative ambiguity in statute that allows recognition of certain amnesties in exceptional circumstances).

264. Goldstone & Fritz, *supra* note 263, 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? Legalism and the International Criminal Court*, 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).

265. 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).

266. Dugard, *Conflicts of Jurisdiction*, *supra* note 257, at 701-02; see also Stahn, *Complementarity*, *supra* note 263, at 708 (discussing amnesties or pardons under articles 12 and 21).

267. See, e.g., Paul Harera & Grace Matsiko, *LRA Asks Government to Legalise Traditional Justice*, THE MONITOR (Uganda), June 22, 2007, available at

mechanism.²⁶⁸ As the analysis will show, none of the provisions dictate deferral to Ugandan AJM, but each might allow it.²⁶⁹ Yet, as discussed in Part IV, the Court and OTP should interpret the statute to allow deferral to local justice only if the AJM also further international criminal justice, including the 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 AJM may seek an Article 16 deferral. Under the ICC statute, the Security Council can request that the Court refrain from, or suspend, an investigation or prosecution for twelve months.²⁷⁰ 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,”²⁷¹ i.e., “Action With Respect to Threats to the Peace, Breaches of Peace, and Acts of Aggression.”²⁷² One commentator has indicated that it is “hard, if not impossible, to contemplate a situation in which refusal to recognize a national amnesty could constitute a threat to international peace.”²⁷³ Others, however, have argued that the Security Council request is a viable means to allow alternatives to ICC prosecution.²⁷⁴

<http://www.monitor.co.ug/news/news06224.php> (describing LRA proposal for alternative justice mechanisms that will “satisfy the admissibility test under the complementarity principle under Article 17 of the Rome Statute”); Gavron, *supra* note 258, at 111 (predicting that Article 17 is most likely provision to be invoked regarding national amnesty, although Security Council might be better body to deal with political and military context); Jennifer Llewellyn, *A Comment on the Complementarity Jurisdiction of the International Criminal Court: Adding Insult to Injury in Transitional Contexts?*, 24 DALHOUSIE L.J. (Can.) 192, 202 (2001) (asserting that use of truth commission should be covered by Article 17).

268. As this article was in the final editing stages, reports emerged that the LRA had dropped its opposition to a temporary solution and had called for Uganda to demand a Security Council resolution suspending prosecution for up to twelve months upon the signing of the peace deal. *See, e.g., Uganda: LRA sticks to its guns, yet ready to sign peace deal*, IRIN, Mar. 27, 2008, available at <http://www.irinnews.org/Report.aspx?ReportId=77481>. The LRA deputy negotiator, however, added that Kony might not sign the peace deal because of the ICC arrest warrants. *Id.*

269. *See* Newman, *supra* note 7, at 329 (discussing negative implications for ongoing conflict if ICC reads Rome Statute narrowly to reject amnesties).

270. “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.” Rome Statute, *supra* note 34, art. 16.

271. Rome Statute, *supra* note 34, art. 16.

272. U.N. Charter ch. VII.

273. Dugard, *Conflicts of Jurisdiction*, *supra* note 257, at 701-02; *see also* Stahn, *Complementarity*, *supra* note 263, at 717 (noting that Article 16 deferral is unlikely).

274. *See, e.g.,* Yasmin Naqvi, *Amnesty for War Crimes: Defining the Limits of International Recognition*, 85 INT’L REV. OF RED CROSS 583, 592 (2003) (discussing how the inclusion of Article 16 acknowledges that prosecution might be threat); Robinson, *supra* note 258, at 503 (concluding Security Council might request deferral where “delicate non-prosecutorial truth and reconciliation process is underway”); Llewellyn, *supra* note 267, at 216 (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).

The Article 16 request 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 provide for a duty to prosecute certain crimes.²⁷⁵ According to some commentators, state parties cannot grant amnesty for genocide, grave breaches, or torture without violating the respective treaty.²⁷⁶ 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.²⁷⁷ For example, the LRA arrest warrants 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 short of torture.²⁷⁸ Uganda has ratified, and has a duty to prosecute under, the Geneva Conventions,²⁷⁹ the Genocide Convention, and the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment.²⁸⁰ 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. It is disputed whether the duty to prosecute binds all states with regard to international crimes.²⁸¹ The lack of state practice seems to preclude a general duty to prosecute international crimes.²⁸² Many states -- and the U.N. -- have either implemented or accepted (explicitly or implicitly) various forms of amnesty for

275. See, e.g., Dugard, *Conflicts of Jurisdiction*, *supra* note 257, at 696.

276. *Id.* at 697.

277. See, e.g., Charles P. Trumbull IV, *Giving Amnesties a Second Chance*, 25 BERKELEY J. INT'L L. 283, 291-93 (2007).

278. See, e.g., Arrest Warrants, *supra* note 52. Other situations might involve charges of genocide, raising a higher expectation of prosecution.

279. See International Committee of the Red Cross [ICRC] Database, *Uganda – Ratifications*, <http://www.icrc.org/ihl.nsf/Pays?ReadForm&c=UG> (last visited Apr. 26, 2008).

280. See Ratifications-Uganda, <http://www.bayefsky.com/docs.php/area/ratif/state/179> (last visited Mar. 11, 2008) (compiling treaty ratifications).

281. Compare Clark, *supra* note 263, at 389-99 (asserting that all states must prosecute genocide and grave breaches under customary international), and Robinson, *supra* note 258, at 492-93 (concluding it is relatively clear that states must prosecute genocide, torture and grave breaches based on treaty and customary law), with John Dugard, *Dealing with Crimes of a Past Regime*, 12 LEIDEN J. INT'L L. (Neth.) 1001, 1003 (1999) [hereinafter Dugard, *Dealing with Crimes*] (emerging duty to prosecute international crimes), O'SHEA, *supra* note 265, at 260 (noting that customary duty does not extend to crimes against humanity), Newman, *supra* note 7, at 314 (asserting no generalized duty to prosecute), and 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).

282. See, e.g., Dugard, *Conflicts of Jurisdiction*, *supra* note 257, at 698; Trumbull, *supra* note 277, at 295-99. *But cf.* O'SHEA, *supra* note 265, at 264 (characterizing state practice as exception to duty).

international crimes.²⁸³ Even a strong proponent of the duty to prosecute, Diane Orentlicher, notes that prosecution of only the most responsible actors would be sufficient in some circumstances.²⁸⁴ As a result, it is difficult to conclude that there is a customary duty to prosecute all international crimes. Nonetheless, “*recent* state practice appears to support a duty to prosecute [crimes against humanity and all war crimes] and the body of jurisprudence supporting this notion is growing. . . .”²⁸⁵ Thus, there may be an emerging norm requiring prosecution across the board for genocide, war crimes, and crimes against humanity, but this assertion is still controversial.²⁸⁶

Even if there is a state duty to prosecute, it does not necessarily follow that the ICC must reject an Article 16 request based on a state decision that breaches the duty to prosecute, according to commentators like Michael Scharf.²⁸⁷ For Scharf, Article 16 is the most important provision regarding an exception for amnesty.²⁸⁸ He acknowledges a potential obstacle: the Security Council must first determine the existence of a threat or breach of peace or act of aggression.²⁸⁹ He notes that the request for deferral must comport with the purposes and principles of the U.N., but asserts that peace negotiators might still use amnesty to end a conflict in some circumstances.²⁹⁰ Yet he argues that if such an amnesty violates international law, the ICC would not be bound by a deferral request.²⁹¹ For example, the ICC might not have to defer where the amnesty covers genocide or grave breaches of the Geneva Conventions.²⁹² As a result, a state amnesty for such crimes would not require suspension of an investigation or prosecution regardless of a Security

283. See Dugard, *Conflicts of Jurisdiction*, *supra* note 257, at 698 (referring to successor governments’ grants of amnesty to prior regime actors guilty of torture and crimes against humanity, as well as U.N. endorsement of amnesties such as South Africa’s); O’Shea, *supra* note 265, at 36-70 (discussing prior amnesties).

284. Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 *YALE L. J.* 2537, 2595-98 (1991); Sifris, *supra* note 5, at 36.

285. Clark, *supra* note 263, at 400 (emphasis added).

286. See *id.* at 400 nn.55-60 (citing scholarly articles and opinions of human rights bodies); Naqvi, *supra* note 274, at 612 & n.127 (discussing emerging duty relevant to various crimes); see also Robinson, *supra* note 258, at 492 (describing persuasive reasons to conclude a duty or emerging duty to prosecute genocide, war crimes and crimes against humanity); see generally, Charles Villa-Vicencio, *Why Perpetrators Should Not Always Be Prosecuted*, 49 *EMORY L.J.* 205 (2000) [hereinafter Villa-Vicencio, *Perpetrators*] (contending state can derogate from duty in favor of truth commission or amnesty where certain criteria met).

287. Scharf, *supra* note 263, at 522 (arguing that the ICC should defer prosecution where alternative justice mechanisms are necessary and promote peace and justice).

288. *Id.* at 522.

289. *Id.*

290. Cf. *id.* at 523 (describing a consistent resolution as one “resolving threatening situations in conformity with principles of justice and international law, and promoting respect for human rights and fundamental freedoms. . .”).

291. *Id.*; see also Naqvi, *supra* note 274, at 594 (noting that amnesty must comport with international law for deferral).

292. Scharf, *supra* note 263, at 523-24 (describing international law requiring prosecution of genocide and grave breaches); see also Stahn, *Complementarity*, *supra* note 263, at 699 (noting Court’s dilemma between giving deference to a request or reviewing the request under international law).

Council request.²⁹³ But a permissible amnesty (or a desire to avoid conflict with the Security Council) might prompt the ICC to honor an Article 16 request based on a state amnesty. Similarly, it has been argued that an Article 16 request might aid countries wishing to use a *truth commission* process in lieu of prosecution at the ICC.²⁹⁴

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, but “it should be acutely conscious that indiscriminate exercise of this power in purported pursuit of peace will emasculate the ICC, and undermine efforts to strengthen deterrence and institutionalise human rights norms.”²⁹⁵ Thus, the Security Council deferral power should be used sparingly, only in circumstances where ICC investigation or prosecution fatally threatens a peace deal effecting international peace and security.

With regard to Uganda, the Security Council could determine the LRA prosecution threatens international peace,²⁹⁶ for example, based on its effect on the still-fragile peace in the Sudan.²⁹⁷ The long-standing position of the LRA has been to reject a temporary suspension of prosecution.²⁹⁸ It seems hard to imagine that Kony would be reassured by a promise that he would not face international justice for a year or two.²⁹⁹ Instead, Kony and others under the arrest warrants would likely surrender for nothing less than a total guarantee of nonprosecution from both the Ugandan government and the ICC. It is unclear whether such a guarantee would be considered trustworthy given contemporary examples of prosecution years after an amnesty (e.g. Pinochet) or amnesties later effectively revoked (e.g. Sierra Leone, Charles Taylor).³⁰⁰ Moreover, there is a timing issue: the LRA would not disarm and surrender prior to an Article 16 suspension³⁰¹ while the Security

293. Cf. Gavron, *supra* note 258, at 108.

294. Llewellyn, *supra* note 267, at 216 (referring to deferral as a “less obvious option” for preserving the ability of states to use truth commissions).

295. Nick Grono, Vice-President, Int’l Crisis Group, Remarks at the International Conference on *Building a Future on Peace and Justice, Negotiating Peace and Justice: Considering Accountability and Deterrence in Peace Processes*, (June 26, 2007), available at www.crisisgroup.org/home/index.cfm?id=4922 [hereinafter *Negotiating Peace and Justice*].

296. Gavron, *supra* note 258, at 108-09 (arguing that Security Council’s recent willingness to characterize internal conflicts as threats to international peace make deferrals viable, while not guaranteeing deferrals for all situations).

297. See, e.g., Human Rights Watch, *Sudan: Regional Government Pays Ugandan Rebels Not to Attack* (June 2006), available at <http://hrw.org/english/docs/2006/06/02/uganda13503.htm> (discussing payoffs to LRA to prevent attacks in Sudan).

298. See, e.g., Newman, *supra* note 7, at 318; Sifris, *supra* note 5, at 42.

299. Cf. Wedgwood, *supra* note 258, at 96 (noting that Security Council deferral is for a limited time, while transition may last many years); *id.* at 97-98 n.20 (suggesting that the suspension may be limited to one renewal or 24 months in total); see also Gavron, *supra* note 258, at 109 (arguing that postponing jurisdiction of ICC for a year or two prevents intervention in an ongoing conflict, rather than ensuring permanent respect for the amnesty); see Llewellyn, *supra* note 267, at 216 (arguing that deferral to truth commission process does not offer certainty and does not end potential problems for a state choosing means other than prosecution).

300. See U.N. Resolution 1688, *supra* note 147.

301. *Uganda: LRA sticks to its guns, yet ready to sign peace deal*, IRIN, Mar. 27, 2008, available at <http://www.irinnews.org/Report.aspx?ReportId=77481>.

Council would likely not act until the peace agreement is being implemented and LRA compliance is evident.

The LRA has recently changed its position, claiming that it might sign the peace deal based on the promise that Uganda would seek the temporary solution offered by Article 16; but it will not disarm until the ICC warrants are permanently removed.³⁰² It is difficult to see how the Security Council could find that solution -- leaving the LRA in control of its arms -- palatable. International human rights organizations have already initiated a campaign to dissuade the Security Council from requesting a deferral, noting that it would set a dangerous precedent; for example, Sudan could argue that a deferral is necessary for its citizens accused of horrific atrocities in Darfur.³⁰³ In addition, it might encourage other rebel groups to delay disarmament in similar circumstances. It might also undermine the ICC by encouraging states parties to go to the Security Council for deferrals rather than carry out their obligations to arrest and surrender individuals to the ICC.³⁰⁴ Moreover, deferral might be unlikely because other avenues are available, such as under Articles 17-19³⁰⁵ as discussed *supra* in Part III.D.

It might be particularly difficult for the United States, a permanent member of the Security Council, to support a deferral regarding the LRA, since it is on the U.S. list of terrorist organizations.³⁰⁶ Although the United States supports a peaceful end to the conflict,³⁰⁷ it might not support giving the LRA a new lease on life in terms of remaining an armed group. Moreover, the United States has expressed skepticism over Acholi justice mechanisms.³⁰⁸ Therefore, a deferral under Article 16 is possible but does not seem likely under these circumstances.

In conclusion, the Security Council may make a deferral request under Article 16 where the ICC prosecution is a genuine obstacle to peace,³⁰⁹ but it seems unlikely given the general trend away from amnesties³¹⁰ and toward accountability. If the Security Council does suspend the prosecution, it should do so only after finding that the suspension furthers both peace and justice, as discussed in Part IV.

302. *See id.* (noting how lead LRA negotiator sought deferral upon signing of peace deal while deputy notes that Kony might not sign the agreement without prior removal of the ICC warrants).

303. *See, e.g.*, Amnesty International, *Letter to Security Council*, April 1, 2008, available at <http://appablog.wordpress.com/2008/04/04/uganda-amnesty-international-letter-to-unscc-re-icc-and-joseph-kony/>.

304. *Id.*

305. *Id.*

306. *LRA Still Terrorist Body*, New Vision (Kampala), Mar. 27, 2008, available at <http://allafrica.com/stories/200803270734.html>.

307. *See, e.g.*, U.S. Department of State, U.S. Statement on the Resumption of the Peace Talks, Virtual Presence Post Northern Uganda, available at <http://northernuganda.usvpp.gov/peaceprocess.html>.

308. *U.S. Doubts Acholi Justice*, New Vision, Oct. 16, 2006, available at <http://www.ictj.org/en/news/coverage/article/1027.html>.

309. *Negotiating Peace and Justice*, *supra* note 295.

310. *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 263, at 717 (citing Report of U.N. Secretary General).

B. Ne Bis In Idem (Article 20)

The next possible avenue for deferral is Article 20, entitled “*Ne bis in idem*.” “The principle of *ne bis in idem* precludes persons from being tried or punished twice for the same crime.”³¹¹ Article 20 might be interpreted to include non-criminal proceedings such as those before a truth commission empowered to grant amnesty, but it is unlikely based on the language of the statute.³¹² Article 20, the international analogue to the U.S. double jeopardy prohibition, first provides that neither the ICC nor another court can retry an accused for conduct already prosecuted in the ICC.³¹³ This provision is inapplicable to the Ugandan situation since no case has gone to trial at the ICC. More significantly in the context of deferral to AJM, domestic prosecutions may preclude proceedings at the ICC.

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.³¹⁴

The first hurdle to applying this provision to non-criminal proceedings is the reference to another trial before another court. Although amnesty granted after truth-telling before a quasi-judicial body such as in the South African truth and reconciliation process might qualify as a trial before a court,³¹⁵ it seems unlikely.³¹⁶

311. M. Cherif Bassiouni, 1 *THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT* 160 (2005).

312. See, e.g., Dugard, *Conflicts of Jurisdiction*, *supra* note 257, at 702; see also Naqvi, *supra* note 274, at 590 (noting that negotiators rejected amnesty in this context).

313. Rome Statute, *supra* note 34 (Article 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.”).

314. *Id.* at art. 20(3).

315. See Dugard, *Conflicts of Jurisdiction*, *supra* note 257, at 702 (discussing requirement of investigation by quasi-judicial body prior to amnesty under South African Promotion of National Unity and Reconciliation Act).

Similarly, a traditional proceeding like *mato oput* is unlikely to be equated to 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.³¹⁷ 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.³¹⁸ While there may be many conceptions of “justice,” the meaning in this context seems relatively straightforward. “Bringing to justice” probably means accountability through criminal prosecution and punishment rather than through restorative justice mechanisms such as a healing ceremony or ritual of forgiveness.³¹⁹ 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 whom benefited from amnesty or underwent non-criminal proceedings would probably be unsuccessful in challenging ICC jurisdiction under the principle of *ne bis in idem*.

316. See, e.g., *id.* (labeling this argument “difficult to sustain”); Gavron, *supra* note 258, at 109 (arguing Article 20 unlikely to refer to truth commission); Llewellyn, *supra* note 267, at 206 (contending that 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 7, at 318 n.115 (concluding that the truth commission is not trial before another court); Scharf, *supra* note 263, at 525 (noting that truth commission is not a court); Christine Van den Wyngaert & Tom Onega, *Ne bis in idem Principle, Including the Issue of Amnesty*, in 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 705, 726-27 (Antonio Cassese et al eds., 2002) (asserting that national amnesties do not qualify as judgments and that it is unlikely that a truth commission “trial” would qualify as a trial under Article 20).

317. Cf. Llewellyn, *supra* note 267, at 207 (recognizing the 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* 13-14 (2005), http://www.iccnw.org/documents/InterestofJustice_JosephYav_May05.pdf (positing that the goal of South African amnesty was not to shield perpetrators but to achieve reconciliation based on truth-telling).

318. See Dugard, *Conflicts of Jurisdiction*, *supra* note 257, at 702 (noting that the Article 20 argument is “difficult to sustain in light of” the requirement of trial by court in a manner consistent with intent to bring to justice).

319. See Gavron, *supra* note 258, at 111 (concluding that “the term ‘to bring someone to justice’ is usually interpreted in a legal sense....”); Llewellyn, *supra* note 267, at 207 (concluding that bringing person to justice will likely require criminal prosecution and probably punishment); Scharf, *supra* note 263, at 525 (noting that the requirement of intent to bring a person to justice “might be interpreted as requiring criminal proceedings”). *But cf.* Slye, *supra* note 281, at 238 (holding that accountable amnesties could bar prosecution).

Given the difficulty of fitting AJM in general under this article, Article 20 is probably not applicable to the Ugandan situation. It is unlikely the Court would determine that a Ugandan truth commission proceeding qualifies as a trial before a court, particularly if the accused does not face criminal sanctions inherent in “criminal responsibility” (Art. 20(3)(a)) or in bringing someone to justice (Art. 20(3)(b)). Similarly, it is improbable that the Court would consider the *mato oput* process to be equivalent to a trial with due process and criminal responsibility. In general, the Court should interpret *ne bis in idem* to cover AJM only if they meet certain standards of international criminal justice as described in Part IV.

C. Prosecutorial Discretion (Article 53)

According to many commentators, prosecutorial discretion is the most plausible avenue to accommodate alternative justice mechanisms, such as amnesty and/or truth commissions.³²⁰ 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.³²¹ Second, it can decline to prosecute in the interests of justice after investigating a situation.³²² The Ugandan case history illustrates this progression. Because the OTP has already obtained arrest warrants, it necessarily already declined to use its discretion to defer at the investigation stage. Furthermore, it is unlikely the OTP will defer at the current prosecution stage, given public statements regarding the Ugandan peace deal.

Under Article 53(1), the OTP first must find a reasonable basis to proceed with an investigation, as it did in the situation in Northern Uganda.³²³ “The decision to

320. Dugard, *Conflicts of Jurisdiction*, *supra* note 257, at 702 (describing prosecutorial discretion as the most plausible possibility for protecting a genuine amnesty); DRUMBL, *supra* note 113, 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) (asserting that it is the most likely avenue); Robinson, *supra* note 258, at 486 (describing this discretion as the most likely point to defer to non-prosecutorial measures); Van den Wyngaert & Onega, *supra* note 316, at 727 (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 Negotiating Peace and Justice*, *supra* note 295 (arguing that prosecutor's justice mandate should not include political judgments 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) (noting the same); Llewellyn, *supra* note 267, 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) (asserting that policy choices should be made by legislators not OTP); Stahn, *Complementarity*, *supra* note 263, at 719 (describing Article 53 as overrated in relevance “for recognition of amnesties as alternative forms of justice”).

321. Rome Statute, *supra* note 34, art. 53, § 1(c).

322. *Id.* at art. 53, § 2(c).

323. Press Release, ICC, 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/archive2004.html>.

open an investigation was taken after thorough analysis of available information in order to ensure that requirements of the Rome Statute are satisfied.³²⁴ 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.”³²⁵

First, with regard to Uganda, it was clear that ICC crimes had been committed given the LRA’s notorious atrocities.³²⁶ For example, one of the worst massacres took place in February 2004, when the LRA killed 337 civilians, mostly women and children.³²⁷ Second, at the time the OTP commenced its initial inquiry, there was no admissibility issue under Article 17, as will be discussed in detail below. The remaining “interest of justice” provision was likely the focus of the OTP determination.³²⁸ Given his decision to initiate the investigation, the Prosecutor must have determined there were no grounds to conclude that the investigation would not serve the interests of justice. In fact, the Prosecutor has indicated that calls to use his discretion for short term political goals are inconsistent with the Rome Statute.³²⁹

After going forward with the investigation, 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.³³⁰

If so, the OTP must notify the Court and the referring party (the State or Security Council).³³¹ The OTP did not make such a determination with Uganda, but rather sought arrest warrants.

324. *Id.*

325. Rome Statute, *supra* note 34, art. 53, § 1(a–c).

326. See, e.g., 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, 404, 407 (2005).

327. FAITH J. H. McDONNELL & GRACE AKALLO, GIRL SOLDIER: A STORY OF HOPE FOR NORTHERN UGANDA’S CHILDREN 152 (2007).

328. See ALLEN, *supra* note 2, at 93, 176.

329. Moreno-Ocampo, *supra* note 1, at 3–4.

330. Rome Statute, *supra* note 34, art. 53, § 2(a–c).

331. *Id.* at art. 53, § 2.

Under Article 53(2)(a), the OTP will not go forward if there is an inadequate legal or factual basis. Here, the OTP found sufficient indications that five leaders of the LRA committed crimes within the jurisdiction of the ICC.³³² With regard to Article 53(2)(b), the OTP determined that the case is admissible under Article 17. At the time the OTP successfully applied for arrest warrants, no Ugandan proceedings had been instituted. Subsequent events, namely the peace negotiations, raise serious Article 17 issues that will be discussed below.

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 (e.g., Uganda) 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 Chamber.³³³ The OTP may reconsider the decision based on new facts or information.³³⁴ The OTP determines whether prosecution would serve the interests of justice based on specified criteria.³³⁵ 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.³³⁶ Additional factors include: (4) interests of the victims; and (5) all other circumstances.³³⁷

The phrase "interests of justice" is so vague as to allow multiple meanings.³³⁸ According to some commentators, the OTP could decide to forego prosecution in deference to a state's conditional amnesty and truth commission.³³⁹ For example,

332. See *supra* Part I.

333. Specifically, section 3 of article 53 provides:

(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.

Rome Statute, *supra* note 34, art. 53, § 3. See, e.g., Little, *supra* note 11, at 378-79 (stating that there is no review of decisions to go forward with prosecution).

334. Rome Statute, *supra* note 34, at art. 53, § 4.

335. *Id.* at art. 53, § 2(c).

336. *Id.*

337. *Id.*

338. O'SHEA, *supra* note 265, at 317; see Danner, *supra* note 112, at 542-45; 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, 8-11 (2006); Chris Gallavin, *Article 53 of the Rome Statute of the International Criminal Court: In the Interests of Justice?*, 14 KING'S C. L. J. 179, 185-87 (2003).

339. See Dugard, *Conflicts of Jurisdiction*, *supra* note 257, at 703 (referring to aspects of Guatemalan and South African alternative justice procedures); see also Clark, *supra* note 263, at 390-91 (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 263, at 718 (doubting that Article 53 justice includes interests of reconciliation or peacemaking, particularly in light of Article 21).

according to the American Non-governmental Organizations Coalition for the ICC, the prosecutor can suspend an investigation, but should reopen it “once certain stability in a peace agreement is reached or other political problems are eliminated.”³⁴⁰ Other commentators have asserted that “justice” must *not* include a situation where the ICC threatens the existence of a transitional democratic government.³⁴¹ 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 “unconscionable criminals [are] acquitted for lack of evidence” in domestic courts.³⁴² There is arguably no justice where the criminals, particularly those most responsible for international crimes, 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 the duty to prosecute.³⁴³ 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.³⁴⁴ Similarly, given the “emerging rule of international law” requiring prosecution of international crimes, the OTP should exercise this discretion only in exceptional cases.³⁴⁵

In the Ugandan situation, the OTP concluded that the interest of justice did not dictate suspension of prosecution; indeed, he went forward with an application for arrest warrants despite protests that it would not be in the interests of justice or victims.³⁴⁶ Because the Court has issued and unsealed the arrest warrants, the OTP might not have the power to use Article 53 to effectively withdraw the arrest warrants in deference to the Ugandan AJM. Article 53(2) seems to assume that a warrant has not yet been sought;³⁴⁷ given that this situation has progressed to the issuance of arrest warrants, Article 53 may no longer apply.³⁴⁸

There is a possible interpretation that might allow the OTP to re-open an Article 53 analysis, however. Article 53(4) provides that the OTP may reconsider a decision (not) to prosecute based on “new facts or information.”³⁴⁹ Because the provision refers to reconsideration of “a decision whether to initiate an

340. John Washburn & Wasana Punyasena, *Interests of Justice Proposals* (May 1, 2005), http://www.iccnw.org/documents/InterestofJustice_WashburnandPunyasena_May05.pdf.

341. Goldstone & Fritz, *supra* note 263, at 662 (“Nor would it be just were the enforcement of prosecution and punishment to evoke dissent sufficiently strong to threaten the existence of the nascent democracy.”).

342. *Id.* at 662.

343. Clark, *supra* note 263, at 402; Dugard, *Conflicts of Jurisdiction*, *supra* note 257, at 703.

344. Gavron, *supra* note 258, at 108 (noting that the consideration that a state’s violation of international obligations through an amnesty would “weigh heavily with the Court”).

345. Dugard, *Conflicts of Jurisdiction*, *supra* note 257, at 703.

346. *See supra* Part I.

347. Rome Statute, *supra* note 34, art. 53, § 2(a) (If “[t]here is not a sufficient legal or factual basis to seek a warrant or summons under article 58” of the Rome Statute then the prosecutor may find that there is not a “sufficient basis for a prosecution.”).

348. Felix Osike, *Kony Must Face Trial – ICC*, NEW VISION, July 12, 2007, <http://www.newvision.co.ug/D/8/13/575670> (stating that the ICC prosecutor, Luis Moreno-Ocampo lacks the legal authority to withdraw the case since the Court issued the arrest warrants).

349. Rome Statute, *supra* note 34, art. 53, § 4.

investigation or prosecution,³⁵⁰ it might cover both a declination to prosecute and an affirmative decision to go forward. The OTP might therefore reconsider a decision to prosecute in light of new facts or information such as a peace agreement requiring promises of nonprosecution.³⁵¹ But Article 58 covering the issuance of warrants does not contain any provisions for reconsideration or withdrawal of the warrant by the OTP.³⁵² Rather, the target of the arrest warrant or the State with jurisdiction over the case may challenge admissibility under Article 17.³⁵³

Even if it were possible under Article 53, it appears unlikely that this prosecutor would now reverse his decision to go forward with the prosecution of the LRA.³⁵⁴ He has characterized the LRA demands to do so as blackmail and extortion.³⁵⁵ He has stated that the ICC prosecution should go forward for the leaders of the LRA, with lesser perpetrators dealt with via Ugandan measures.³⁵⁶ Thus, it is unlikely that the “interests of justice” determination will now be used to defer to AJM 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 the Northern Ugandan situation. The main argument is that the interests of victims to peace and security outweigh the need to prosecute.³⁵⁷ As discussed above, the interests of the victims of the LRA are divided.³⁵⁸ Moreover, the term “victims” could be interpreted in many ways, from direct victims of LRA violence to the international community. The crucial circumstance, of course, is the need for LRA cooperation to achieve a peace deal. The victims and circumstances might weigh toward declination of prosecution.

On the other hand, the factors related to the perpetrator do not generally lean in the favor of mercy for the LRA accused. The crimes alleged are undoubtedly grave, although so are all the crimes covered by the statute, calling into question

350. *Id.*

351. See Manisuli Ssenyonjo, *Accountability of Non-state Actors in Uganda for War Crimes and Human Rights Violations: Between Amnesty and the International Criminal Court*, 10 J. CONFLICT & SECURITY L. 405, 428 (2005) (citing Rome Statute, *supra* note 34, art. 53, § 4) (advocating prosecution by ICC, unless new facts or information show that the accused are willing to surrender and abide by a peace agreement).

352. *See id.* at art. 58.

353. *Id.* at art. 19, § 2.

354. *Cf.* ALLEN, *supra* note 2, at 93 (Prosecutor reportedly indicated that temporary suspension of prosecution might be possible after peace deal, but not immunity).

355. Moreno-Ocampo, *supra* note 1.

356. *Id.*

357. *See, e.g.*, Position Paper of the Refugee Law Project (July 28, 2004) available at <http://hrw.org/campaigns/icc/docs/ij070505.pdf>. *Contra* Human Rights Watch, Policy Paper: The Meaning of “The Interests of Justice” in Article 53 of the Rome Statute (June 2005), available at <http://hrw.org/campaigns/icc/docs/ij070505.pdf> (arguing that it would be contrary to object and purpose of the ICC for the OTP to suspend prosecution under Article 53 due to an offer of national amnesty, the formation of a truth commission or the implementation of some other traditional reconciliation method).

358. *See generally* Pham et al., *Forgotten Voices*, *supra* note 136 (discussing the results of a population-based survey on attitudes about peace and justice in northern Uganda).

the utility of this factor.³⁵⁹ There are no indications that the accused are so aged or infirm as to call into question the efficacy of prosecution.³⁶⁰ Nor are the perpetrators minor figures, whose role in the crime calls into question the value of prosecution.³⁶¹ Moreover, a determination that the prosecution would be prohibitively harmful requires speculation and undermines deterrence.³⁶² There might also be an argument that Uganda waived its putative right to investigate or prosecute when it referred the situation.³⁶³ In light of shortcomings in the Ugandan judicial system, it might serve the interests of justice for the case to be prosecuted at the ICC.³⁶⁴ Thus, the OTP was likely acting properly within its discretion in going forward with the arrest warrants. Regardless, it is unlikely at this point that Article 53 would be used to defer to Uganda AJM regarding those most responsible.³⁶⁵ If the OTP were to revisit the “interests of justice” determination, it should consider the compatibility of the Ugandan AJM with international criminal justice requirements as discussed in the next Part.

D. Inadmissibility (Article 17)

If the OTP declines to cease prosecution in the interests of justice, the use of AJM might render the case inadmissible under Article 17.³⁶⁶ 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. . . .”³⁶⁷ Either a state with jurisdiction or the accused might challenge admissibility under Article 17, arguing that the ICC must defer to local justice. The complicated admissibility issue is best explored through the

359. See Robert D. Sloane, *Sentencing for the ‘Crime of Crimes’: The Evolving ‘Common Law’ of Sentencing of the International Criminal Tribunal for Rwanda*, 5 J. INT’L CRIM. JUST. 713, 722 (2007) (asserting that gravity is rarely a significant criterion for international crimes).

360. See Rome Statute, *supra* note 34, art. 31. While it is argued that Dominic Ongwen was abducted as a child, the crimes with which he is charged were committed as an adult. Moreover, he would have the opportunity to raise defenses such as mental disease or defect or duress at trial. *Cf.* Arrest Warrants, *supra* note 52.

361. See generally Arrest Warrants, *supra* note 52 (describing how each arrest warrant alleges that the perpetrators are major leaders in the LRA).

362. Gavron, *supra* note 258, at 110 (While it may be that prosecution increases violence and is not in the interest of justice, “this involves speculating about future events and has the unattractive corollary of turning the deterrence argument on its head.”).

363. See Mohamed M. El Zeidy, *The Ugandan Government Triggers the First Test of the Complementarity Principle: An Assessment of the First State’s Party Referral to the ICC*, 5 INT’L CRIM. L. REV. 83, 108-09 (2005) (discussing whether Uganda should be allowed to request deferral when it waived its initial primacy).

364. *Id.* at 111-17 (concluding that the ICC is a better venue due to Ugandan police corruption, weak judicial independence, and inadequate resources).

365. See Sifris, *supra* note 5, at 39 (arguing that a deferral for the lesser perpetrators under Article 53 is likely).

366. See Robinson, *supra* note 258, at 499 (commenting that despite the controversy over allowing a truth commission to render case inadmissible, Article 17 was left ambiguous to allow for narrow provision for deferral).

367. Rome Statute, *supra* note 34, art. 17 (1)(a).

example of the Ugandan case. As the discussion will show, the ICC is unlikely to hold that the nonprosecutorial Ugandan AJM³⁶⁸ render the case inadmissible, but the statutory language is ambiguous enough 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 19.³⁶⁹ Article 17 lays out substantive tests of admissibility, while Article 18 covers preliminary admissibility rulings and Article 19 covers subsequent admissibility determinations.³⁷⁰ There are three stages to complementarity regarding Uganda, where Uganda's actions could block ICC prosecution: at the time of (1) notice of the OTP's initial inquiry under Article 18; (2) initial determination of admissibility, during the investigatory stage; and (3) second stage determination of admissibility, when Uganda and the LRA reach a peace deal on AJM.

First, it is likely that the time has passed for a deferral under Article 18. Under this provision, 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 Court that it is investigating or has investigated certain persons related to the OTP's investigation and request that the OTP suspend the inquiry. Absent special authorization by the Court, the OTP must defer to the State's investigation under Article 18. The OTP may then ask for updates regarding investigation and prosecution.³⁷¹ 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.³⁷² On the other hand, the OTP might defer to a conditional amnesty process.³⁷³

Here, the Prosecutor determined that there was a reasonable basis to initiate an investigation in Northern Uganda on July 29, 2004.³⁷⁴ On or before that date, the Prosecutor notified "the States Parties to the ICC and other concerned states of his intention to start an investigation, in accordance with article 18 of the Rome Statute."³⁷⁵ To date, there has been no announcement of a domestic investigation from Uganda or any other State. Thus, there is not yet a state investigation or prosecution or decision not to prosecute to which the OTP might defer. There are

368. If criminal prosecutions were to go forward under a special division of the Ugandan High Court, *see supra* Part II, the ICC would undertake a similar analysis regarding genuine willingness and ability to investigate and prosecute.

369. *Id.* at art. 17-19.

370. *Id.*

371. *Id.* at art. 18(5).

372. *See* Goldstone & Fritz, *supra* note 263, at 661-62 (describing the prosecutor's task as ascertaining propriety of the amnesty process after a deferral to state investigation).

373. *See id.* at 661.

374. ICC, Prosecutor Opens Investigation, *supra* note 46.

375. *Id.*

indications, however, that Uganda may assert jurisdiction after completion of a peace deal with the LRA.³⁷⁶ Yet under Article 18, it appears that there is a one month limit on automatic deferrals to the State.³⁷⁷ Therefore, Article 18 seems inapplicable and attention shifts back to Article 17.

The target of the arrest warrant or a State with jurisdiction over the case may challenge Article 17 admissibility via Article 19. The State should do so at the earliest opportunity. 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.³⁷⁸

These admissibility challenges might come at either the initial or the second stage determination of admissibility. "Initial determination of admissibility" refers to the first stage of the situation in Uganda: at the time of investigation through the issuance of warrants. The "second stage" determination refers to the time of an imminent or settled peace agreement that raises a new issue: Uganda's assertion of jurisdiction based on AJM.

With regard to stage one admissibility, Uganda self-referred the situation and, at least for the first few years, took no action to investigate or prosecute suspected LRA perpetrators relating to the situation in Northern Uganda.³⁷⁹ As a matter of statutory interpretation, there is a controversy over whether inaction by all relevant states is sufficient to render a case admissible.³⁸⁰ Although a full discussion of complementarity is beyond the scope of this article, 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."³⁸¹ In fact, in some cases "inaction by States is the appropriate course of action."³⁸² In the situation in Uganda, with its long history of suspicion in the North against the state, prosecution by the ICC might be seen as

376. Cf. Paul Harera & Grace Matsiko, *LRA Asks Government to Legalise Traditional Justice*, THE MONITOR (Uganda), June 22, 2007, available at <http://www.monitor.co.ug/news/news06224.php> (describing the LRA proposal for implementing alternative justice mechanisms that will "satisfy the admissibility test under the complementarity principle under Article 17 of the Rome Statute").

377. Rome Statute, *supra* note 34, art. 18(2).

378. *Id.* at art. 19(10).

379. See Human Rights Watch, *Uprooted and Forgotten*, 17 HUMAN RIGHTS WATCH 2, 2-6 (Sept. 2005), available at <http://www.hrw.org/reports/2005/uganda0905/> (discussing impunity in Northern Uganda).

380. See, e.g., Anita Frohlich, *Reconciling Peace with Justice: A Cooperative Division of Labor*, 30 SUFFOLK TRANSNAT'L L. REV. 271, 299-300 (2007).

381. ICC, Office of the Prosecutor, Paper on Some Policy Issues Before the Office of the Prosecutor 5 (Sept. 2003), available at http://www.icc-cpi.int/library/orgs/otp/030905_Policy_Paper.pdf [hereinafter Prosecutor Policy Paper].

382. *Id.*

neutral and impartial, in contrast to prosecution by biased state organs.³⁸³ According to the OTP, “[i]n such cases there will be no question of ‘unwillingness’ or ‘inability’ under article 17.”³⁸⁴ This interpretation is supported by the decision of the Pre-Trial Chamber³⁸⁵ and by expert opinion,³⁸⁶ although it is not universally accepted.³⁸⁷

Regardless, the OTP determined that the Ugandan case was admissible under Article 17 at the investigative stage. Despite pleas from some quarters to drop the investigation, no state notified the OTP of any investigation or prosecution of the case, and the Court did not step in to stop a wayward prosecution despite the debate over Uganda’s self-referral.³⁸⁸ Further, the application for arrest warrants was granted, also indicating admissibility.³⁸⁹ Thus, the case was admissible during the first stage of the admissibility inquiry.

Stage two admissibility relates to the “accountability and reconciliation” track of the peace process. As described above, the deal calls for the LRA to avoid ICC prosecution by undergoing Ugandan mechanisms including *mato oput*, a traditional Acholi reconciliation process, and a truth commission.³⁹⁰ As of April 11, 2008, it

383. *Id.*

384. *Id.*

385. Arrest Warrants, *supra* note 52.

386. See ICC, XABIER AGIRRE et al, INFORMAL EXPERT PAPER ON THE PRINCIPLE OF COMPLEMENTARITY IN PRACTICE 7 (2003) available at <http://www.icc-cpi.int/otp/complementarity.html> (noting that in the inaction scenario there is no need to examine unwillingness or inability because none of the alternatives under Article 17(1)(a-c) are satisfied). See also Akhavan, *supra* note 326, at 414 (“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.”); El Zeidy, *supra* note 363, at 102-04, available at <http://www.ingentaconnect.com/content/innp/icla> (arguing that inaction should render the case admissible by implication, under either 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 Prosecutor Policy Paper, *supra* note 381, at 5 (providing that while there “may be” cases where inaction is appropriate, duty of states to exercise national criminal jurisdiction should be recalled); see also El Zeidy, *supra* note 363, at 104-05 (noting the state self-referral should sometimes be based on legitimate reason such as better due process rights at the ICC and should be considered on a case-by-case basis to avoid overloading the ICC).

387. 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); see also Schabas, *supra* note 54, at 27-32 (arguing that self-referral was never intended and that Uganda should prosecute the LRA). *But see* Akhavan, *supra* note 326, at 413-15 (arguing even if the unwilling/unable analysis were required, Uganda’s referral is admissible because Uganda is unwilling to prosecute in state court because of amnesty and fears accusations of political taint, and Uganda is unable to prosecute because it cannot obtain the accused members of LRA).

388. See Rome Statute, *supra* note 34, art. 19.

389. *Id.* at art. 58 (15) (requiring reasonable grounds to believe that the accused has committed crime within jurisdiction of the court).

390. See *supra* Part I. Hybrid or internationalized courts are not proposed. See Carsten Stahn, *The Geometry of Transitional Justice*, 18 LEIDEN J. INT’L L. 425, 463 (2005) [hereinafter Stahn, *Geometry*] (describing Article 17 and mixed courts).

appears that the stage two admissibility issue might be raised in several ways. First, it appears that both Uganda and the LRA accused will challenge admissibility under Article 17; indeed, the annexure to the agreement on accountability and reconciliation refers to the principle of complementarity.³⁹¹ Second, the Pre-Trial Chamber may be contemplating addressing the issue *sua sponte* as it has requested that Uganda describe the impact of the annexure on Uganda's cooperation with regard to the arrest warrants,³⁹² although the request was put in terms of evaluating Uganda's duty to cooperate in executing the warrants, the information would be relevant to an Article 17 evaluation. Thus, it must be determined whether the proposed AJM are sufficient to render inadmissible the case against those named in the ICC arrest warrants.

The ICC could interpret Article 17 very broadly to find that local justice mechanisms 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;
- (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.³⁹³

For Uganda, the gravity of the case is not relevant. Even those who support deferral to the peace deal's AJM do not argue that Kony's crimes are not of sufficient gravity. Similarly, the issue regarding Article 20 has already been discussed. This leaves several issues raised by Article 17(1)(a) and (b) that are best understood in conjunction with a real situation, such as the Ugandan case. The

391. Amnesty International, *supra* note 83, at 7, 36.

392. Request for Information from the Republic of Uganda on the Status of Execution of the Warrants of Arrests, Prosecutor v. Kony et al (Feb. 29, 2008), available at <http://www.icc-cpi.int/library/cases/ICC-02-04-01-05-274-ENG.pdf>. Uganda's response noted that the Government "is yet to work out the finer details and specifics of implementing the Agreement and Annexure" such as the jurisdiction of the court. Request for Information from the Republic of Uganda on the Status of Execution of the Warrants of Arrest, Mar. 28, 2008, ADM/70/269/02, available at <http://www.icc-cpi.int/library/cases/ICC-02-04-01-05-286-Anx2-ENG.pdf>.

393. Rome Statute, *supra* note 34, art. 17(1).

first set of issues revolve around the terms “investigated,” “prosecuted,” and “decided”: (1) is Uganda investigating or prosecuting the case? (2) has Uganda already investigated and decided not to prosecute the case? If so, there remains a set of issues regarding the quality of such acts: (1) is Uganda unwilling or unable genuinely to carry out the investigation or prosecution? (2) is Uganda acting in bad faith by deciding not to prosecute?

With regard to Article 17(1) (a) and (b), it is possible that the AJM being implemented in Uganda could qualify as an “investigation” or “prosecution,” although “prosecution” is particularly unlikely. The traditional Acholi process of *mato oput* does require establishment of facts,³⁹⁴ which would necessitate some sort of investigation. A truth commission might also investigate facts similar to the case before the ICC, although it depends on the type of truth commission. Assuming a truth commission has the proper mandate, the process might qualify as investigation.³⁹⁵ It is more of a stretch to consider a traditional reconciliation ceremony or truth commission a “prosecution” as prosecution usually implies criminal responsibility and exposure to certain types of sanctions, namely incarceration. A traditional Ugandan practice like *mato oput* entails compensation,³⁹⁶ but compensation does not necessarily bring to mind criminal prosecution although it might represent social condemnation like a prosecution. Yet, 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.³⁹⁷ On balance, while it seems that the AJM in Uganda would not fall under the ordinary interpretation of investigation or prosecution, the Court could interpret the language broadly enough to encompass the Ugandan truth commission and traditional methods like *mato oput*.³⁹⁸

Similarly, the statute could be interpreted to consider the lack of prosecution in Uganda as a decision not to prosecute following investigation through a truth commission or *mato oput*.³⁹⁹ But it is difficult to characterize the truth commission

394. See *supra* Part II.

395. William W. Burke-White, *The International Criminal Court and the Future of Legal Accountability*, 10 ILSA J. INT'L & COMP. L. 195, 198 (2003) (arguing truth commission might satisfy investigation); Llewellyn, *supra* note 267, 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 263, at 711 (arguing best interpretation of 17(1) includes truth commission investigations).

396. See *supra* Part II.

397. The civil law system’s frequent combination of compensation and criminal prosecution also illustrates the lack of strict separation between the two, as does the ICC’s embrace of both incarceration and reparations. See, e.g., DRUMBL, *supra* note 113, at 80-82.

398. See Robinson, *supra* note 258, at 500 (noting the investigation could include truth commission); Scharf, *supra* note 263, at 525 (contending that although 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 264, at 96 n.147 (noting lead negotiator indicated truth commission might not constitute investigation).

399. Cf. Cheah Wui Ling, *Forgiveness and Punishment in Post-Conflict Timor*, 10 UCLA J. INT'L L. & FOREIGN AFF. 297, 320 (2005).

or *mato oput* process as an investigation and decision not to prosecute.⁴⁰⁰ It appears that the peace deal has already taken prosecution off the table. As a result, the decision not to prosecute was not based on any investigation; while there might be an investigation through the AJM, it is not the basis of the peace accord's pre-determination of nonprosecution. This is likely sufficient to prevent the AJM in Uganda from rendering the case inadmissible.⁴⁰¹ It could be argued, however, that the decision not to prosecute is not finalized until the accused has cooperated with the AJM.⁴⁰² Yet if a lack of cooperation could lead to prosecution in exceptional cases, the presumption is nonprosecution, even if the truth commission or *mato oput* process reveals heinous crimes. It is therefore possible but implausible to characterize the Ugandan 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*.⁴⁰³

400. Dugard, *Conflicts of Jurisdiction*, *supra* note 257, at 702 (arguing that it is difficult to maintain interpretation of South African-style amnesty as a decision not to prosecute in light of unwillingness to prosecute).

401. *See, e.g.*, Frohlich, *supra* note 380, at 309 (contending that wording of Article 17 implies a process where punishment was a possibility).

402. *See* Llewellyn, *supra* note 267, at 204.

403. Rome Statute, *supra* note 34, art. 17(2) (emphasis added).

Article 17(3) provides: “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.”⁴⁰⁴

Inability is not at issue with regard to stage two of the admissibility determination in the Ugandan situation. The 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, the admissibility determination will likely hinge on the (un)willingness of Uganda to genuinely investigate, prosecute, or decline to prosecute.

There is a strong argument that the peace deal evidences Uganda’s unwillingness to act genuinely.⁴⁰⁵ The Court must consider three factors: (1) shielding of accused; (2) delay; and (3) intent to bring to justice.⁴⁰⁶ First, the decision to use AJM seems to be for the precise purpose of “shielding the person concerned from criminal responsibility.” Although there is no blanket self-amnesty,⁴⁰⁷ it appears that the peace deal removes the possibility of what would commonly be considered as “criminal” responsibility. Even the Acholi culture seems to accept this. Traditional ceremonies are often performed in tandem with criminal prosecution, for example, after release from prison. Thus, the type of accountability achieved through *mato oput* complements but does not replace criminal responsibility.⁴⁰⁸ 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 the Ugandan decision to use AJM.⁴⁰⁹ Thus, although the ICC would likely consider the Ugandan AJM to be improper shielding, it could conclude otherwise.

The second factor of unjustified delay does not seem applicable because Uganda is not dragging out the process of investigating or prosecution but rather

404. *Id.* at art. 17(3).

405. See Llewellyn, *supra* note 267, 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); Van den Wyngaert & Onega, *supra* note 316, at 726 (“[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)) (citation omitted); Robinson, *supra* note 258, at 499-502 (noting unlikely that conditional amnesty or targeted prosecution would be considered genuine under Article 17).

406. Due process standards are also required. See Stahn, *Complementarity*, *supra* note 263, at 714.

407. See, e.g., Robinson, *supra* note 258, at 497 (concluding blanket amnesty would never satisfy Article 17).

408. See RLP, *Peace First*, *supra* note 123, at 25.

409. See Sifris, *supra* note 5, at 42; Stahn, *Complementarity*, *supra* note 263, at 715.

announcing that no prosecution will be forthcoming. Yet if the delay in the “proceedings” were interpreted broadly enough to cover the Ugandan circumstances, then the next factor, intent to bring to justice, would be dispositive.

The third 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.⁴¹⁰ 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 (or perhaps vice versa). The AJM being used by Uganda might be independent or impartial to the extent that the truth commission and Acholi elders (and/or others in charge of carrying out *mato oput*) are fair and unbiased. But it seems that these procedures are inconsistent with an intent to bring Kony and others “to justice.” As discussed in the context of Article 20, the term “justice” might encompass restorative justice means but “bring to justice” seems to imply criminal responsibility.⁴¹¹ There is enough room for interpretation, however, that the Court could conclude otherwise.

In sum, the Court could choose to interpret Article 17 to encompass certain types of alternative mechanisms that it deems sufficiently genuine. The Court would have to interpret both Articles 17 (1) and (2) broadly to conclude that the Ugandan AJM render the case inadmissible. The same broad interpretation might lead the OTP to decline to investigate or prosecute a situation because it is inadmissible under Article 17.⁴¹² Neither the Court nor the OTP should stretch the language of the statute so far unless the AJM meet the standards of international criminal justice, as discussed in the next Part.

IV. PRINCIPLED GUIDELINES FOR DEFERRAL TO AJM

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. 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, particularly, those of the

410. See Stahn, *Complementarity*, *supra* note 263, at 714.

411. 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); Dugard, *Conflicts of Jurisdiction*, *supra* note 257, at 702; Sifris, *supra* note 5, at 42; cf. Stahn, *Complementarity*, *supra* note 263, at 711, 716 (contending that a truth commission would “bring to justice” only if it has power to recommend prosecution).

412. Rome Statute, *supra* note 34, art. 53.

ICC.⁴¹³ 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,⁴¹⁴ includes retribution, deterrence, expressivism,⁴¹⁵ and restorative justice, especially reconciliation.⁴¹⁶ 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 the putative truth commission and to the *mato oput* process. Given the likelihood of recurrence of the Ugandan dilemma,⁴¹⁷ the framework proposed here also offers guidelines for future situations.

This Part advances 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 isolates the goals of the ICC and offers concrete criteria for advancing those goals through deference to AJM. Of course, the theoretical bases for the goals of the ICC overlap,⁴¹⁸ 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.

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 mandate aimed at ending impunity.⁴¹⁹ 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.

413. Cf. Blumenson, *supra* note 3, at 871 (explaining that the ICC obligation to do justice can give way in certain circumstances, but must mitigate injustice).

414. As discussed *infra*, there is significant skepticism over international criminal justice's ability to advance these theories in reality. See *infra* Part IV.C.

415. DRUMBL, *supra* note 113, at 149.

416. Danner, *supra* note 112, at 531 (discussing reconciliation and retribution as ICC mandates); Ralph Henham, *The Philosophical Foundations of International Sentencing*, 1 J. INT'L CRIM. JUST. 64, 80 (2003) (discussing restorative justice and ICC); *but cf.* DRUMBL, *supra* note 113, at 150 (noting that reconciliation is a laudable objective but one only given rhetorical attention by international tribunals).

417. See, e.g., Newman, *supra* note 7, at 342.

418. See, e.g., DRUMBL, *supra* note 113, at 149 (stressing that retribution, deterrence and expressivism are not mutually exclusive).

419. See Blumenson, *supra* note 3, at 819 (noting that institutional objectives of ICC include maintaining legitimacy by going forward with prosecution); see also Little, *supra* note 11, at 396 (recognizing that in early stages of court, accountability and prosecution are favored over victim autonomy).

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, or even all war crimes and crimes against humanity.⁴²⁰ This guideline is not followed here, as it appears unrealistic to expect the LRA to agree to prosecution for those most responsible for international crimes: its leaders. The ICC warrants for Kony and other leaders have been the sticking point in negotiations. Therefore, it is little help for the OTP to repeat its offer to defer to AJM for lesser offenders while prosecuting those already named in the warrants.⁴²¹ It is likely that this circumstance will re-occur in the future, particularly where ICC situations involve ongoing conflict.⁴²² Therefore, the analysis below draws on the literature's proposed factors to assess legitimate AJM regardless of the type of crime.

The AJM must be evaluated based on a two-part inquiry: first, whether the AJM meets the threshold requirement of necessity and legitimacy, and second, whether the AJM furthers 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 AJM is 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 restorative justice.⁴²³

420. Slye, *supra* note 281, at 245 & n.246 (making the case for withholding amnesty from those “most responsible for war crimes, crimes against humanity or other serious violations of international criminal law”); William Burke-White, *Reframing Impunity*, 42 HARV. INT’L L. J. 467, 479 (2001) [hereinafter Burke-White, *Reframing Impunity*] (refusing to provide amnesty for “genocide, grave breaches of the Geneva Conventions, torture, and crimes against humanity”); see Stahn, *Complementarity*, *supra* note 263, at 702, 706; see also Alex K. Kriksciun, Comment, *Uganda’s Response to International Criminal Court Warrants: A Misguided Approach?*, 16 TUL. J. INT’L & COMP. L. 213, 241 (2007) (arguing for “dual path” of continuing Uganda’s ICC referral and promoting limited amnesty for those less responsible); OHCHR, *Making Peace*, *supra* note 24, at 49 (finding that respondents of a recent survey make distinctions based on the gravity of a crime and the seniority of the perpetrator).

421. See Louise Parrott, *The Role of the International Criminal Court in Uganda: Ensuring that the Pursuit of Justice Does Not Come at the Price of Peace*, 1 AUSTL. J. PEACE STUDIES 8, 26 (2006); Sifris, *supra* note 5, at 48 (noting unlikelihood that person in power would negotiate peace if prosecution rather than amnesty likely to follow).

422. See, e.g., Newman, *supra* note 7, at 342.

423. Accord Scharf, *supra* note 263, at 512 (noting alternative mechanisms encompass “prevention, deterrence, punishment, and rehabilitation”); cf. Miriam J. Aukerman, *Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice*, 15 HARV. HUM. RTS. J. 39, 96 (2002) (describing how goals of retribution and deterrence favor prosecution while other goals may favor alternative mechanisms in some societies).

Although there might be other purposes of the ICC⁴²⁴ 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.⁴²⁵ 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 20 such that a truth commission or traditional process blocks jurisdiction under the principle of *ne bis in idem*; (3) whether the OTP should exercise its discretion to decline to prosecute in light of local justice under Article 53; and (4) whether the ICC should interpret Article 17 broadly enough that a truth commission or traditional process renders the case inadmissible. The presumption is for national or international prosecution,⁴²⁶ but if deferral to Ugandan 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.⁴²⁷ The ICC should not defer to an AJM unless the State's decision to use AJM instead of prosecution is based on necessity.⁴²⁸ 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.⁴²⁹ 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. Uganda cannot end the conflict militarily; it has tried and failed to do so for decades. The international community appears unwilling to use force to

424. See, e.g., Steven Glickman, *Victims' Justice, Note*, 43 COLUM. J. TRANSNAT'L L. 229, 238 (2004) (discussing six theories including rehabilitation, restitution, and restoration of rule of law); Danner, *supra* note 112, at 543 n.274 (recognizing goals of international prosecutions include truth telling, punishment, healing victims, advancing the rule of law, and reconciliation); DRUMBL, *supra* note 113, at 62 (noting rehabilitation is important for child soldiers and that incapacitation is not seen as central goal); and Little, *supra* note 11, at 368 (discussing accountability versus victim autonomy).

425. Cf. Newman, *supra* note 7, at 354 (calling for theoretical and empirical basis for ICC deferral to amnesties).

426. See generally LEILA NADYA SADAT, *THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW: JUSTICE FOR THE NEW MILLENIUM* (2002).

427. 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 263, at 707.

428. See Majzub, *supra* note 320, at 276 (avoiding resumption of conflict); Naqvi, *supra* note 274, at 617 (proposing but for test); O'SHEA, *supra* note 265, at 85 (noting amnesty inappropriate unless it is price for peace); Robinson, *supra* note 258, at 497 (arguing for necessity based on "irresistible social, economic or political realities"); Scharf, *supra* note 263, at 512 (recognizing amnesty as a "bargaining tool of last resort").

429. See Hanlon, *supra* note 45, at 320 (describing U.N. and E.U. support for prosecution of Kony).

end the conflict.⁴³⁰ The LRA maintains the capability to inflict further atrocities on civilians. Thus, Uganda's agreement to seek the withdrawal of the ICC warrants (or to otherwise thwart ICC prosecution) seems like a last resort measure necessary to secure the peace.

In addition, the agreement must be legitimate.⁴³¹ It must be created by a democratic government or international body, rather than an autocratic government intent on covering up its own international crimes.⁴³² Its formation and practice must represent the people⁴³³ and adhere to a principle of non-discrimination.⁴³⁴ 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.⁴³⁵

Although the Ugandan government is harshly criticized for its relatively authoritarian "Movement" (no party) state,⁴³⁶ the choice of Ugandan AJM appears to be legitimate. The AJM proposals were first put forth by Acholi leaders, rather than the government. The Museveni government has only recently embraced and expanded them beyond *mato oput* to other tribal mechanisms and a truth commission. Moreover, the most marginalized segments of society are generally in the North – the same region from which the initial calls for AJM originated. As a result, it does not appear that the government is adopting AJM to protect itself, unlike, for instance, Idi Amin's establishment of a truth commission in 1970s Uganda.⁴³⁷ To the contrary, the government is more likely to be held accountable through AJM investigating crimes by both sides of the conflict than through the ICC,⁴³⁸ as noted above, no public ICC arrest warrants have been issued against Ugandan officials.

430. See Trumbull, *supra* note 277, at 314.

431. Cf. DRUMBL, *supra* note 113, at 190 (proposing guidelines for qualified deference to local justice including good faith and democratic legitimacy).

432. Dugard, *Dealing with Crimes*, *supra* note 281, at 1012 (noting that truth commission should be established by a democratic regime); Goldstone & Fritz, *supra* note 263, at 659 (asserting that prosecution and punishment may trigger the "democratic order"); Clark, *supra* note 263, at 409 (arguing that the AJM must rehabilitate and aid in the transition to be accepted by the population); Naqvi, *supra* note 274, at 620 (favoring legitimate means); O'SHEA, *supra* note 265, at 333 (democratically elected government); Slye, *supra* note 281, at 245 (arguing accountable amnesty should be democratic in its creation); Trumbull, *supra* note 277, at 322 (arguing that amnesty should be a product of democratic process); Robinson, *supra* note 258, at 497 (preferring the use of democratic will); Roche, *supra* note 339, at 575 (arguing that creation by democratic body or referendum is ideal); Stahn, *Complimentary*, *supra* note 215, at 707 (noting international law disfavors self-amnesties).

433. See Burke-White, *Reframing Impunity*, *supra* note 420, at 472 (arguing that the legitimacy of amnesty depends on its creation by a representative government or process).

434. See generally Stahn, *Geometry*, *supra* note 390, at 435; Roche, *supra* note 339, at 575-76.

435. See Dugard, *Dealing with Crimes*, *supra* note 281, at 1012 (noting the use of a representative body); Villa-Vicencio, *Perpetrators*, *supra* note 286, at 209 (noting the need for transparency and support of majority of citizens for policy).

436. See, e.g., FINNSTRÖM, *supra* note 10, at 108, 312. See also Economist Intelligence Unit, *Democracy Index 2006*, ECONOMIST, at 3 tbl.1, available at http://www.economist.com/media/pdf/DEMOCRACY_TABLE_2007_v3.pdf (ranking Uganda as a hybrid, below full and flawed democracies).

437. See HAYNER, *supra* note 115, at 51-52 (describing ineffective and forgotten 1974 Commission of Inquiry into the Disappearance of the People of Uganda).

438. Cf. DRUMBL, *supra* note 113, at 144 (discussing motives of political elites behind referral).

Yet even among the Acholi, opinions are divided on the question of prosecution. In non-Acholi areas of the North, a 2005 survey showed that support for prosecution was greater than support for AJM.⁴³⁹ There are no reliable figures nationwide. The Acholi and NGO elites might be pushing the AJM agenda in order to maximize their own power.⁴⁴⁰ Yet a more recent survey found that in 2007, when the peace process seemed to be making process, fewer respondents from Northern Uganda favored punishment, trials, imprisonment or death for LRA leaders.⁴⁴¹ With people beginning to trickle out of IDP camps,⁴⁴² the momentum is toward the peace deal. Recent focus groups discussions show that many support non-ICC prosecution, but that they would support traditional justice if necessary for peace.⁴⁴³ On the other hand, it seems that peer pressure influenced responses.⁴⁴⁴ It is therefore plausible but not certain that many Ugandans would support peace at the cost of nonprosecution.

Moreover, the potential for elite manipulation of AJM to the detriment of popular support⁴⁴⁵ can be mitigated. For example, popular input should be sought regarding the mandate of the truth commission, *mato oput* can be reformed to include women, and other tribes can be given a voice in the choice of AJM. Further, surveys consistently show that respondents in Northern Uganda desire truth-telling and reparations such as compensation, which may be achieved through a truth commission and *mato oput*.⁴⁴⁶ Finally, victims in Northern Uganda want both the government and LRA to be held responsible⁴⁴⁷ and might support AJM on that ground. In sum, the peace agreement's inclusion of AJM probably stems from the necessity of circumstances and is more likely legitimate than not. The ICC

439. See *supra* Part II.

440. See DRUMBL, *supra* note 113, at 144; ALLEN, *supra* note 2, at 137-53 (describing diversity of views regarding prosecution and Acholi elites); FINNSTRÖM, *supra* note 10, at 70-71 (discussing conflict over claims to Acholi leadership positions).

441. Pham et al, *When the War Ends*, *supra* note 159, at 34, 45.

442. *Need to Maintain Momentum*, *supra* note 16, at 5 n.23 (estimating nearly 1.4 million displaced, 400,000 returnees, only 2% Acholi).

443. Oxfam, *The building blocks of sustainable peace: The views of internally displaced people in Northern Uganda*, OXFAM BRIEFING PAPER, Sept. 24, 2007, available at http://www.oxfam.org.uk/resources/policy/conflict_disasters/bp106_nuganda.html; see also Pham et al., *When the War Ends*, *supra* note 159, at 47-48 (noting that while many northern Ugandans will compromise justice for peace, they "still support the use of the formal justice system as a means of holding those most responsible for serious crimes accountable, particularly if it can be achieved as part of the peace process").

444. *Id.*; see also Katy Glassborow & Peter Eichstaedt, *Ugandan Rebels to Appeal ICC Warrants*, INST. WAR & PEACE REPORTING, June 19, 2007, available at http://www.iwpr.net/?p=acr&s=f&o=343316&apc_state=henh (noting that during consultations with LRA delegation, many people supported local justice but privately expressed that they had been too afraid to voice actual support for punishment).

445. ALLEN, *supra* note 2, at 177 (describing local interest group creation of "myth" of local restorative justice); DRUMBL, *supra* note 113, at 93-99 (discussing Rwandan *gacaca* as justice ordered by the state and elites).

446. See OHCHR, *Making Peace*, *supra* note 24, at 47 (Aug. 2007 survey); Pham et al., *When the War Ends*, *supra* note 159 (Dec. 2007 survey).

447. OHCHR, *Making Peace*, *supra* note 24, at 22.

should therefore consider whether the truth commission and/or *mato oput* further 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. These theories are widely cited despite skepticism about the ability of international criminal justice to achieve these goals. Mark Drumbl, for example, has shown the limited efficacy of retribution, deterrence, and expressivism in the prosecution and sentencing practices of previous international tribunals.⁴⁴⁸ Others have also criticized international criminal tribunals because they rarely serve retribution or deterrence better than local justice.⁴⁴⁹ 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 justice, the ICC should consider certain factors. If AJM meet most of the enumerated factors to a significant extent, or at least to the same extent as ICC prosecution, then they further this theory, and the ICC should defer.

This section will examine each of the four theories separately, briefly explaining the 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 justice.⁴⁵⁰ The factors will not add up to a

448. DRUMBL, *supra* note 113, at 149.

449. 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 & John Morss, *International Sentencing Law: In Search of a Justification and Coherent Framework*, 6 INT'L CRIM. L. REV. 191, 191 (2006) (contending that general deterrence marginally justifies international criminal sentencing while reconciliation, retribution, and 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 277, at 309-11 (criticizing deterrence theory).

450. These criteria are commonly discussed in the context of evaluating amnesties and/or truth commissions. See Aukerman, *supra* note 423, at 92-94 (considering context, crimes, and culture regarding alternative mechanisms); Burke-White, *Reframing Impunity*, *supra* note 420, at 469 (discussing legitimacy and scope analysis of amnesties); DRUMBL, *supra* note 113, at 188 (discussing qualified deference); Dugard, *Dealing with Crimes*, *supra* note 281, at 1012 (discussing process and substance requirements for acceptable truth commission); Goldstone & Fritz, *supra* note 263, 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 115, at 252 (discussing truth commission criteria of process, product and impact); Henrard, *supra* note 310, at 649 (discussing conditional amnesty with truth commission criteria); Naqvi, *supra* note 274, at 616-17 (discussing criteria for recognition of amnesty for war crimes); Newman, *supra* note 7, at 354 (discussing public goods analysis of amnesties); O'SHEA, *supra* note 265, at 332-34 (proposing factors for U.N. acceptance of state amnesty); Robinson, *supra* note 258, at 497 (discussing the necessity exception for certain amnesties); Roche, *supra* note 339, at 575 (discussing criteria for legitimate truth commission); Scharf, *supra* note 263, at 526-27 (offering six considerations regarding amnesty); Slye, *supra* note 281, at 245 (asserting that legitimate amnesties have accountability, truth, participation of victims, and reparations); Stahn, *Complementarity*, *supra* note 263, at 695 (discussing guidelines for permissible amnesties or pardons); Trumbull, *supra* note 277, at 320-21 (balancing test for recognizing amnesties); Villa-

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 AJM. This section will ground the discussion in reality by evaluating how the criteria apply to the Ugandan truth commission and Acholi *mato oput* process. Although discussed separately here, the truth commission and *mato oput* are more likely to further the goals of international criminal justice, and more likely to attract popular support, when combined.⁴⁵¹

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 by enhancing international cooperation.”⁴⁵² The emphasis on prosecution is taken to be retributive. Retribution typically justifies prosecution and punishment based on individual culpability: a person is prosecuted and punished because he deserves it.⁴⁵³ “Retribution requires proportionality between the gravity of the offense and the severity of sanction.”⁴⁵⁴ Retribution is generally linked to criminal prosecution, but its concern with individual culpability and proportional punishment might be furthered by alternative measures.⁴⁵⁵

First, the AJM must provide accurate individual assessment of culpability.⁴⁵⁶ The AJM could include an extensive investigation to establish culpability or provide incentives for perpetrators to admit culpability. An accurate and effective investigation would require an independent body with adequate resources, time frame, and power.⁴⁵⁷ For example, a truth commission with subpoena powers and adequate staffing might investigate the accused.⁴⁵⁸ 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.⁴⁵⁹ The full disclosure process would likely require admission of responsibility by the perpetrator under threat of

Vicencio, *Perpetrators*, *supra* note 286, at 216-17 (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, 211 (2003) (making the case for amnesty only if there is investigation, prosecution, and justice).

451. OHCHR, *Making Peace*, *supra* note 24, at 54.

452. Rome Statute, *supra* note 34, at pmb1 ¶ 4.

453. See, e.g., DRUMBL, *supra* note 113, at 15, 150; O’SHEA, *supra* note 265, at 79.

454. DRUMBL, *supra* note 113, at 154.

455. This conception rejects strict retributivism, as described by Blumenson, which requires prosecution. See Blumenson, *supra* note 3, at 834.

456. See Scharf, *supra* note 263, at 526 (discussing individual responsibility of perpetrators).

457. See generally, HAYNER, *supra* note 115; Henrard, *supra* note 310, at 627 (stating the fact-finding rationale for truth commission).

458. See, e.g., HAYNER, *supra* note 115, at 141.

459. See, e.g., *id.* at 40-41; see also O’SHEA, *supra* note 265, at 333-34 (stating that proper amnesty should be granted after public disclosure of truth).

prosecution for nondisclosure.⁴⁶⁰ Either model would require some form of due process⁴⁶¹ for the accused including defenses like duress,⁴⁶² which would mitigate or eliminate individual responsibility. The conditional nonprosecution model might provide more incentives to take responsibility than prosecution; such a confession might be acceptable to victims despite its quasi-coerced nature. This model 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.

Similarly, *mato oput* requires an investigation and establishment of responsibility. The core of the *mato oput* ritual includes establishment of the facts and an expression of responsibility on the part of the accused. Where there is an identifiable victim and perpetrator, therefore, *mato oput* provides an accurate individual assessment of culpability. As noted above, however, identification of individual perpetrators and corresponding victims will be a daunting task. Like the truth commission process, *mato oput* would comport with the concerns for individual culpability if it is carefully crafted to overcome the difficulties identified above.

Second, the AJM might further retribution if they provide some form of just punishment short of incarceration.⁴⁶³ Whatever the form of punishment, it must not violate international law. For example, a traditional process that includes the giving of a girl as compensation will not be acceptable.⁴⁶⁴ Similarly, capital punishment is not an option, let alone a punishment approaching an “eye for an eye” calculus, which would violate human rights standards.⁴⁶⁵ But other forms of punishment commonly included in nonprosecutorial⁴⁶⁶ models of accountability might suffice: community service, fines, reparations, shaming, removal from office, etc.⁴⁶⁷

460. See, e.g., HAYNER, *supra* note 115, at 43; Stahn, *Geometry*, *supra* note 390, at 433 (necessity of judicial system to carry out last-resort prosecutions); Villa-Vicencio, *Perpetrators*, *supra* note 286, at 209 (necessity of threat of prosecution for South African process).

461. See Aukerman, *supra* note 423, at 49; Blumenson, *supra* note 3, at 867; Hayner, *supra* note 115, at 129; but see Kevin Jon Heller, *The Shadow Side of Complementarity*, 17 CRIM. L.F. 255, 259 (2006) (arguing that ICC should be amended to protect defendant’s rights in domestic proceedings).

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

463. Cf. Dan Markel, *The Justice of Amnesty?*, 49 U. TORONTO L.J. 389, 431 (1999) (discussing that 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); Villa-Vicencio, *Reek of Cruelty*, *supra* note 7, at 165, 174 (citing Jean Hampton’s conception of punishment).

464. See, e.g., DRUMBL, *supra* note 113, at 192 (describing Pashtunwali, code of conduct of Afghanistan’s Pashtun region); cf. Alisa Tang, *Afghan Girls Traded for Debts, Blood Feuds*, USA TODAY, July 9, 2007.

465. Cf. DRUMBL, *supra* note 113, at 156.

466. 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.

467. See, e.g., Robinson, *supra* note 258, at 498; Scharf, *supra* note 263, at 527.

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,⁴⁶⁸ 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)⁴⁶⁹ is often perceived as insufficient as well.⁴⁷⁰ Arguably, no term of incarceration could be proportional to an international crime like genocide.⁴⁷¹ Since neither AJM nor the ICC metes out proportional punishment, AJM that approach proportionality might suffice when compared to a similarly ineffective punishment under the ICC. If the AJM fall woefully short of even the ICC's disproportionately weak punishment, then they would not suffice.

With regard to the proposed Ugandan truth commission, it will likely fall short of proportionality 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;⁴⁷² 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.⁴⁷³ This is particularly true when the prisoner would be incarcerated in an internationally-approved prison, where conditions might far exceed local standards of living, let alone imprisonment.⁴⁷⁴ Thus, the Western 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 LRA to enter a peace agreement, thereby failing proportionality.⁴⁷⁵

Mato oput arguably blends shaming with its compensatory remedy. The process has a clear compensatory requirement, but as discussed above, compensation might not be feasible for LRA most perpetrators. As noted above,

468. Proportionality also means the lack of excessive punishment, which is generally not at issue for ICC crimes given their gravity.

469. Rome Statute, *supra* note 34, art. 77.

470. See, e.g., Aukerman, *supra* note 423, at 63 (discussing limitations of retributive prosecution); Blumenson, *supra* note 3, at 841.

471. But see Raquel Aldana-Pindell, *In Vindication of Justiciable Victims' Rights to Truth and Justice for State-Sponsored Crimes*, 35 VAND. J. TRANSNAT'L L. 1399, 1450 (2002) (discussing how proportionality requires scaled punishment but not ideal relationship between a crime and its punishment).

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

473. DRUMBL, *supra* note 113, at 161.

474. See *id.* at 16; ALLEN, *supra* note 2, at 134-35 (quoting Acholi leader as saying that Kony should be in the community among those who had suffered, not air-conditioned prison); Glickman, *supra* note 424, at 253 n.90 (noting superior living conditions including health care); Hanlon, *supra* note 45, at 323 (quoting Ugandan criticism of superior ICC prison conditions).

475. See Aukerman, *supra* note 423, at 57 (discussing how alternative mechanisms are even less proportional than prosecution).

shaming is traditionally part of Acholi culture, and it seems to be incorporated into the *mato oput* process, particularly given its communal origins.⁴⁷⁶ The perpetrator must acknowledge the facts and take responsibility for the act as well as the negative effects of cen that he has brought upon himself and clan. This local shaming punishment⁴⁷⁷ might be as close to proportional punishment as an ICC sentence.

Thus, the Ugandan AJM might impose just punishment on offenders who are deemed individually culpable through a truth commission or *mato oput* process. The mere fact that extraordinary crimes are treated via AJM while ordinary crimes are prosecuted, however, undermines retribution.⁴⁷⁸ Yet there are strong arguments that international prosecution already fails retributive principles, particularly proportionality. Although there would be significant difficulties, AJM might match international criminal prosecutions in terms of furthering retribution.

Furthermore, 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.⁴⁷⁹ In his conception of retribution, victims play a central role.⁴⁸⁰ 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.⁴⁸¹ 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.⁴⁸²

The Ugandan 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, for example in the form of victim testimony in public or private hearings or even victim questioning of accused. While it is not clear whether Uganda or the international community would fund a reparations system, the truth commission could explore this topic and issue recommendations. The

476. Cf. DRUMBL, *supra* note 113, at 167 (discussing incorporation of the East Timorese world view).

477. Cf. Pham et al., *When the War Ends*, *supra* note 159, at 40 (only 35% of respondents consider traditional ceremonies as forms of punishment, but a majority nonetheless agree that those responsible for abuses should undergo traditional ceremonies).

478. See DRUMBL, *supra* note 113, at 154.

479. See Blumenson, *supra* note 3, 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.

480. *Id.* at 838.

481. *Id.* at 862-66.

482. *Id.* at 868-69.

public nature of the truth commission's work, whether in public hearings⁴⁸³ 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.

Mato oput would also further victim-conscious retribution. The *mato oput* process requires establishment of truth. Although the scope of the investigation was traditionally limited to a single incident, *mato oput* might be adapted to the present situation. Moreover, it acknowledges the victim and repudiates his victimization via recognition and compensation. *Mato oput* fosters internal accountability by requiring the perpetrator to take responsibility for the act.⁴⁸⁴ It relies on a form of public disgrace by requiring the perpetrator to take responsibility for the crime. Overall, the truth commission and *mato oput* process seem better-suited to victim-conscious retribution than ICC prosecution.

2. Deterrence

The Preamble of 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.”⁴⁸⁵ 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.⁴⁸⁶ 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 punishment⁴⁸⁷ as well as publicity for the outcome of the process. The truth commission report and outcome of *mato oput* must be publicized to a broader audience, in order to pose a deterrent effect. The difficulties inherent in determining the actual deterrent effect of prosecution are writ large in AJM. To create fear, the threatened “punishment” must be perceived as significant suffering. It is not clear whether the Ugandan alternative sanctions have teeth within the local community or the (would-be) offender population, let alone the international community. Even if the Ugandan AJM fail to further deterrence, however, they

483. See, e.g., Slye, *supra* note 281, at 245 (public process or acknowledgement).

484. Blumenson, *supra* note 3, at 870.

485. Rome Statute, *supra* note 34, at pmb1.

486. DRUMBL, *supra* note 113, at 16.

487. See Tom Syring, *Truth versus Justice: A Tale of Two Cities?*, 12 INT'L LEGAL THEORY 143, 204 (2006).

might match ICC prosecution in their inadequacy or be justified on other preventive grounds.

For instance, although 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.⁴⁸⁸ 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.

In Uganda, if the truth commission or *mato oput* process provides a credible threat of suffering of some sort, then it would further specific deterrence by discouraging repeat offenses by perpetrators. It is possible but ultimately unlikely that Kony and other LRA leaders who face AJM will be deterred from committing further crimes. Of course, 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 like Kony, who feel their prior crimes are justified, are unlikely to be discouraged from committing further crimes because of the suffering inflicted via a truth commission or *mato oput* process.⁴⁸⁹ But if Kony genuinely embraces Acholi traditions, the negative impact of *mato oput* might be more powerful than a prison term in an ICC-approved prison cell. Moreover, rank and file LRA might be “scared straight” and deterred from future crimes.⁴⁹⁰ 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 Kony's. Along with a truth commission, *mato oput* might be seen as a more wide-sweeping accountability mechanism that would increase the certainty of punishment for offenders. While international criminal prosecutions are rare and tend to focus on those most responsible,⁴⁹¹ AJM could ratchet up the likelihood that would-be

488. See Aukerman, *supra* note 423, at 69; Bagaric & Morss, *supra* note 449, at 249-50.

489. They are also unlikely to be significantly effected 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 113, at 62.

490. Aukerman, *supra* note 423, at 69-70.

491. Domestic prosecution of international criminals is also rare. See HAYNER, *supra* note 115, at 89.

perpetrators would face accountability, thereby discouraging them from committing offenses.

On the other hand, ICC deferral to AJM might substantially undermine deterrence if AJM are perceived as a slap on the wrist. The punishment imposed by a truth commission or *mato oput* might not be seen as substantial suffering to be avoided, even within Northern Uganda.⁴⁹² The punitive aspects of *mato oput* also might not translate to other cultures. It is not clear how general “general deterrence” is supposed to be. Must the deterrent impact reach all of Uganda? Of Africa? The world? If so, how does deferral to local mechanisms – even the principle of complementarity itself – comport with the ICC goal of deterrence? Is there a way to publicize the culture-specific punishment so that it creates a fear of suffering despite cultural differences? These and other questions related to deterrence have yet to be fully explored. It is possible (and disturbing) that the message received by other rebel leaders or potential insurgents would be 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. 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.

However, there is a fundamental disconnect between the underlying assumptions of deterrence and the character of international criminals that undermines the deterrent impact of both prosecutorial and nonprosecutorial methods.⁴⁹³ 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.⁴⁹⁴ A rebel leader might well consider the threat of ICC warrants while negotiating peace, as Kony has done during the recent Ugandan talks. But it is improbable that the likelihood of capture and accountability is a motivating factor at earlier stages of a violent insurgency, when leaders are more likely focused on staying alive and amassing power.⁴⁹⁵ Similarly, where the criminals are the 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. In fact, Justice Goldstone seems to question deterrence as a goal of the

492. Cf. Aldana-Pindell, *supra* note 471, at 1459-65 (arguing that alternative sanctions have little, if any, deterrent effect).

493. See generally DRUMBL, *supra* note 113, at 17, 171; Robert D. Sloane, *The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law*, 43 STAN. J. INT'L L. 39, 72 (2007) [hereinafter Sloane, *Expressive Capacity*] (noting rational actor model of deterrence even more suspect in international, rather than domestic, context).

494. See Aukerman, *supra* note 423, at 64, 68; Leila Nadya Sadat, *Exile, Amnesty and International Law*, 81 NOTRE DAME L. REV. 955, 999 (2006).

495. See, e.g., DRUMBL, *supra* note 113, at 171-73; *Negotiating Peace and Justice*, *supra* note 295.

ICC, noting that the ICC was not established to end atrocities “for tribunals cannot in themselves accomplish this. Rather the tribunals were established on the basis that prosecution and punishment would end the impunity of perpetrators.”⁴⁹⁶ Thus, Justice Goldstone seems to attribute a backward-looking perspective to the ICC, more compatible with retribution than consequentialism like deterrence.

Overall, the assessment of deterrence is necessarily opaque. Both international criminal prosecution and AJM appear to fall short. AJM might be marginally more successful in deterring the rank and file by increasing the certainty of accountability. Thus, the Ugandan AJM seem to further deterrence to the same if not a slightly greater extent than limited international criminal prosecution, but the deterrent impact appears to be negligible in either case.

The Preamble, however, refers to prevention in general, not merely deterrence. Other preventive effects might result from AJM that would not stem from ICC prosecution. An alternative approach might be marginally more successful than criminal prosecutions regarding collective action and bystander acquiescence.⁴⁹⁷ The Ugandan truth commission process might bring out not only the roots of the conflict but also recommend reforms⁴⁹⁸ that deprive Kony of a rallying cry and discourage the rise of another LRA. The official acknowledgement of past abuses might have a preventive effect.⁴⁹⁹ A traditional mechanism like *mato oput* might reintegrate offenders into the community, decreasing the likelihood that they would re-offend. Although the deterrent impact of both prosecution and AJM is likely to be slight, the truth commission or *mato oput* might further the broader goal of prevention more effectively than ICC prosecution.

3. Expressivism

Several scholars have argued for an expressivist function for international criminal law in addition to retribution and deterrence.⁵⁰⁰ For example, Diane Marie Amann contends that expressivism best justifies international criminal justice.⁵⁰¹ According to Amann, “[e]xpressivism comprises a complex of theories that focus on the expressive function of a governmental action, a deed.”⁵⁰² The message

496. Goldstone & Fritz, *supra* note 263, at 659; see also George P. Fletcher, *Justice and Fairness in the Protection of Crime Victims*, 9 LEWIS & CLARK L. REV. 547, 555 (2005) (calling prevention a “makeweight” argument).

497. DRUMBL, *supra* note 113, at 173.

498. See HAYNER, *supra* note 115, at 55.

499. See Henrard, *supra* note 310, at 637; Roche, *supra* note 339, at 568-69.

500. See DRUMBL, *supra* note 113, at 52 (describing Rome Statute preamble as vaguely expressivist); Ralph Henham, *Some Issues for Sentencing in the International Criminal Court*, 52 INT’L & COMP. L.Q. 81, 111(2003) (significance of expressivism in ICC); cf. Sloane, *Expressive Capacity*, *supra* note 493, at 75 (moral educative model).

501. Amann, *supra* note 449, at 117. See also DRUMBL, *supra* note 113, at 17 (concluding expressivism has stronger potential than deterrence and retribution).

502. Amann, *supra* note 449, at 118.

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.

Expressivism is sometimes conceived of as part of retribution⁵⁰³ or at least as overlapping with it.⁵⁰⁴ 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.⁵⁰⁵

For example, the existence of the ICC, its actual prosecutions, and its potential punishment might have expressive value in that they signal moral condemnation.⁵⁰⁶ 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.⁵⁰⁷ 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, the Ugandan AJM appear to further the goals of expressivism substantially.⁵⁰⁸ To judge the capacity for AJM to express moral condemnation of actions, the ICC should consider whether AJM further truth-telling, create a record of history, and disseminate that record.⁵⁰⁹

Truth commissions are effective avenues for a broad inquiry into the past and truth-telling.⁵¹⁰ With the proper mandate and powers, the Ugandan truth commission could write an authoritative history of the conflict, including the broader North-South divide within the country. While it would be impossible to detail all of the international crimes over the past two decades, it could give the big picture of the situation and offer representative cases. It should discuss atrocities by the LRA and Ugandan officials. It should also propose reforms to prevent future

503. 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 471, at 1470 (placing expressivism under retribution).

504. See DRUMBL, *supra* note 113, at 61.

505. The consequentialist message of deterrence, by contrast, is aimed at creating fear.

506. See Amann, *supra* note 449, at 120 (describing expressive function of penal statutes and punishment).

507. See *id.* at 120 (noting that condemnatory pronouncements that carry no consequences may cultivate a norm but must be followed by effective enforcement).

508. See DRUMBL, *supra* note 113, at 176 (noting that alternative forms of accountability may be equal or superior to criminal prosecutions in terms of expressive legitimacy).

509. See Roche, *supra* note 339, at 569 (explaining the importance of public acknowledgment, condemnation, and the creation of a public record of the wrongdoings); *cf.* Aukerman, *supra* note 423, at 85 (supporting the idea that the true function of punishment is to express condemnation and maintain social cohesion).

510. See, e.g., Villa-Vicencio, *Perpetrators*, *supra* note 286, at 214 (noting the superiority of truth commissions in establishing the truth of past).

conflict. The report should be publicized all over the country, through various media and institutions including the churches and tribes. In doing so, the truth commission would denounce the acts described within the report to inculcate values of respect for human rights in society.⁵¹¹ Similarly, *mato oput* would censure the bad acts of the perpetrator. *Mato oput* might be particularly powerful because the accused is required to accept responsibility for the crime, effectively embracing the denunciation inherent in the process.

The message of condemnation might be muffled, however, if it is not accompanied by punishment.⁵¹² Although Western criminal justice skews toward incarceration, there is room for other types of punishment to give credibility to condemnatory messages. Moreover, within the local communities, participation in AJM might be seen as a more meaningful measure of accountability. Kony, stripped of his power, confessing before a truth commission or drinking the bitter root in an expression of remorse and reconciliation might provide a powerful message of censure. By contrast, for Acholi or other victims, the expressivist message from Kony's ICC prosecution might be diluted by a long, distant, criminal trial presumably followed by incarceration in an air-conditioned prison cell, with plentiful food and medical care.⁵¹³ This is particularly true because Kony would likely plead not guilty and not admit responsibility or remorse via a criminal trial; while there are questions whether Kony would do so via AJM, full disclosure and admission of responsibility are requirements of a conditional truth commission process or *mato oput*.⁵¹⁴ Thus, the Ugandan AJM 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.⁵¹⁵ Victims are also eligible for reparations such as restitution, compensation, and rehabilitation.⁵¹⁶ The

511. See Aukerman, *supra* note 423, at 90-91 (explaining the potential for truth commissions to effect greater moral consensus than prosecutorial methods); Aldana-Pindell, *supra* note 471, at 1474 (stating that truth commissions are more apt at capturing institutional guilt and public complicity in the atrocities than prosecutorial methods).

512. Cf. Amann, *supra* note 449, at 120.

513. See DRUMBL, *supra* note 113, at 15-16; ALLEN, *supra* note 2, at 34-35 (quoting an Acholi leader as saying that Kony should be in the community among those who had suffered, not in an air-conditioned prison); Glickman, *supra* note 424, at 253 n.90 (noting the superior living conditions including health care); Hanlon, *supra* note 45, at 323 (quoting Ugandan criticism of superior ICC prison conditions).

514. See *supra* Part I.

515. See Rome Statute, *supra* note 34, arts. 53, 68, 82.

516. *Id.* at arts. 75, 79. See generally Keller, *supra* note 62.

unprecedented involvement of victims in the proceedings and in seeking reparations⁵¹⁷ at an international tribunal reflects a growing concern for restorative justice.⁵¹⁸ Restorative justice is often linked to truth commissions and other AJM, indicating that AJM will likely advance its aims. To do so, AJM should take steps to reconcile victims and perpetrators, to reintegrate former rebels, and to restore the bonds within broader society.⁵¹⁹

The Ugandan AJM can achieve restorative justice, including reconciliation, as well as if not more than ICC prosecution.⁵²⁰ Reconciliation between victims and perpetrators often starts with truth-telling and investigation of the roots of the conflict.⁵²¹ Reconciliation would typically require that the process “name names” or otherwise identify perpetrators while also allowing for victim participation.⁵²² The accused should be treated fairly,⁵²³ in a way that models inclusiveness.⁵²⁴ 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.⁵²⁵ All victims should be treated with respect and offered support throughout and after the process in order to avoid retraumatization.⁵²⁶

Victims would ideally be given full redress for past harm, whether physical or psychological injury or social, economic, or political injustices.⁵²⁷ It is a prerequisite to reconciliation and restoration that basic security and economic needs be provided for, where feasible.⁵²⁸ International funding that previously supported humanitarian aid, for example, should shift to other needs of victims and society. Similarly, 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

517. International Criminal Court, *The Role of the Trust Fund for Victims and Its Relation with the Registry of the International Criminal Court*, ICC Press Kit No.:pids.008.2004-EN (April 22, 2004), available at <http://www.icc-cpi.int/library/press/pressreleases/PIDS008.2004-EN.pdf>.

518. See DRUMBL, *supra* note 113, at 53, 124 (noting ICC takes restorative initiatives more seriously, although limited in ability to further them).

519. See Stahn, *Geometry*, *supra* note 390, at 434 (designing truth commissions aimed at reintegration).

520. See Aukerman, *supra* note 423, at 73-75 (describing advantages of truth commissions in truth-telling, recording past, moral consensus). *But see* Aldana-Pindell, *supra* note 471, at 1438 (contending that victims prefer limited truth of criminal process to more lenient truth commission).

521. See, e.g., HAYNER, *supra* note 115, at 72.

522. See *id.* at 127; Robinson, *supra* note 258, at 497-98.

523. Dugard, *Dealing with Crimes*, *supra* note 281, at 1012 (asserting that the process should “name names” so long as accused have right to challenge); Roche, *supra* note 339, at 573 (noting fairness to offenders necessary for reconciliation).

524. Roche, *supra* note 339, at 574.

525. See Henrard, *supra* note 310, at 648.

526. See HAYNER, *supra* note 115, at 135-49; OHCHR, *Making Peace*, *supra* note 24, at 48.

527. See HAYNER, *supra* note 115, at 170-71; Roche, *supra* note 339, at 572, 578.

528. HAYNER, *supra* note 115, at 81; Ellen A. Waldman, *Healing Hearts or Righting Wrongs? A Meditation on the Goals of “Restorative Justice,”* 25 *HAMLIN J. PUB. L. & POL'Y* 355, 367 (2003-04).

and proposals for reform.⁵²⁹ The dangers of exacerbating tensions within society should be considered and mitigated to the extent possible.⁵³⁰

With regard to Uganda, the truth commission can further reconciliation on a large scale, while *mato oput* would address local or tribal reconciliation. The truth commission could be set up to name names through a fair process that allows victims to be involved and the accused to defend themselves to the extent feasible. The truth commission should establish the broad contours of the conflict and do in-depth investigations of representative cases.⁵³¹ It might offer support for victims through training of staff to deal with victims and through counseling programs (or at least referrals to local support groups).⁵³² It could work with the international community to offer aid to meet basic minimum needs of victims and to support broader reforms. An effective truth commission with a proper mandate, well-chosen commissioners, and binding recommendations might overcome the past shortcomings of truth commissions.⁵³³ Overall, the Ugandan truth commission could strongly support broad societal reconciliation.⁵³⁴

The *mato oput* process also seems likely to achieve restorative justice, particularly reconciliation and restitution, on a local level. *Mato oput* reintegrates the offender by requiring acknowledgement and compensation on the part of the perpetrator, participation of the victim, reconciliation between the two, and restoration of the bonds between the clans of the perpetrator and victim. Although *mato oput* does not address broader issues such as the roots of the conflict or necessary reforms to the system, it does seem likely to succeed in reconciliation, reintegration, and restoration at the clan or tribal level within Acholi and similar cultures. Thus, *mato oput*, particularly if combined with a truth commission, substantially furthers restorative justice.

If the above criteria are kept in mind, Uganda could craft a truth commission and *mato oput* process that further not only restorative justice, but also expressivism, prevention, and retribution. The properly crafted process must still maintain the support of the people. As a result, care must be taken to modify the processes to further international criminal justice without losing the local, nonprosecutorial nature of AJM. While requirements such as those based on due process principles will add a layer of prosecution-like qualities to a truth commission or *mato oput*, the requirements should not overwhelm the alternative nature of the AJM. For example, the broad inquiry and truth-telling of the truth

529. Aukerman, *supra* note 423, at 81-82 (discussing advantages of truth commission for restorative justice); Roche, *supra* note 339, at 579 (wider range of reform measures).

530. See Henrard, *supra* note 310, at 639.

531. This should include the responsibility of both the LRA and the Ugandan government. It should not include equal numbers or emphasis on both, since the LRA is broadly seen as bearing the greater culpability. But the policies of the Ugandan government that contribute to the root causes of the conflict and its alleged crimes should not be ignored simply because the LRA is worse.

532. HAYNER, *supra* note 115, at 146.

533. See *id.* at 213.

534. See, e.g., Aukerman, *supra* note 423, at 73-75 (describing advantages of truth commissions in truth-telling, recording the past, and achieving a moral consensus).

commission and the ritual qualities of *mato oput* would not be found in a prosecutorial approach. These distinctions should be preserved to protect the alternative nature of a properly designed truth commission or *mato oput*, which must still meet the above requirements.⁵³⁵

Returning to the two-part inquiry for Ugandan AJM compliance with international justice standards, the threshold requirement is likely satisfied. It appears that Uganda's agreement to a nonprosecutorial alternative for the LRA is necessary to achieve peace and is supported by the people; although there are questions regarding the breadth and depth of public support in Uganda, these concerns can probably be mitigated by the crafting of a proper truth commission and inclusive AJM.

Furthermore, a truth commission and *mato oput* process designed to satisfy the requirements described above would satisfy restorative justice and expressivism. They would likely be generally ineffective at achieving deterrence and basic retribution,⁵³⁶ but they do further victim-conscious retribution. Moreover, the Ugandan AJM's failings in terms of classic retribution and deterrence are substantially matched by the inadequacy of international criminal prosecution in 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 Ugandan truth commission and *mato oput* 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. As a result, the Court or OTP should probably defer if faced with a challenge under Article 17 or the other avenues described in Part III. There are caveats: in order to further the respective goals of international criminal justice, the truth commission must have the qualities discussed above; the process of *mato oput* must be adapted to deal with this conflict; and the proposed traditional reconciliation ceremonies for other tribes must also be altered to fit the circumstances. 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 Uganda-LRA peace talks raise profound issues regarding international criminal justice. The ability of the LRA to terrorize civilians has gained it a seat at the negotiating table, where it demands nonprosecutorial alternatives as a condition of peace. The apparent clash between peace and justice will likely arise again as

535. Thanks to Professor Mark Drumbl for pointing out the need to emphasize this caveat.

536. There are rumors that Uganda may add punishment to AJM. See Blumenson, *supra* note 3, at 816 n.46. If the added punishment is significant, approaching that of the likely ICC incarceration, then the AJM is more likely to further retribution and deterrence.

the ICC investigates ongoing mass violence where peace deals are more likely to resolve conflicts than military victories. 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 tentative Uganda – LRA peace deal, which promises traditional justice mechanisms like *mato oput* as well as a truth commission in lieu of ICC prosecution, provides an opportunity to assess nonprosecutorial alternatives under the Rome Statute.

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 OTP, with the acquiescence of the Court, might decide not to investigate or prosecute as a matter of discretion (Article 53). The Court or OTP might consider whether the alternative process blocks the ICC case under the principle of *ne bis in idem* (Article 20) or due to inadmissibility (Article 17). In interpreting these provisions, the relevant ICC entity should not only consider statutory interpretation but also assess the AJM. First, it should evaluate whether nonprosecutorial AJM are necessary and legitimate. If so, it should examine whether the alternative advances the goals of international criminal justice. Where the AJM further retribution, deterrence, expressivism, and restorative justice to a similar extent as international prosecution, the ICC should defer as has been suggested above regarding Uganda. 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.