**Restorative and Negotiated Justice in Transitional Societies: Rethinking the ICC’s Principle of Complementarity**

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**Introduction**

The nature and design of transitional justice mechanisms have long been subjects of debate, particularly regarding what institutional frameworks they should take and the extent to which they should rely on or break from prior institutions.[[1]](#footnote-0) While transitional justice has historically centered on institutional reforms, the shift toward incorporating cultural dimensions is a relatively recent development, reflecting a growing recognition that lasting transformation requires changes beyond formal legal and political structures.[[2]](#footnote-1) This shift aligns with broader debates about the role of institutions in justice processes, particularly in the context of the International Criminal Court (ICC). The International Criminal Court (ICC), established under the Rome Statute, operates under the principle of complementarity, meaning it only intervenes when national jurisdictions are unwilling or unable to prosecute crimes.[[3]](#footnote-2) However, the ICC’s narrow emphasis on the prosecution as the primary means of justice has raised concerns about its legitimacy and effectiveness in post-conflict societies, where alternative mechanisms—such as truth commissions, traditional reconciliation practices, and community-driven justice-often play a central role.[[4]](#footnote-3)

This paper argues that the International Criminal Court’s restrictive interpretation of complementarity and its preference for formal prosecutions over alternative justice mechanisms have contributed to significant legitimacy and efficacy challenges in transitional justice contexts. By examining selected case studies, this paper will demonstrate how existing accountability mechanisms often marginalize locally embedded justice practices, including truth commissions, traditional reconciliation methods, and community-driven forms of accountability, despite their potential to fulfill the Rome Statute’s broader objectives. Furthermore, this paper contends that international justice can be strengthened through a more flexible and contextually adaptable approach—one that integrates traditional justice mechanisms, fosters international engagement to enhance legitimacy, and reinterprets the ICC’s role within transitional societies to support, rather than supplant culturally relevant justice processes. By moving beyond a rigid binary between prosecution and reconciliation, the ICC can develop a more inclusive and culturally sensitive accountability model that better aligns with post-conflict community needs while upholding the fundamental goals of international criminal justice.

**ICC’s Principle of Complementarity and Alternative Justice Mechanisms**

The principle of complementarity, enshrined in Article 17 of the Rome Statute, establishes the International Criminal Court (ICC) as a court of last resort, intervening only when national courts are unwilling or unable to genuinely prosecute international crimes. Article 17(1) of the Rome Statute states:

“Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine 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. ”[[5]](#footnote-4)

This provision underscores the ICC’s role as a subsidiary legal institution, meant to support rather than replace domestic legal processes. The Court is expected to act only in instances where national systems fail to deliver meaningful justice. However, the Rome Statute does not explicitly define what constitutes a “genuine” investigation or prosecution, leaving room for interpretation on whether alternative justice mechanisms, such as truth commissions or traditional reconciliation initiatives, can serve as legitimate substitutes for prosecution.

Additionally, Article 17(2) specifies when the state is unwilling to prosecute:

“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.”[[6]](#footnote-5)

As Darryl Robinson points out, when the ICC Prosecutor determines that prosecution should proceed, a state relying on alternative justice mechanisms still has a path to argue for deference under Article 17.[[7]](#footnote-6) Specifically, Article 17(1)(b) provides a potential avenue for truth commissions or other reconciliation measures to be recognized as legitimate alternatives to prosecution, as it allows a case to be deemed inadmissible if a state has investigated the matter and decided not to prosecute, provided that the decision was not driven by unwillingness or inability. Hence, a state that implements a targeted prosecution strategy—where high-ranking perpetrators are prosecuted while lower-level offenders are dealt with through a truth commission—could potentially satisfy the complementarity test, provided that the truth commission carries out a genuine investigation and that the selection of defendants for prosecution is based on objective criteria rather than political considerations. If a particular individual of interest to the ICC is in good faith not selected for prosecution, the case may still be considered inadmissible before the Court under Article 17(1)(b). In contrast, a blanket amnesty would never satisfy the complementarity test, as it would lack an investigation, and a genuine prosecutorial decision, and would clearly indicate an intent to shield perpetrators.[[8]](#footnote-7)

Even if a truth commission conducted an investigation in such a scenario, the absence of an option to prosecute would make it impossible to characterize the outcome as a meaningful decision. Similarly, a legislative act granting amnesty would likely be deemed an instance of unwillingness to prosecute. The most difficult case is that of conditional amnesties, in which a truth commission is empowered to grant amnesty on a case-by-case basis. While such a system could theoretically satisfy Article 17, it would require a detailed and credible investigation, a discretionary power to deny amnesty, and a genuine commitment to justice. The ICC would likely assess whether the truth commission functioned with quasi-judicial characteristics, maintained independence from political influence, possessed sufficient resources and enforcement powers, and provided alternative forms of accountability such as public acknowledgment of crimes, reparations, or institutional reforms.[[9]](#footnote-8)

Another path for alternative justice mechanisms to meet complementarity criteria is through prosecutorial discretion, outlined in Article 53. Specifically, under this article, the Prosecutor has the discretion to decline prosecution if doing so would not serve the “interests of justice.” Since the “interest of justice” remains undefined by the Rome Statute, it leaves room for debate over whether peacebuilding considerations can justify prioritizing reconciliation over criminal accountability. For instance, a state could argue that the interests of justice” under Article 53 should be interpreted broadly to include truth commissions, as post-conflict societies must balance accountability with peace and reconstruction. Given limited resources and fragile stability, prioritizing truth-telling, victim support, and reconciliation over some prosecutions may better serve justice in a transitional context. Thus, foregoing retributive justice for broader societal healing could align with justice’s overarching goals, even if it diverges from the ICC’s prosecutorial focus.[[10]](#footnote-9)

Nonetheless, this approach is not without limitations, as Article 53 should be read in light of the preamble, which emphasizes prosecution as a core mechanism for accountability and reflects a retributive approach to justice, stating:

“Recognizing that such grave crimes threaten the peace, security and well-being of the world, affirming that the most serious crimes of concern to the international community as a whole must not go unpunished.”[[11]](#footnote-10)

Finally, Article 16 grants the UN Security Council authority to defer ICC prosecutions if they pose a threat to international peace and security, providing a political tool that has occasionally been leveraged to accommodate transitional justice goals.[[12]](#footnote-11)

Martha Minow highlights that during the drafting of the Rome Statute, debates over the meaning of justice and the scope of prosecutorial discretion were left unresolved, intentionally preserving ambiguity to allow for political flexibility.[[13]](#footnote-12) Some delegations pushed for an explicit definition of justice that emphasized criminal trials as the only acceptable form of accountability, fearing that a broader interpretation might enable states to evade responsibility through symbolic, non-punitive measures. Others advocated for a more expansive definition that would allow truth commissions and reconciliation mechanisms to be recognized as legitimate justice processes. The final text of the Rome Statute reflects a compromise between these competing perspectives, leaving justice as an open-ended term to be interpreted in practice.[[14]](#footnote-13)

This ambiguity has given rise to significant discretion in how different ICC Prosecutors have approached complementarity. Former ICC Prosecutor Luis Moreno Ocampo took a strict, prosecution-focused stance, asserting that alternative justice mechanisms, such as truth commissions, could not substitute for criminal accountability. His view emphasized that the ICC’s role was to enforce legal responsibility and that political negotiations should remain separate from judicial decisions. In contrast, his successor, Fatou Bensouda, adopted a slightly more pragmatic approach, acknowledging the role of restorative justice in achieving peace but ultimately maintaining that prosecution must remain the cornerstone of accountability. Current Prosecutor Karim Khan has further introduced flexibility, emphasizing victim-centered justice and a broader interpretation of what may satisfy the interests of justice.[[15]](#footnote-14) These differing approaches highlight the ongoing debate about whether justice should be defined strictly through prosecutions or if other mechanisms, such as reparations and reconciliation, should play a complementary role.

Preserving prosecutorial discretion to treat truth commissions and similar efforts as satisfying the complementarity requirement offers a pragmatic means of encouraging states to engage seriously with past atrocities without fearing automatic ICC intervention. Rather than weakening accountability, this approach can incentivize the adoption of meaningful, locally appropriate justice mechanisms that reflect a state’s unique historical and political context. As Professor Mnookin argues, such flexibility fosters constructive national responses while still allowing the ICC to step in when those efforts fall short[[16]](#footnote-15).

The Rome Statute’s deliberate ambiguity—particularly in Articles 17 and 53—leaves room for this discretion. By not explicitly endorsing or excluding alternative justice mechanisms, the Statute entrusts the Prosecutor with the responsibility to assess, case by case, whether domestic processes sufficiently reflect a commitment to justice. The differing approaches taken by successive Prosecutors underscore how this discretion can be exercised in varied but principled ways. It is not a blank check, but a carefully calibrated tool that, when used judiciously, allows the Court to adapt to the complexities of transitional contexts. In this light, the evolving prosecutorial practice should be seen not as inconsistency but as an effort to refine the ICC’s role in a diverse international landscape. The real challenge lies in maintaining the legitimacy and coherence of the Court’s work while allowing enough flexibility to respect credible national efforts.[[17]](#footnote-16)

In this context, proactive complementarity serves as a strategic tool for bridging the impunity gap—that is, the accountability void left when only the highest-level perpetrators are prosecuted. By encouraging and supporting domestic proceedings for lower-level offenders, including through alternative justice mechanisms, the Prosecutor can extend the reach of justice beyond what the Court alone could achieve. This approach leverages the Statute’s built-in discretion to promote broader accountability while preserving the ICC’s focus on the most serious crimes.[[18]](#footnote-17)

Indeed, if truth commissions or restorative mechanisms lead to victim satisfaction, societal healing, and deterrence, they arguably serve the same functional goals as retributive justice, fulfilling the ICC’s mandate in a different form.[[19]](#footnote-18) Thus, rather than treating prosecution and reconciliation as mutually exclusive, a reinterpretation of justice under Article 17 - one that recognizes the value of cultural awareness and community-driven initiatives - could lead to a more inclusive and effective international justice system. In contrast, ICC’s reluctance to engage with hybrid models can reinforce a narrow, prosecution-centric view of justice.

**Bridging the Gap Between Retributive and Restorative Justice**

While the ICC identifies a range of objectives beyond retribution—including truth-telling, victim participation, and reconciliation—it offers no clear hierarchy among them.[[20]](#footnote-19) Indeed, as the literature makes clear, these goals often stand in tension with one another. The imperative to end impunity, for instance, may conflict with the goal of preserving peace in fragile post-conflict societies (234), and the desire to create an accurate historical record may be constrained by a trial’s procedural focus on the guilt or innocence of a particular defendant.[[21]](#footnote-20)

Moreover, although retribution is often treated as the central goal of international criminal courts—with five current and former chief prosecutors affirming its primacy—its value is increasingly contested..[[22]](#footnote-21) Other commonly cited goals, such as establishing historical records, fostering reconciliation, and expressing condemnation, are more accurately described as means to other ends, particularly the prevention of future crimes. These functions, while possessing some intrinsic worth, are generally assigned low expected value because they are rarely achieved as ends in themselves and often function instead as mechanisms for deterrence or norm-setting.[[23]](#footnote-22)

The limitations of the ICC’s victim-centered functions further complicate the picture. Though the Rome Statute allows victims to participate beyond the role of witnesses, such participation is significantly constrained by procedural limits, representational filters, and the sheer number of victims.[[24]](#footnote-23) As a result, victims are rarely able to engage meaningfully in the justice process or achieve closure through it. Reparations, too, are generally inaccessible, as most victims are excluded from the trial’s formal scope and the convicted are typically indigent.[[25]](#footnote-24) Even when participation occurs, its effect on victims’ sense of justice or healing is minimal, leading some to conclude that closure, like other supposed aims of international justice, has limited practical value.[[26]](#footnote-25)

Against this backdrop, some scholars argue that courts should refocus their efforts on the prevention of future violations, which offers the greatest long-term benefit for both individuals and societies.[[27]](#footnote-26) The immense social and economic costs of the crimes addressed by the ICC underscore the value of deterrence. Thus, while retribution, reconciliation, and victim acknowledgment are important, they may serve best as instruments for achieving the higher-value goal of prevention.

This broader reflection on the fragmented and occasionally conflicting goals of international criminal law provides a useful entry point to reconsider how justice is conceived in transitional contexts—particularly in terms of *how* justice is delivered and experienced, rather than simply *what* outcomes it seeks to achieve. While goals such as deterrence or norm development may be important, they tend to operate at a systemic or abstract level. In contrast, the tension between retributive and restorative justice engages directly with the lived realities of victims, communities, and perpetrators. It implicates not only institutional aims but also moral and social understandings of justice in the wake of mass violence. Thus, focusing on the relationship between these two paradigms allows for a more grounded exploration of what justice can or should look like in practice.

The common framing of retributive and restorative justice as mutually exclusive is therefore not only conceptually flawed but practically limiting, as it obscures the potential for integrated approaches that respond to both accountability and reconciliation. Retributive justice emphasizes punishment and deterrence, ensuring that perpetrators of mass atrocities face legal consequences. Restorative justice, on the other hand, focuses on truth-telling, victim participation, reconciliation, and societal healing. The two approaches, however, need not be in opposition; rather, they can be mutually reinforcing when designed in a complementary manner.

Lucy Allais argues that the South African TRC, often cited as an example of a purely restorative approach, actually incorporated retributive elements and was responsive to the moral concerns underlying retributive justice.[[28]](#footnote-27) As she explains, “the TRC did not fail to respect the moral concerns underlying retributivism. It did not involve criminal prosecutions, but it did impose significant moral and social sanctions, which can serve as an alternative form of accountability.”[[29]](#footnote-28) This suggests that restorative justice mechanisms, when properly structured, do not necessarily forgo retribution but rather integrate it into a broader framework that seeks not only to punish but also to heal.

Allais further critiques the assumption that retributive justice is the sole mechanism for upholding moral responsibility, arguing that justice, properly conceived, requires not only that wrongdoers be held to account but also that their victims be acknowledged in ways that go beyond mere retribution.[[30]](#footnote-29) Her reasoning rests on the premise that punitive responses alone fail to provide victims with a substantive sense of closure, whereas truth-telling and historical acknowledgment can contribute to a deeper form of justice. She underscores that a justice system that does not allow for victim participation and acknowledgment of harm may achieve retribution but fails to meet the broader goals of post-conflict recovery.

Similarly, Alicia Weaver critiques the rigid legalistic approach of transitional justice and contends that “rather than being seen as competitive means of post-conflict reconciliation, restorative and retributive justice should be seen as complementary - working together to achieve the most justice for the most people.”[[31]](#footnote-30) Weaver argues that transitional justice efforts that rely solely on prosecution risk alienating local communities by imposing external norms that do not resonate with the affected populations. Weaver highlights the importance of integrating customary justice practices, asserting that such approaches are not merely pragmatic compromises but deeply embedded traditions that offer meaningful pathways to reconciliation[[32]](#footnote-31). Her critique of purely retributive frameworks is grounded in the observation that legal trials often fail to capture the broader sociopolitical realities of post-conflict societies, focusing narrowly on individual culpability while neglecting the collective nature of past injustices.

Weaver further explores how retributive justice, when imposed without consideration for local perspectives, can result in outcomes that feel disconnected from the lived realities of affected communities. Legal retribution, though symbolically powerful, is often insufficient in healing the social fabric of a community shattered by violence. Victims need more than a distant trial and a legal verdict; they need tangible acknowledgment and a role in shaping the justice process.”[[33]](#footnote-32) This observation highlights the limitations of legal punishment alone, particularly in societies where community bonds and traditional dispute resolution mechanisms play a crucial role in maintaining social order.

By examining these arguments, it becomes evident that retributive justice can be strengthened by incorporating restorative elements, such as victim participation in trials, truth commissions that complement prosecutions, and reintegration programs that acknowledge both guilt and societal healing. The TRC, despite its limitations, demonstrated how public truth-telling and acknowledgment of victims’ suffering can provide a form of accountability that does not rely solely on criminal prosecutions.[[34]](#footnote-33) Furthermore, Weaver’s analysis underscores the necessity of avoiding a one-size-fits-all model of justice, advocating instead for a justice paradigm that is sensitive to cultural contexts and capable of addressing the multifaceted needs of post-conflict societies.

Restorative justice mechanisms gain legitimacy when there are some elements of accountability, preventing outright impunity. Allais and Weaver converge on the idea that justice cannot be reduced to a singular punitive model; rather, it must account for both the moral demands of retribution and the social imperatives of reconciliation. They ultimately argue that a more effective justice system would allow for a dynamic relationship between legal trials and community-driven processes, ensuring that justice is not only legally sound but also socially transformative. The case studies that follow demonstrate how these models have been applied in different contexts, highlighting their achievements and conflicts with the ICC’s prosecutorial approach.

**South Africa’s Truth and Reconciliation Commission**

The South African Truth and Reconciliation Commission (TRC) represents one of the most widely analyzed examples of transitional justice, often cited as an embodiment of restorative justice. Established in 1995 under the Promotion of National Unity and Reconciliation Act, the TRC was created in response to the systemic injustices of apartheid and the negotiated settlement that led to a democratic transition. Unlike Nuremberg-style trials, which focused on retributive justice, the TRC aimed to balance truth-telling, victim participation, and reconciliation with elements of accountability.[[35]](#footnote-34)

The TRC was fundamentally shaped by political constraints and cultural narratives. The post-apartheid government, led by the African National Congress (ANC), faced a delicate negotiation process with the outgoing National Party (NP), which made amnesty for past crimes a non-negotiable condition of the transition.[[36]](#footnote-35) Thus, the TRC’s structure reflected this political compromise—it offered conditional amnesty in exchange for full disclosure of crimes committed during apartheid, rather than pursuing large-scale prosecutions.

However, beyond these political calculations, the TRC was also deeply influenced by South African cultural and philosophical traditions of justice, particularly the concept of ubuntu. Archbishop Desmond Tutu, who chaired the commission, repeatedly invoked ubuntu, an indigenous Southern African philosophy emphasizing interconnectedness, social harmony, and communal healing. Tutu framed the TRC’s justice model as one rooted in restoration rather than retribution, arguing that:

“The central concern is not retribution or punishment but, in the spirit of ubuntu, the healing of breaches, the redressing of imbalances, the restoration of broken relationships.”[[37]](#footnote-36)

Ubuntu, which is often expressed through communal conflict resolution practices in various South African ethnic groups, prioritizes reintegration over punishment, favoring public acknowledgment of wrongdoing over retributive isolation. Traditional justice mechanisms in pre-colonial African societies, such as the lekgotla system among the Tswana people, emphasized public deliberation, reconciliation, and compensation rather than punitive imprisonment. Similarly, the indaba system, an indigenous deliberative practice used by the Zulu people, focused on dialogue and collective decision-making rather than adversarial legal proceedings. South African policymakers integrated these culturally embedded practices into the TRC’s design, incorporating public truth-telling sessions where perpetrators had to admit wrongdoing before victims and the nation.[[38]](#footnote-37)

Martha Minow highlights that the TRC was partially shaped by international pressure to adhere to legal norms of accountability, while simultaneously responding to South Africa’s unique cultural and political realities. She argues that the TRC’s reliance on public acknowledgment rather than formal prosecutions mirrored indigenous justice mechanisms, making it more culturally resonant but also vulnerable to critiques that it failed to satisfy the demands of international retributive justice.[[39]](#footnote-38)

Although the TRC is often classified as a restorative justice mechanism, Lucy Allais argues that it incorporated elements of retributive justice through public accountability and moral sanctioning. Unlike many indigenous justice mechanisms that involve closed community discussions, the TRC process was deliberately public, exposing perpetrators to national and international scrutiny[[40]](#footnote-39). Minow similarly contends that public shaming, reputational damage, and conditional amnesty functioned as alternative forms of punishment, ensuring that perpetrators faced consequences even in the absence of prison sentences, therby contrasting with unconditional amnesty practies in other countries.[[41]](#footnote-40)

While the TRC did not impose traditional legal sanctions, it nevertheless ensured a form of accountability through:

* Public moral condemnation - perpetrators had to confront their victims and communities.
* Loss of social status and reputational damage - public hearings effectively “punished” perpetrators by stripping them of legitimacy.
* Conditional amnesty - offenders who failed to provide full disclosure remained liable for prosecution.

Minow underscores that this model mirrors some elements of retributive justice because it ensures that perpetrators face consequences proportionate to their wrongdoing without resorting to incarceration.[[42]](#footnote-41) This suggests that the TRC was not purely restorative but rather a hybrid mechanism that merged indigenous reconciliation practices with elements of legal accountability.

The TRC achieved significant breakthroughs in truth-telling and historical documentation, allowing victims to share their experiences in public forums and establishing an official record of apartheid-era atrocities. Between 1996 and 1998, over 21,000 victim statements were recorded, and 7,000 perpetrators applied for amnesty[[43]](#footnote-42). Additionally, the TRC’s public hearings exposed state-sponsored violence, leading to broader societal recognition of the injustices committed.

Despite these achievements, the TRC was widely criticized for granting amnesty to perpetrators, many of whom never faced further legal accountability. Critics argue that by prioritizing reconciliation over punishment, the TRC denied victims full justice. As Allais observes: “The TRC process appeared to equate violence carried out in opposition to an unjust and oppressive state with violence carried out in the service of perpetuating an unjust state.”[[44]](#footnote-43) This critique highlights the TRC’s failure to distinguish between politically motivated resistance and acts of state repression, which created a sense of moral equivalence between oppressors and the oppressed. Moreover, while the TRC recommended financial reparations, the South African government failed to implement many of these measures. Victims received no immediate compensation, and subsequent reparations payments were drastically reduced by Parliament.[[45]](#footnote-44)

Additionally, the TRC lacked enforcement mechanisms to ensure perpetrators told the full truth. While applicants had to provide a full disclosure of their crimes to receive amnesty, the commission lacked the power to verify all claims, and several high-profile figures never faced legal consequences.[[46]](#footnote-45)

The TRC illustrates both the promise and the pitfalls of reconciliation-focused justice. While it successfully documented past atrocities and facilitated truth-telling, its failure to impose meaningful sanctions on perpetrators weakened its legitimacy. The South African case highlights the necessity of integrating accountability with reconciliation efforts, rather than treating them as opposing paradigms.

By embedding culturally specific justice mechanisms, such as ubuntu and the emphasis on public acknowledgment, the TRC provided a form of justice that resonated with local traditions. However, as Allais and Minow argue, the TRC’s effectiveness was limited by the political constraints that shaped it, resulting in insufficient legal accountability for some perpetrators.

### **The Uganda Case: Traditional Justice, the ICC, and the Peace-Justice Dilemma**

The Ugandan case provides a striking example of the tension between traditional reconciliation mechanisms and international retributive justice. The protracted conflict between the Lord’s Resistance Army (LRA) and the Ugandan government led to competing justice models, where local traditions such as mato oput stood in contrast with the International Criminal Court (ICC)’s intervention and prosecutorial model​.[[47]](#footnote-46)

Uganda’s Acholi people, the primary victims of LRA violence, have long relied on mato oput, a customary reconciliation ritual aimed at restoring social harmony after violent disputes​. Mato oput, which translates to “drinking the bitter root,” is a symbolic process that emphasizes truth-telling, compensation, and reintegration rather than punitive measures​. Unlike Western legal systems that isolate the perpetrator through incarceration, mato oput rebuilds communal ties by requiring the perpetrator to publicly acknowledge wrongdoing, compensate the victim’s family, and participate in reconciliation ceremonies.​[[48]](#footnote-47)

The ritual follows a structured process, beginning with the separation of the affected clans, followed by mediation by elders, establishment of an agreed-upon truth, and then compensation for the victim’s family, often in the form of cattle or money​. The final step, the drinking of the bitter root mixture, symbolizes the unity and healing of the community, reaffirming the offender’s reintegration​.[[49]](#footnote-48)

However, despite its cultural legitimacy, mato oput faced serious limitations in the context of the LRA conflict. First, the sheer scale of atrocities—including mass abductions, mutilations, and sexual violence—raised concerns about whether a mechanism designed for small-scale communal disputes could adequately address the LRA’s crimes against humanity​. Second, Joseph Kony and senior LRA leaders refused to fully participate in traditional reconciliation, undermining the effectiveness of the process​.[[50]](#footnote-49)

The ICC became involved in Uganda in 2003, after President Yoweri Museveni referred the LRA’s crimes to the Court​.[[51]](#footnote-50) This resulted in arrest warrants for five senior LRA commanders, including Joseph Kony, under charges of war crimes and crimes against humanity​.[[52]](#footnote-51) However, instead of facilitating peace, the ICC’s involvement became a major obstacle in peace negotiations. Kony and other indicted LRA leaders refused to sign a peace deal unless the ICC lifted the warrants, arguing that prosecution would eliminate their incentive to surrender​.[[53]](#footnote-52)

The Juba Peace Talks (2006-2008), which sought to end the conflict, highlighted this tension[[54]](#footnote-53). The LRA demanded alternative justice mechanisms, such as mato oput, be recognized in place of ICC prosecutions​. The Ugandan government initially advocated for a hybrid model, suggesting that a combination of mato oput, truth commissions, and some prosecutions could satisfy ICC requirements​. However, the ICC remained reluctant, emphasizing that only legal accountability through prosecution would fulfill Uganda’s international obligations​.[[55]](#footnote-54)

To address the ICC’s concerns while incorporating local justice practices, Uganda established the War Crimes Division (WCD) of the High Court in 2008​. The WCD was designed to prosecute high-ranking LRA commanders while allowing lower-level combatants to go through traditional reconciliation processes​. This hybrid approach sought to balance the need for accountability with the reality that thousands of former LRA combatants required reintegration​.[[56]](#footnote-55)

However, several challenges emerged:

1. Political Selectivity: The WCD primarily focused on LRA members, ignoring crimes committed by Ugandan government forces, raising concerns about selective justice​.
2. ICC Skepticism: Despite Uganda’s efforts to establish alternative justice measures, the ICC continued to insist that prosecutions were necessary to fulfill Uganda’s obligations under international law​.
3. Community Distrust: Many northern Ugandans remained skeptical of ICC interventions, perceiving them as Western-imposed justice that disregarded local traditions​.[[57]](#footnote-56)

The Uganda case study underscores the importance of integrating cultural justice mechanisms into international legal frameworks. While mato oput provided a culturally resonant approach to reconciliation, it lacked the coercive power needed to hold perpetrators accountable at a large scale. Conversely, the ICC’s strict prosecutorial model ignored the social realities of post-conflict Uganda, where reconciliation was often prioritized over retribution​.

This supports the broader argument of this paper: retributive and restorative justice should not be seen as mutually exclusive. Instead, the ICC should develop a more flexible approach that incorporates traditional justice mechanisms while ensuring meaningful accountability. Such an approach would enhance the ICC’s legitimacy, making its involvement less likely to disrupt peace negotiations and more likely to be accepted by local populations.

**The Rwanda Case: The Gacaca Courts and the Tension Between Retributive and Restorative Justice**

The Rwandan genocide of 1994 left the country grappling with an overwhelming number of perpetrators and a broken legal system. In response, the Rwandan government revived and adapted the traditional gacaca court system to address mass atrocity crimes, seeking a balance between retributive and restorative justice. The gacaca courts, a form of community-based justice, were used to process cases that would have otherwise taken centuries under the formal legal system. These courts, while rooted in pre-colonial Rwandan traditions, were fundamentally altered to address crimes of an unprecedented scale.[[58]](#footnote-57) The case of Rwanda exemplifies both the successes and limitations of alternative justice mechanisms when confronted with mass violence, particularly in relation to international accountability frameworks like the ICC.

Historically, gacaca functioned as a localized method of resolving disputes within Rwandan communities, focused on reconciliation and social reintegration rather than punishment. The post-genocide gacaca courts were similarly designed to facilitate communal healing, requiring perpetrators to confess their crimes in front of their communities, seek forgiveness, and, in some cases, offer reparations. Unlike the adversarial judicial model, gacaca emphasized dialogue, collective decision-making, and reintegration of offenders.[[59]](#footnote-58)

The new gacaca system expanded upon these principles but introduced significant modifications to address the genocide. Approximately 12,000 community tribunals were established, tasked with handling over 1.2 million cases. While this process drastically expedited case resolution and provided a forum for victims to confront perpetrators, it also revealed key tensions between retributive and restorative justice.[[60]](#footnote-59)

The gacaca courts accomplished what no formal legal system could have under the circumstances. By the time the gacaca process ended in 2012, over one million cases had been adjudicated, with a 65% conviction rate. Public participation was central to the process, involving nearly all of Rwanda’s adult population in some capacity. Surveys of participants revealed widespread support for the process, particularly in its ability to promote truth-telling and societal reintegration.[[61]](#footnote-60)

Additionally, gacaca encouraged perpetrator apologies, an element largely absent from formal international prosecutions. Unlike the South African TRC, which focused primarily on victims’ narratives, the gacaca process placed greater emphasis on reconciling entire communities by compelling perpetrators to admit their wrongdoing publicly. Some offenders later described how the process helped them reintegrate into society, with one perpetrator stating, *“Survivors have not only forgiven us in theory, but this has also been put into practice.”*[[62]](#footnote-61)

Despite these achievements, the gacaca process faced substantial criticism. While it was presented as a restorative justice mechanism, it also bore significant retributive elements, including lengthy prison sentences. Initially, gacaca courts imposed severe penalties, but over time, sentences became more lenient, incorporating alternative forms of punishment such as community service.[[63]](#footnote-62)

One of the primary criticisms of gacaca was its lack of procedural safeguards. Unlike formal courts, gacaca tribunals relied on community members - many of whom lacked legal training - to adjudicate cases. This resulted in inconsistent verdicts, wrongful convictions, and potential manipulation of the process for personal grievances. A major concern was the process’s failure to ensure due process for the accused, leading to wrongful imprisonments and political targeting.[[64]](#footnote-63)

Furthermore, the Rwandan Patriotic Front (RPF)-led government has been accused of using gacaca to consolidate its power, particularly by targeting political opponents under the guise of justice. Scholars such as Anuradha Chakravarty have argued that the RPF leveraged gacaca to entrench authoritarian rule by encouraging communities to denounce individuals perceived as threats to the regime.

Additionally, the gacaca courts failed to provide meaningful reparations to genocide survivors. Unlike the South African TRC, which recommended financial compensation for victims, the gacaca courts largely focused on punitive measures against perpetrators, neglecting the material and psychological needs of survivors.

The gacaca courts’ reliance on community-based justice contrasts sharply with the International Criminal Tribunal for Rwanda (ICTR), which the United Nations established to prosecute high-ranking genocide perpetrators. The ICTR, headquartered in Arusha, Tanzania, operated under a strictly retributive model, handing down lengthy prison sentences to those deemed most responsible. However, it was widely criticized for its remoteness from Rwanda, its slow judicial process, and its high costs.[[65]](#footnote-64)

Minow highlights that the ICTR’s failure to connect with the Rwandan people significantly undermined its legitimacy. Many Rwandans viewed the tribunal as an external, Western-imposed mechanism that was disconnected from local realities. Additionally, the ICTR’s exclusive focus on prosecuting Hutu leaders, while largely ignoring war crimes committed by the RPF, further damaged its credibility.[[66]](#footnote-65)

The gacaca process, despite its flaws, was perceived as more legitimate by many Rwandans because it engaged local communities and aligned with traditional justice practices. This underscores the broader argument that justice mechanisms must be culturally sensitive to be effective in post-conflict societies.

The Rwandan gacaca courts demonstrate both the potential and the challenges of integrating restorative and retributive justice in transitional societies. While they successfully facilitated mass accountability, truth-telling, and reintegration, their lack of procedural safeguards, politicization, and failure to provide reparations highlight the risks of relying exclusively on alternative justice mechanisms. The case reinforces the need for a hybrid approach that combines culturally embedded reconciliation practices with formal legal accountability mechanisms. This supports the broader argument of this paper: justice mechanisms must be adapted to local contexts while ensuring fairness and accountability to avoid undermining long-term reconciliation efforts.

**Conclusion**

This paper has examined the limitations of accountability mechanisms in transitional justice by analyzing case studies from South Africa, Uganda, Rwanda, and Chile, highlighting the tension between retributive and restorative approaches. The International Criminal Court’s strictly prosecutorial model has often failed to accommodate the complex realities of post-conflict societies, where justice is not only about punishment but also about reconciliation and social restoration. In contrast, local mechanisms such as mato oput in Uganda, gacaca in Rwanda, and the TRC in South Africa have demonstrated the value of culturally embedded justice practices, even as they faced challenges related to legitimacy, procedural fairness, and enforceability.

The Pinochet case further illustrates that even within formal prosecutorial models, justice can be constrained by political and legal barriers, reinforcing the argument that a hybrid model - combining local reconciliation mechanisms with formal legal accountability - offers a more balanced approach to transitional justice. Rather than viewing prosecution and reconciliation as mutually exclusive, this paper has argued that justice mechanisms must be adaptable, context-sensitive, and capable of integrating both retributive and restorative principles to enhance legitimacy, effectiveness, and societal healing.

For the ICC and other international legal bodies to be truly effective, they must engage more meaningfully with community-based justice traditions, ensuring that accountability mechanisms resonate with affected populations while maintaining core principles of legal responsibility. By rethinking complementarity to allow for a broader spectrum of justice approaches, international law can better serve its fundamental goal: ensuring justice while fostering lasting peace.

1. *See* Paul Gready & Simon Robins, *Transitional Justice and Theories of Change: Towards Evaluation as Understanding*, 14 Int’l J. Transitional Just. 280 (2020); Ruti Titel, Transitional Justice (2002); Carsten Stahn, *The Geometry of Transitional Justice: Choices in Institutional Design*, 18 Leiden J. Int’l L. 425 (2005) (arguing that transitional justice requires pluralist and complimentarity approaches, achieved though a combination of domestic and international mechanisms). [↑](#footnote-ref-0)
2. Pablo de Greiff, *On Making the Invisible Visible: The Role of Cultural Interventions in Transitional Justice Processes*, in Clara Ramírez-Barat, Transitional Justice, Culture, and Society 11, 24 (Soc. Sci. Research Council 2014). [↑](#footnote-ref-1)
3. *Rome Statute of the International Criminal Court* art. 17, July 17, 1998, 2187 U.N.T.S. [↑](#footnote-ref-2)
4. *See* Priscilla Hayner, Unspeakable Truths: Confronting State Terror and Atrocity (2001); Martha Minow, Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence (1998). [↑](#footnote-ref-3)
5. *Rome Statute*, *supra* note 3, art. 17. [↑](#footnote-ref-4)
6. *Id*. [↑](#footnote-ref-5)
7. Darryl Robinson, Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court, 14 Eur. J. In’l L. 481 (June 2003). [↑](#footnote-ref-6)
8. *Id*. at 498-502. [↑](#footnote-ref-7)
9. *Id*. [↑](#footnote-ref-8)
10. Declan Roche, Truth Commission Amnesties and the International Criminal Court, 45 Brit. J. Criminol. 568–69 (2005). [↑](#footnote-ref-9)
11. *Rome Statute*, *supra* note 3, pmbl. [↑](#footnote-ref-10)
12. *Rome Statute*, *supra* note 3, art. 16. [↑](#footnote-ref-11)
13. Martha Minow, *Do Alternative Justice Mechanisms Deserve Recognition in International Criminal Law?: Truth Commissions, Amnesties, and Complementarity at the International Criminal Court*, 60 Harv. Int’l L.J. 1, 9–10 (2019). *See also* Jennifer J. Llewellyn, *A Comment on the Complementary Jurisdiction of the International Criminal Court: Adding Insult to Injury in Transitional Contexts?*, 24 Dalhousie L.J. 192 (2001) (arguing that the ICC’s potential assertion of jurisdiction over cases handled by truth commissions may undermine their effectiveness, discourage their use in transitional contexts, and add insult to existing injuries in post-conflict societies). [↑](#footnote-ref-12)
14. *Id.* at 10. [↑](#footnote-ref-13)
15. *Id*. at 11-15. [↑](#footnote-ref-14)
16. *Id*. at 19-20. [↑](#footnote-ref-15)
17. *Id*. [↑](#footnote-ref-16)
18. William W. Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*, 49 Harv. Int’l L.J. 53 (2008). [↑](#footnote-ref-17)
19. Minow, *supra* note 13, at 21. [↑](#footnote-ref-18)
20. *See* Mirjan Damaška, *What Is the Point of International Criminal Justice?*, 83 Chi.-Kent L. Rev. 329, 331 (2008); see also Stuart Ford, *A Hierarchy of the Goals of International Criminal Courts*, 27 Minn. J. Int’l L. 284 (2018); Margaret M. deGuzman, *Choosing to Prosecute: Expressive Selection at the International Criminal Court*, 33 Mich. J. Int’l L. 265, 269–70, 276 (2012) (arguing that retribution alone cannot justify the ICC’s work and suggesting that states are not fundamentally retributivists and unwilling to fund trials if punishment is the sole objective). [↑](#footnote-ref-19)
21. Ford, *supra* note 20, at 197, 234. [↑](#footnote-ref-20)
22. *Id*. at 196. [↑](#footnote-ref-21)
23. *Id*. at 235–36. [↑](#footnote-ref-22)
24. *Id*. at 204. [↑](#footnote-ref-23)
25. *Id*. at 205-06. [↑](#footnote-ref-24)
26. *Id*. at 207, 236. [↑](#footnote-ref-25)
27. *Id*. at 228, 244. [↑](#footnote-ref-26)
28. Lucy Allais, *Restorative Justice, Retributive Justice, and the South African Truth and Reconciliation Commission*, 39 Phil. & Pub. Aff. 331 (2011). [↑](#footnote-ref-27)
29. *Id.* at 336. [↑](#footnote-ref-28)
30. *Id.* at 354, 358. [↑](#footnote-ref-29)
31. Alicia Weaver, *Truth and Justice? Towards Comprehensive Transitional Justice in Uganda and the Democratic Republic of Congo* 3 (Dec. 2016) (unpublished undergraduate thesis, Univ. of Neb.–Lincoln, Dep’t of Pol. Sci.) (on file with Univ. of Neb.–Lincoln). [↑](#footnote-ref-30)
32. *Id.* at 11. [↑](#footnote-ref-31)
33. *Id.* at 38-39. [↑](#footnote-ref-32)
34. Allais, *supra* note 28, at 337. [↑](#footnote-ref-33)
35. Minow, *supra* note 13, at 2. [↑](#footnote-ref-34)
36. Allais, *supra* note 28, at 333. [↑](#footnote-ref-35)
37. *Id.* at 337-38. *See also* Desmond Tutu, *No Future Without Forgiveness* (Rider 2000). [↑](#footnote-ref-36)
38. Headman S. Ntlapo & Peter White, *Ubuntu Justice and the South African Truth and Reconciliation Commission: An African Missiological Response*, 8 Stellenbosch Theol. J*.* 1 (2022). *See also* Tanya Goodman, Performing a “New” Nation: The Role of the TRC in South Africa, in *Social Performance: Symbolic Action, Cultural Pragmatics, and Ritual* 169 (Jeffrey C. Alexander, Bernhard Giesen & Jason L. Mast eds., Cambridge Univ. Press 2006); Tanya Goodman, Performing a “New” Nation: The Role of the TRC in South Africa, in *Social Performance: Symbolic Action, Cultural Pragmatics, and Ritual* 169 (Jeffrey C. Alexander, Bernhard Giesen & Jason L. Mast eds., Cambridge Univ. Press 2006). [↑](#footnote-ref-37)
39. Minow, *supra* note 13, at 27-29. [↑](#footnote-ref-38)
40. Allais, *supra* note 28, at 333-34. [↑](#footnote-ref-39)
41. Minow, *supra* note 13, at 29-30. [↑](#footnote-ref-40)
42. *Id.* at 30. [↑](#footnote-ref-41)
43. Allais, *supra* note 28, at 334. [↑](#footnote-ref-42)
44. *Id.* at 334-35. [↑](#footnote-ref-43)
45. Roche, supra note 10, at 578–79. [↑](#footnote-ref-44)
46. *Id.* at 570. [↑](#footnote-ref-45)
47. Minow, *supra* note 13, at 7-8. [↑](#footnote-ref-46)
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49. *Id*. [↑](#footnote-ref-48)
50. Keller, *supra* note 48, at 232–37. [↑](#footnote-ref-49)
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52. International Criminal Court, Situation in Uganda,<https://www.icc-cpi.int/uganda>. [↑](#footnote-ref-51)
53. Alexander K.A. Greenawalt, *Complementarity in Crisis: Uganda, Alternative Justice, and the International Criminal Court*, 50 Va. J. Int'l L. 107, 118 (2009).​ [↑](#footnote-ref-52)
54. *Id.* at 114, 120, 158. [↑](#footnote-ref-53)
55. [↑](#footnote-ref-54)
56. Marieke Wierda & Michael Otim, Courts, Conflict and Complementarity in Uganda, in *The International Criminal Court and Complementarity: From Theory to Practice* 1168–71 (Carsten Stahn & Mohamed M. El Zeidy eds., Cambridge Univ. Press 2011). [↑](#footnote-ref-55)
57. Keller, *supra* note 48, at 215–16. [↑](#footnote-ref-56)
58. Minow, *supra* note 13, at 31-32. [↑](#footnote-ref-57)
59. *Id.* at 33-34. [↑](#footnote-ref-58)
60. *Id.* at 32. [↑](#footnote-ref-59)
61. *Id.* at 33. [↑](#footnote-ref-60)
62. *Id.* [↑](#footnote-ref-61)
63. *Id.* at 34-37. [↑](#footnote-ref-62)
64. *Id.* [↑](#footnote-ref-63)
65. *Id.* [↑](#footnote-ref-64)
66. *Id.* [↑](#footnote-ref-65)