WHO WILL SAVE THESE ENDANGERED SPECIES? EVALUATING THE IMPLICATIONS OF THE PRINCIPLE OF COMPLEMENTARITY ON THE TRADITIONAL AFRICAN CONFLICT RESOLUTION MECHANISMS

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I. INTRODUCTION

The adoption and subsequent coming into force in 2002 of the Rome Statute of the International Criminal Court (ICC)[1] consecrated a new epistemic paradigm of individual accountability for the perpetration of the most egregious crimes, which began with the establishment of the Nuremberg Tribunal.[2] Crimes such as genocide,[3] crimes against humanity,[4] war crimes[5] and the crime of aggression[6] have been described by the Statute as being of 'most serious concern to the international community as a whole'[7] for which perpetrators 'must not go unpunished'[8].

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1 UN Doc. A/CONF.183/9*, available at http://untreaty.un.org/cod/icc/statute/romefra.htm (accessed 20 July 2010). According to article 126(1), the Statute would enter into force 'on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations'.

2 The International Military Tribunal at Nuremberg (IMT) was established by an agreement between four victorious Allied Powers at the end of World War II. See Agreement for the Prosecution of and Punishment of the Major War Criminals of the European Axis. Aug. 8, 1945, 59 Stat. 1544, 82 UNTS 279, reprinted in 39 *American Journal of International Law* (1945): 257.

3 Article 6 of the Statute.

4 Article 7 of the Statute.

5 Article 8 of the Statute.

6 According to article 5(2) of the Statute, 'the Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to the crime'.

7 Preamble to the Statute, paragraph 4.

8 *Ibid.*

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Predictably, one of the fundamental questions which the drafters of the Statute had to deal with was the relationship between the ICC and national courts.[9] While there was unanimous agreement in relation to the substantive aspects of the crimes covered by the Statute, the same could not be said about the procedure to be adopted for their enforcement. Despite their support for the establishment of the ICC, states were not ready to risk their sovereignty in favour of a supranational criminal court.[10] To surmount this obstacle, the concept of 'complementarity'[11] was 'invented'[12] under which states 'retain primary responsibility for investigating and prosecuting international crimes,'[13] 'unless a state is "unwilling" or "unable" genuinely to carry out the investigation or prosecution'.[14]

The extent to which non-prosecutorial and alternative methods of investigation and enforcement of international criminal law are contemplated within the meaning of the word 'unwilling' as used in the Statute has been a subject of debate among legal scholars;[15] and the uncertainty arising from this ambiguity has already begun to take its toll on the African conflict resolution mechanisms which are fundamentally non-prosecutorial. Not ready to take any chances and desperate to avoid ICC investigation, some states in the African region, which are involved in armed conflicts, have begun to transform these essentially restorative indigenous conflict resolution mechanisms into Western-type retributive institutions 'in an effort to fall within the complementarity principle'.[16]

9 Jimmy Gurule, 'United States Opposition to the 1998 Rome Statute Establishing an International Criminal: Is the Court's Jurisdiction Truly Complementary to National Criminal Jurisdictions?', 35(1) *Cornell International Law Journal* (2001): 6. National courts include indigenous, non-Western-type mechanisms adopted by states to bring perpetrators of crimes to justice.

10 Under customary international law, as well as multilateral treaties, the right to prosecute perpetrators of crimes contained in the Statute inheres in the states, and, historically, they have rarely waived it. Gurule, *supra* note 9, at 6; Mohammed M. El Zeidy, 'The Principle of Complementarity: A New Machinery to Implement International Criminal Law', 23 *Michigan Journal of International Law* (2002): 869, 870.

11 Preamble, paragraph 10; articles 1 and 17 of the Statute.

12 According to Van der Vyver: 'deliberations in New York on the ICC added a new word to English language: "complementarity" – or gave a new meaning to the word as defined by American English'. See Johan D. Van der Vyver, 'Personal and Territorial Jurisdiction of the International Criminal Court', 14(1) *Emory International Law Review* (2000): 66. Newton described the term 'complementarity' as 'a "newly minted phrase" that builds on the well-established practice of nations enforcing international law'. See Michael A. Newton, 'Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court', 167(20) *Military Law Review* (2001): 28.

13 Bruce Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law*, Oxford University Press (2003), p. 86.

14 Article 17(1)(a) of the Statute.

15 For instance, it is not clear whether amnesty granted by a national government to perpetrators of international crimes amounts to 'unwillingness' within the contemplation of the Statute. See Jennifer J. Llewellyn, 'A Comment on the Complementary Jurisdiction of the International Criminal Court: Adding Insult to Injury in Transnational Contexts?', 24 *Dalhousie Law Journal* (2001): 192; Michael P. Scharf, 'The Amnesty Exception to the Jurisdiction of the International Criminal Court', 32 *Cornell International Law Journal* (1999): 507; Darryl Robinson, 'Serving the Interest of Justice: Amnesties, Truth Commissions and the International Criminal Court', 14 *European Journal of International Law* (2003): 481; Jennifer Elsea, *International Criminal Court: Overview and Selected Legal Issues*, Novinka Books (2003), p. 35.

16 Mark A. Drumbl, *Atrocity, Punishment, and International Law*, Cambridge University Press (2007), p. 145.

Through the lens of the *gacaca* in Rwanda, *mato oput* in Uganda and the Sierra Leone Truth and Reconciliation Commission, this paper evaluates the implications of these transformations on reconciliation in a post-conflict African society. It argues that not only are these indigenous institutions ill-equipped to exercise jurisdiction over these crimes, but their transformation from purely reconciliatory to punitive institutions will extinguish the last flames of hope for reconciliation in post-conflict African society.

II. COMPLEMENTARITY: AN OVERVIEW

According to the Preamble to the Rome Statute of the International Criminal Court,[17] and article 1 thereof, the International Criminal Court 'shall be complementary to national criminal jurisdictions'. This was a concessionary provision inserted in the Statute to attract the largest number of supporting states following strong resistance to the creation of an international court with unmitigated universal jurisdiction.[18] It is common knowledge that traditionally, every state regards the prosecution of its citizens who are alleged to have committed crimes as an intrinsic part of its sovereignty,[19] the infraction of which is generally viewed as an infraction of the state's sovereignty. The principle of complementarity, therefore, ensures primacy of national courts over the prosecution of international crimes[20] subject to the right of the ICC to assume jurisdiction in the event of 'unwillingness'[21] or 'inability'[22] on the part of states 'genuinely to carry out the investigation or prosecution'.[23]

Questions have been asked, however, concerning the extent to which complementarity has 'safeguarded' the sovereignty of states in respect of the prosecution of international crimes committed in their territories. For states in the African region, the unresolved issue is the extent to which the traditional conflict resolution mechanisms are contemplated by the Statute as constituting 'ability' and 'willingness' 'genuinely to carry out the investigation or prosecution'[24] of perpetrators of international crimes committed in their territories. This doubt stems from the fact that these mechanisms are essentially non-prosecutorial and restorative, with an emphasis on amnesty – an approach that is seemingly

17 Preamble, paragraph 10 of the Statute.

18 Juyal Anshumala, *Towards a More Effective International Criminal Court: An Examination of the Problems and Prospects of its Complementary Jurisdiction*, unpublished LLM Thesis, Dalhousie University, Canada (2000), p. 6. He argues that the flaws of complementarity may seriously affect the prospects of the ICC to effectively prevent impunity and to bring about justice for victims.

19 Federica Gioia, 'State Sovereignty, Jurisdiction, and "Modern" International Law: The Principle of Complementarity in the International Criminal Court', 19 *Leiden Journal of International Law* (2006): 1095, 1096. She also points out that the legitimacy of this self-protective attitude of states is sanctioned by the UN Charter, citing article 2(1) and (7) thereof.

20 Jann K. Kleffner, 'The Impact of Complementarity on National Implementation of Substantive International Criminal Law', 1 *Journal of International Criminal Justice* (2003): 86, 87.

21 Article 17(2) of the Statute.

22 Article 17(3) of the Statute.

23 Article 17(1) of the Statute.

24 Article 17(1)(a) of the Statute.

unknown to international criminal justice, which is punitive and prosecution driven. Whether 'prosecutions' conducted before these traditional institutions would amount to 'sham trials',[25] and therefore deprive them of the benefit of complementarity, has remained unclear.

III. YOU DON'T BELONG HERE: COMPLEMENTARITY *VERSUS* RESORT TO AFRICAN DISPUTE RESOLUTION MECHANISMS AND THE AMNESTY QUESTION

In recent times, and with the emergence of a permanent international criminal prosecution system, the international community has begun to deny recognition to amnesty granted by states to perpetrators of international crimes.[26] As the succeeding examples will show, at the heart of the jurisprudence of most African conflict resolution mechanisms is the power to grant amnesty to perpetrators of crimes, in exchange for their confessions and repentance. The underlying idea is that these restorative approaches engender post-conflict reconciliation between victim and villain, and act as a catalyst for durable peace; however, scholars are divided over whether the grant of amnesty through these mechanisms deprives the victims of crimes of their right to justice. The right of victims of crimes to justice is generally viewed as the minimum condition for lasting reconciliation in a post-conflict society; however, there is debate about the definition and scope of the concept of 'justice' in the context of accountability for international crimes. The debate centres on the extent to which restorative forms of justice, particularly as practised in Africa, is contemplated by an international justice system that is 'deeply associated with core liberal legalist assumptions manifested in the ordinary operation of criminal law in Western states'.[27] International criminal justice 'evidences a predominance of Western-generated theories and absence of non-Western discourse'.[28] For Mani, this leads to 'a troubling imbalance or injustice in the study of justice' insofar as 'international lawyers... have largely referred to and replicated their own legal systems, rather than catered to and built on local realities and needs'.[29] For some, amnesty undermines the rule of law and encourages impunity. They insist that prosecution and punishment advance society's political identity during the transition as a democratic rule-of-law-abiding state, and support the political processes.[30] Others, however, argue that

25 Van der Vyver, *supra* note 12, at 74.

26 Yasmin Naqvi, 'Amnesty for War Crimes: Defining the Limits of International Recognition', 85 *International Review of the Red Cross* (2003): 583, 586.

27 Drumbl, *supra* note 16, p. 125.

28 *Ibid.*

29 *Ibid.*, citing Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of War*, Polity Press (2002), pp. 47–8.

30 D. Orentlicher, 'Settling Account: The Duty to Prosecute Human Rights Violations of a Prior Regime', 100 *Yale Law Journal* (1991): 2537, 2548. Bassiouni states that 'if peace is not intended to be a brief interlude between conflicts' then it must be accompanied by justice. See Cherif Bassiouni, 'Searching for Peace and Achieving Justice: The Need for Accountability', 59 *Law and Contemporary Problems* (1996): 9, 13.

amnesty is not necessarily antithetical to the ideal of justice but complementary to it. To them, prosecutorial justice and the restorative model are two sides of the same coin.[31] Charles Villa-Vicencio, while expressing support for the ICC, also fears that its Statute 'could be misinterpreted, albeit incorrectly, as foreclosing the use of truth commissions'.[32] Similarly, Boraine observes:

> It is to be hoped... that when the International Criminal Court comes into being, it will not, either by definition or by approach, discourage attempts by national states to come to terms with their past... It would be regrettable if the only approach to gross human rights violations comes in the form of trials and punishment. Every attempt should be made to assist countries to find their own solutions provided that there is no blatant disregard of fundamental human rights.[33]

One commentator has stated that the practice of amnesty by states 'does not yet support the present existence of an obligation under the customary international law to refrain from conferring amnesty for... crimes against humanity', citing the United Nations' earlier endorsement of peace deals.[34] In this sense, it is argued, for the purpose of the principle of complementarity, that amnesty amounts to an acquittal and, therefore, could be relied on under the plea of double jeopardy (*ne bis in idem*).[35] In my view, it is wrong to describe amnesty as amounting to a finding of not guilty. In fact, the contrary is the case. Amnesty is only granted to a person who acknowledges and confesses his guilt but who repents of his acts with a profound commitment not to perform the act or similar acts again.

The more popular view is that the Statute makes no accommodation for domestically enacted amnesty processes,[36] especially those in respect of which

31 Carlo S. Nino, 'The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina', 100 *Yale Law Journal* (1991): 2619. Scharf puts it more succinctly thus:

> It is a common misconception that granting amnesty from prosecution is equivalent to foregoing accountability and redress. As the Haitian and South African situations indicate, amnesty is often tied to accountability mechanisms that are less invasive than domestic or international prosecution. Where amnesty has been traded for peace, the concerned governments have made monetary reparations to the victims and their families, established truth commissions to document the abuses (and sometimes identify perpetrators by name), and have instituted employment bans and purges (referred to as 'lustration') that keep such perpetrators from positions of public trust. While not the same as criminal prosecution, these mechanisms do encompass the fundamentals of a criminal justice system: prevention, deterrence, punishment, and rehabilitation.

See Scharf, *supra* note 15, at 512.

32 Charles Villa-Vicencio, 'Why Perpetrators Should Not be Prosecuted: Where the International Criminal Court and Truth Commissions Meet', 49 *Emory Law Journal* (2002): 205, at 205.

33 Alex Boraine, *A Country Unmasked: South Africa's Truth and Reconciliation Commission*, cited by Robinson, *supra* note 15, at 482.

34 Michael Scharf, 'The Letter of the Law: The Scope of the International Legal Obligation to Prosecution to Prosecute Human Rights Crimes', 15 *Law and Contemporary Problems* (1996): 41, 59.

35 Van der Vyver, *supra* note 12, at 78.

36 Richard J. Goldstone and Nicole Fritz, '"In the Interest of Justice" and Independence Referral: The ICC Prosecutor's Unprecedented Powers', 13 *Leiden Journal of International Law* (2000): 655, 659.

there was no prior investigation.[37] But even where a state investigates but decides not to prosecute, the ICC may still declare such an action to be unwillingness on its part, particularly where there is sufficient evidence to prosecute.[38]

At the negotiation stage of the Statute, the issue of how to deal with amnesties granted by states through various means, including truth and reconciliation commissions, was seriously debated. Some delegates wanted a provision in the Statute recognising national amnesties granted by alternative conflict resolution mechanisms.[39] Others rejected this view, arguing that prosecution is the sole appropriate and obligatory response in the aftermath of perpetration of heinous crimes.[40] There appeared to have been a consensus, however, that while it was not proper to lay down 'an iron rule mandating prosecution as the only accepted response in all situations', any express provision of amnesty in the Statute 'would be immediately exploited and abused'.[41] It was not surprising, therefore, that the drafters of the Statute chose to remain silent on the issue, allowing the Court some degree of discretion over the matter.[42]

In discussing amnesty in the context of the principle of complementarity, articles 16, 17 and 20 of the Statute provide some insight. Article 16 requires the ICC to defer to a national amnesty if the Security Council adopts a resolution under Chapter VII of the United Nations Charter requesting the Court not to commence investigation or prosecution, or to defer any proceeding already in

37 Daniel D. Nsereko, 'The International Criminal Court: Jurisdictional and Related Issues', 10 *Criminal Law Forum* (1999): 87, 119. According to Nsereko,

> the granting of blanket amnesties to persons who are otherwise amenable to the ICC jurisdiction without a prior investigation and careful delving into the merits of their case is *prima facie* evidence of unwillingness or inability of the State concerned to prosecute them. The situation is, however, different where the State has investigated the case and, in its sovereign wisdom, decided not to prosecute the persons concerned by granting them amnesty or pardon. It does not have to disclose the reasons for declining to prosecute.

Ibid.

38 Llewellyn, *supra* note 15, at 204.

39 At the preparatory conference, the US Delegation distributed a 'nonpaper', proposing that the Court should take into account such amnesties in the interest of international peace and national reconciliation when deciding whether to exercise jurisdiction over a situation. See Scharf, *supra* note 15, at 508.

40 Robinson, *supra* note 15, at 483.

41 *Ibid.*

42 *Ibid.* Scharf formulates six tests to be applied by the Court in determining whether to defer to an amnesty arrangement in accordance with its obligation in line with the principle of complementarity under the Statute. They are: (1) Do the offences constitute grave breaches of the Geneva Convention or genocide, for which there is an international obligation to prosecute? (2) Would an end to the fighting or transition from repressive rule have occurred without some form of amnesty agreement? (3) Has the State or international community instituted a mechanism designed to discover the truth about victims and attribute individual responsibility to the perpetrators? (4) Has the State provided victims with adequate reparation and/or compensation? (5) Has the State implemented meaningful steps to ensure that violations of international humanitarian law and serious human rights abuses do not recur? (6) Has the State taken steps to punish those guilty of committing violations of international humanitarian law through non-criminal sanctions, such as imposition of fines, removal from office, reduction of rank, etc? See Scharf, *supra* note 15, at 526–67.

progress, which will last for a period of twelve months, subject to renewal.[43] It has been argued that the inclusion of this provision is an admission by the international community that unlimited prosecution for international crimes may amount to a threat to peace and security, and an acknowledgement of the primacy of peace over justice when it comes to resolving conflict.[44] It seems, however, that the amnesty contemplated by this provision is that granted in peace deals, not that granted by alternative conflict resolution mechanisms after full hearing and disclosure by the perpetrators of their crimes.

For the African conflict resolution mechanisms, articles 17 and 20 are relevant. The wording of article 17(1)(c) seems to suggest the ICC's lack of recognition of non-prosecutorial approaches to conflict resolution, the category to which the said African mechanisms belong. It states that the Court shall consider a case inadmissible where 'the person concerned has already been "tried"'. Since the approaches adopted by these mechanisms are not technically in the form of 'trials', it is doubtful if their proceedings would meet the threshold of inadmissibility.[45]

The interpretation given to the word 'trial' above is reinforced by the prosecution requirement evident in both the Preamble to the Statute and the rest of article 17(1). For instance, paragraph 5 of the Preamble states that it is the responsibility of the international community to ensure 'effective prosecution' of serious crimes, while paragraph 7 enjoins states to exercise 'criminal jurisdiction' over those responsible for international crimes. The above examples underscore the preference of the Court for resort to the retributive justice model founded on the traditional criminal law conception of justice.[46]

Earlier in this paper, it was indicated that one of the defining characteristics of the concept of 'unwillingness' as used in article 17(2)(a) is the 'purpose of shielding the person concerned from criminal responsibility'. A similar provision is contained in article 20, which deals with the *ne bis in idem* provision.[47]

43 Article 16 states that:

> 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.

44 Naqvi, *supra* note 26.

45 Llewellyn argues, specifically in respect of truth commissions, that a person who has gone through these commissions ought to be deemed to have been 'tried' for the purpose of taking the benefit of the principle of double jeopardy under the Statute. See Llewellyn, *supra* note 15, at 206.

46 Claudia Angermaier, 'The ICC and Amnesty: Can the Court Accommodate a Model of Restorative Justice?', 1 *Eyes on the ICC* (2004): 131, 144.

47 Paragraph 3 states that:

> no person who has been tried by another court ... shall be tried by the Court with respect to the same conduct unless proceedings in the other court:
>
> (a) Were the for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or

A trial is said to amount to 'shielding' a person when it is a 'sham proceeding',[48] but determining whether a proceeding is a sham is not an easy task. In respect of the African conflict resolution mechanisms, although a prosecution-minded international lawyer would readily describe proceedings conducted by them as sham, advocates of restorative justice would surely disagree. A conservative interpretation of the provisions of the Statute would reinforce the view of the former.

The uncertainty surrounding the status of the African conflict resolution mechanisms in the context of the principle of complementarity under article 17 of the Statute has led to a desperate response from some states in the region, which are either already subjects of ICC prosecution or targets of investigation. In order to demonstrate a semblance of compliance with the said article, the traditional complexion of some of these mechanisms is being altered from restorative to retributive institutions by the ICC-targeted states in the region to avoid ICC prosecution. The *mato oput* of Uganda, *gacaca* of Rwanda and the Truth and Reconciliation Commission of South Africa are but a few examples.

IV. FROM TRANSFORMATION TO DISTORTION: AFRICAN CONFLICT RESOLUTION MECHANISMS AND THE CRISIS OF LEGAL TRANSPLANT

African conflict resolution mechanisms have come under severe pressure from the international legal regime.[49] The scramble for compliance with the criteria of admissibility under the principle of complementarity by states in the region, which are potential targets of ICC investigation, has initiated a drive that has seen these mechanisms moving 'toward homogenization by massaging the traditional into the neotraditional'.[50] In many parts of the African region, there are a number of traditional mechanisms that are historically effective, not only for conflict resolution but also in enhancing reconciliation between parties to disputes.[51] This is because intrinsic in the socio-political philosophy of Africa is the notion of communality, as opposed to Western individualism. This is referred to by some African political thinkers as 'ubuntu', 'unhu' or 'ujama'. At the heart of these concepts is the notion of forgiveness by the victim based on admission of guilt and repentance by the villain, which ultimately leads to reconciliation.[52] A distinctive

> (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognised 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.

48 Van der Vyver, *supra* note 12, at 74.

49 Drumbl, *supra* note 16, p. 145.

50 *Ibid.*

51 Center for Conflict Resolution, 'African Traditional Methods in Conflict Resolution', available at http://www.cecore.org/african.html (accessed 11 September 2001).

52 Birgit Brock-Utne, 'Indigenous Conflict Resolution in Africa', a draft presented to the Weekend Seminar on Indigenous Solutions to Conflicts held at the University of Oslo, Institute of Educational Research, 23–4 February 2001, available at http://www.africavenir.com/publications/occasional-papers/BrockUtneTradConflictResolution.pdf (accessed 11 September 2009).

characteristic of these mechanisms is their essentially non-prosecutorial and restorative approaches to the settlement of disputes woven around the concept of amnesty.[53] Paul Rusesabagina, a survivor of Rwandan genocide, reflecting on the effectiveness of local justice in post-conflict reconciliation said:

> The adversarial system of justice practiced in the West often fails to satisfy [Africans], I am convinced because it does not offer warring parties the opportunity to be human with each other at the end. Whether you were the victim or the aggressor you had to strip yourself of pride and recognise the basic humanity of the fellow with whom you were now sharing a banana beer. There was public shame in this system, true, but also display of mutual respect that closed the circle. Everyone who showed up to hear the case was invited to sip the banana beer too, as a symbol of the accused man's reconciliation with the entire people. It was like a secular communion. The lasting message for all that gathered there was that solutions could always be found inside – inside communities and inside people.[54]

Without compromising the right of victims to justice, these mechanisms 'emphasize reconciliation as the ultimate goal of justice, not retribution or punishment, and speak to the attitude of people whose acceptance of justice is needed for success'.[55] By guaranteeing amnesty for the perpetrators in exchange for their confessions and repentance, the affected persons or communities forge a new partnership of peace, love and reconciliation. In modern times, a model of this approach has been formulated and applied with great success through truth and reconciliation commissions, particularly the type established in South Africa.

The effectiveness of the traditional African conflict resolution mechanisms consists in their ability to bring into the dispute resolution process people other than the parties who are directly involved in a conflict. They recognise that for a genuine resolution of a conflict to occur, it must be situated within a socio-political context and not just rest on the individual accused of committing a crime.[56] According to Prendergast, 'for conflict prevention and resolution to hold requires the participation of all segments of society. Traditional authorities (chiefs and elders), women's organisations, local institutions, and professional associations have critical roles to play in the development of grassroots peacebuilding.'[57]

53 Center for Conflict Resolution, *supra* note 51.

54 Kathleen E. MacMillan, 'The Practicability of Amnesty as a Non-Prosecutory Alternative in Post-Conflict Uganda', 6 *Cardozo Public Law, Policy and Ethics Journal* (2007): 199, citing Paul Rusesabagina and Tom Zoellner (ed.), *An Ordinary Man: Autobiography*, Penguin (2006), p. 197.

55 MacMillan, *supra* note 54, at 212.

56 Michael Mendel, *How America Gets Away With Murder*, Pluto (2004), p. 241.

57 John Prendergast, 'Building on Locally-Based and Traditional Peace Process', in David R. Smock (ed.), *Creative Approaches to Managing Conflict in Africa*, United States Institute of Peace (1997), pp. 16, 17. Writing about Ghana, Professor Owusu of the University of Michigan said:

A. The *mato oput* of Uganda

The Acholi people of northern Uganda traditionally do not use a prosecution-trial-based approach to violent crimes.[58] They adopt a traditional method called *mato oput* (which is an Acholi vernacular, meaning 'drinking the herb of the oput tree')[59] in resolution of disputes, including violent crimes.[60] It emphasises reconciliation, and derives its name from the process normally adopted, which ends in a 'significant ceremony of "mato oput", the traditional drinking of a bitter herb of the oput tree'.[61] The process involves:

- the guilty acknowledging responsibility,
- the guilty repenting,
- the guilty asking for forgiveness,
- the guilty paying compensation,
- the guilty being reconciled with the victim's family through sharing the bitter drink – mato oput.[62]

Consistent with most African conflict resolution mechanisms, parties whose conflicts have been resolved through the *mato oput* process are exempt from further prosecution by the State, essentially receiving full amnesty.[63] Attempts to adopt this mechanism in the resolution of the over two decade old armed conflict between the Ugandan government and the Lord's Resistance Army, a rebel group in Uganda, over the control of the Acholi subregion of northern Uganda, has been

> Ghanaian respect for the establishment and preservation of peace, order, and justice is based on the theological, moral, and cultural values. This foundation supports the pattern of controlling norms for the constitutional and social orderly and harmonious existence rooted in the sanctity of ancestral family ...

Ibid., p. 20.

58 MacMillan, *supra* note 54, at 212.

59 Brock-Utne, *supra* note 52.

60 Eric Blumenson, 'The Challenge of a Global Standard of Justice: Peace, Pluralism, and Punishment at the International Criminal Court', 44 *Columbia Journal of Transnational Law* (2006): 801, 810–12.

61 Brock-Utne, *supra* note 52. Barney Afako puts it more succinctly thus:

> Like many African resolution mechanisms, the Acholi believe that deep social rifts are caused by killings and require elaborate reconciliation mechanisms to restore fractured relations. Mato oput is performed after a mediation process has brought together two families and clans. The offender accepts responsibility, asks for forgiveness and must make reparation to the victims. The perpetrator and the victim's family then share the root drink from a calabash, to recall and bury the bitterness of the soured relations.

See Barney Afako, 'Traditional Drink Unites Ugandans', BBC News, available at http://news.bbc.co.uk/2/hi/africa/5382816.stm (accessed 19 February 2009); Barney Afako, 'Reconciliation and Justice: "Mato Oput" and the Amnesty Act', Conciliation Resources, available at http://www.c-r.org/our-work/accord/northern-uganda/reconciliation-justice.php (accessed 19 February 2009). According to Brock-Utne, 'the bitter drink has no medicinal effect. It only symbolises the psychological bitterness that prevailed in the mind of the parties in the conflict situation.' See Brock-Utne, *supra* note 52.

62 Brock-Utne, *supra* note 52.

63 Sean Sinclair-Day, 'Mato Oput: Better Amnesty Brew', Suite101.com, available at http://www.suite101.com/blog/mrsean/mato_oput_bitter_amnesty_brew (accessed 19 February 2009).

resisted by the ICC. The court has insisted on the prosecution of those alleged to have committed international crimes during the conflict, despite resistance by the Acholi people who are the victims of the alleged crimes.[64] According to Baines, 'the biggest misconception of traditional justice in the West is that it is "tribal" and therefore not modern, and thus "not good." '[65]

Fearing arrest upon cessation of hostilities, the rebels who were indicted by the ICC vowed to fight on until the arrest warrant issued against them was dropped.[66] Although the tension between justice and peace is not part of the focus of this paper, suffice it to say that the uncertainty surrounding the admissibility of the *mato oput* conflict resolution process pursuant to article 17(2) of the Statute of the ICC has led to its transformation into a retributive institution. In the aftermath of the ICC's insistence on arresting and prosecuting the members of Lord's Resistance Army despite serious opposition by the Acholi people, who preferred their traditional approach, *mato oput*, there has been an attempt by the Acholis to transform their *mato oput* from its restorative nature into a Western criminal court. Accordingly, Acholi parliamentarians have drafted an addendum to the ICC bill, the implementing law, to attach penalties to their traditional justice mechanism in an effort to fall within the complementarity principle and prevent criminal prosecution of such cases.[67] This is aimed at demonstrating their 'willingness' to 'genuinely carry out investigation or prosecution' pursuant to article 17 of the Statute. Although the 'court' is yet to be duly constituted, nor have the rules of evidence and procedure been published, admissibility of its proceedings under article 17 may be determined by a simple application of the standard by which the *gacaca* is currently judged. It must ensure that its proceedings are not 'inconsistent with an intent to bring persons concerned to justice', regardless of the procedure adopted. The same is also true of *gacaca* and the Truth and Reconciliation Commission.

B. 'Justice on the grass': the *gacaca* experiment

Gacaca, which originates from the Rwandan national language, Kinyarwanda, when roughly translated into English means 'justice on the grass'.[68] It is a traditional method of dispute resolution in Rwanda.[69] Its proceedings are conducted in an informal manner through a process that involves the entire

64 As Afako states, 'a bitter drink known as mato oput by the Acholi people of northern Uganda may have the ingredients for peace between the Ugandan government and the Lord's Resistance Army (LRA)'. See Afako, *supra* note 61.

65 Brain Adeba, 'Truth and Reconciliation, Ugandan Style', Liu Institute for Global Issues, available at http://www.ligi.ubc.ca/?p2=/modules/liu/news/view.jsp&id=290 (accessed 19 February 2009).

66 Michele Ernsting, 'Uganda Chiefs Advise Hague Court against Arrest Warrants', available at http://www.gmu.edu/departments/icar/ICC/Chiefs.pdf (accessed 19 February 2009).

67 Blumenson, *supra* note 60, at 816 n.46.

68 Adrien Katherine and Mark R. Johnson, 'The Promise of a Post-Genocide Constitution: Healing Rwandan Spirit Injuries', 7 *Michigan Journal of Race & Law* (2002): 247, 280 n. 321.

69 Drumbl, *supra* note 16, p. 85.

community where each member of the community could request to speak. An ancient tradition, it was originally designed for domestic disputes involving property settlement and the likes.[70] The 'trials' were meant to promote reconciliation and justice for the perpetrator in front of family and neighbours.[71] According to the Organisation of African Unity (now the African Union) Special International Panel of Eminent Personalities,

> As one authority tells us, 'Defining *gacaca* is a hard thing to do.... A *gacaca* is not a permanent judicial or administrative institution. It is a meeting which is convened whenever the need arises and in which members of one family or of different families or all inhabitants of one hill participate.... supposedly wise old men... will seek to restore social order by leading the group discussions which, in the end, should result in an arrangement that is acceptable to all participants in the *gacaca*. The *gacaca* intends to "sanction the violation of rules that are shared by the community, with the sole objective of reconciliation"... .' *The objective is, therefore, not to determine guilt or to apply state law in a coherent and consistent manner (as one expects from state courts of law) but to restore harmony and social order in a given society, and to re-include the person who was the source of the disorder.*[72]

Gacaca, like most African traditional institutions, is part of the culture of the people and 'established upon principles of morality and reverence'.[73]

At the end of the Rwandan genocide of 1994, the International Criminal Tribunal for Rwanda (ICTR) was established with jurisdiction to prosecute the masterminds of the genocide. But it soon became obvious that the number of suspects in detention waiting for trial was overwhelmingly beyond the capacity of the Tribunal to try.[74] To deal with this problem, the Rwandan government, among other things, transformed traditional *gacaca* institutions into courts for the trial of genocide suspects. Organic Law No. 40/2000 of 26 January 2001, establishing *gacaca* jurisdictions for the prosecution of genocide offences and crimes against

70 Erin Daly, 'Between Punitive and Reconstructive Justice: The Gacaca Courts in Rwanda', 34 *Journal of International Law and Politics* (2002): 355, 371.

71 Jeevan Vasagar, 'Grassroots Justice', *The Guardian*, available at http://www.guardian.co.uk/world/2005/mar/17/worlddispatch.rwanda (accessed 20 February 2009).

72 Organisation of African Unity (now the African Union) Special International Panel of Eminent Personalities to Investigate the 1994 Genocide in Rwanda and the Surrounding Events (OAU IPEP) (2000), available at http://www.africa-union.org/Official_documents/reports/Report_rowanda_genocide.pdf (accessed 20 February 2009). Emphasis mine.

73 Jeremy Sarkin, 'Tension between Justice and Reconciliation in Rwanda: Politics, Human Rights, and Due Process and the Role of GACACA Courts in Dealing with the Genocide', 45 *Journal of African Law* (2001): 143, 159.

74 For instance, by December 2002, seven years after the ICTR was established, only eleven cases were completed while more than 110,000 suspects were in detention. See William W. Burke-White, 'A Community of Courts: Toward a System of International Criminal Law Enforcement', 24 *Michigan Journal of International Law* (2002): 1, at 54.

humanity committed between 1 October 1990 and 31 December 1994, came into effect on 15 March 2001.[75]

The idea of *gacaca* as a retributive institution is strange to Rwandans. Despite the representation of the Rwandan government that the *gacaca* jurisdictions are not meant to displace customary *gacaca* procedures, there is clear evidence that that has been the case.[76] Rather than having an emphasis on amnesty, which was a core characteristic of the traditional *gacaca*, the present *gacaca* are clothed in the jurisdiction to administer severe punishment to convicts of up to thirty years' imprisonment.[77]

C. Truth and reconciliation commissions: the South African model

The use of truth and reconciliation commissions (TRCs) for post-conflict resolutions is undoubtedly not autochthonous to the African region; however, the model adopted by the South African government to address gross violations of human rights during the apartheid era was clearly built on the template of traditional African conflict resolution.

The era of apartheid in South Africa was characterised by the commission of crimes some of which were of international proportion. Resistance by the

75 This Organic Law was amended in 2004. The amended law, which collapsed and simplified elements of the previous law, categorises offenders and punishments. The categories are as follows:

- Category 1: planners, leaders, notorious murders, torturers (even when not resulting in death), rapists and sexual torturers, and those who committed dehumanizing acts against a dead body (in all cases, actual perpetrators and accomplices are implicated);
- Category 2: (1) murderers; (2) those who committed attacks with the intention to kill but did not succeed; and (3) those who committed other offences against the person without the intention to kill;
- Category 3: those who committed property offences (an offender in this category cannot be prosecuted if there is an agreement between the offender and the victim to settle the property harms caused).

See Drumbl, *supra* note 16, p. 86.

76 In drawing a distinction between the customary and the contemporary *gacaca*, Amnesty International states that:

> Customary *gacaca* proceedings dealt with interfamily or intercommunity disputes. Offenders voluntarily appeared before *inyangamuyago*. Their appearances before community elders demonstrated their desire to be re-integrated into the community whose mores they had violated. Community elders, acting as judicial arbiters, were similarly free to determine sanctions that best served the interests of the community. Decisions were consensual and represented a compromise between collective and individual interests. Sanctions were enforced through social pressure applied by community members. The focus throughout was on the restoration of social harmony.
>
> Contemporary *Gacaca* jurisdictions deal, not with local disputes, but with a genocide organised and implemented by state authorities in which hundreds of thousands of individuals lost their lives. The new jurisdictions are state creations. Their operation and sentencing are dictated by national legislation ...

See 'Gacaca: A Question of Justice', December *Amnesty International* (2002): 21.

77 Article 73 of the 2004 Organic Law.

subjugated black majority to the oppressive regime of the white-dominated minority government[78] led to some of the worst violations of human rights.[79] With the end of apartheid and the emergence of a democratic government in 1994 headed by Nelson Mandela, a TRC was set up.[80] It was charged with the responsibility of redressing gross violations of human rights committed during the period of apartheid, facilitating the grant of amnesty to perpetrators who repented by confessing their acts, and recommending reparation for the victims of human rights violations.[81]

As stated earlier, the South African TRC was clearly an archetype of African conflict resolution mechanisms. Apart from its broad outreach involving participation in the process by individuals, groups and communities, it also successfully blended the demand for justice with the need to ensure reconciliation. The success of the South African Truth and Reconciliation Commission was so profound that, 'of the many truth commissions to date, this has been the one that has most effectively captured public attention throughout the world and provided the model for succeeding truth commissions'[82] as an alternative to criminal prosecution, as opposed to others that are complementary to it.[83] It has even stimulated the idea of a Permanent Court of Arbitration in the African region.[84] Some international lawyers criticised the TRC, however, arguing that by

78 Wilson P. Nagan, 'Transitional Justice: The Moral Foundation of Trials and Commissions in Social and Political Transformation', 13 *East African Journal of Peace and Human Rights* (2007): 190, 202.

79 *Ibid.* Nagan states that:

> By the 1960s, a police state was rapidly created and the arsenal of weapons of repression became an intrinsic part of the legal and political culture of apartheid. Apartheid thus evolved into domination and subjugation of the black citizens. The policy and practice was supported by the power of a contemporary 'garrison' state. By the 1980s the national security state was integrating vast institutions of white society, and certain Civil Corporation Bureaus had been created to totally mobilise white society against the threatened black 'total' onslaught. The practical effects for the society were widespread repression, murder, gross rights violations and the emergence of shadowy death squads. South Africa also developed a nuclear arsenal and there is evidence of experimentation with the lethal chemical weapons, some of which were to solve the racial problem with injections into blacks, making them lose their pigmentation and become 'white'.

Ibid., at 202 citing Helen E. Purkitt, and Stephen F. Burgess, 'South African's Weapon of Mass Destruction', available at http://www.indiana.edu/~iupress/books/0-253-34506-5.shtml (accessed 10 February 2009).

80 The Commission was established by the Promotion of National Unity and Reconciliation Act, The Republic of South Africa, Act No. 34 of 1995, as amended by The Promotion of National Unity and Reconciliation Amendment Act No. 84 of 1995.

81 Antje Du Bois-Pedain, *Transnational Amnesty in South Africa*, Cambridge University Press (2007), p. 19.

82 Audrey R. Chapman and Hugo Van Der Merwe (eds), *Truth and Reconciliation in South Africa: Did the TRC Deliver?*, University of Pennsylvania Press (2008), p. 8.

83 The major difference here is that whereas the alternative model guarantees immunity against prosecution for those who appear before it, the complementary model does not enjoy such power.

84 Themba Gadebe, 'South Africa: Country to Host Permanent Court of Arbitration for Continent', Global Policy Forum, available at http://www.globalpolicy.org/intljustice/general/2007/0418africapca.htm (accessed 10 October 2008).

granting amnesty to perpetrators of international crimes, it travestied justice and encouraged impunity.[85]

Like other African conflict resolution mechanisms previously discussed, the South African TRC model has caved in to the 'pressures of the international legal paradigm',[86] with Sierra Leone's Truth and Reconciliation Commission (SLTRC) as a classic example. As part of a negotiated peace deal between the government of Sierra Leone and the rebel Revolutionary United Front,[87] the SLTRC was established, modelled on the South African TRC. Accordingly, 'the Commission was presented as an alternative to prosecutions, not a complement to them'.[88]

The establishment of the Special Court for Sierra Leone (SCSL) in 2000[89] to prosecute persons who bear the greatest responsibility for the Sierra Leonean armed conflict changed the complexion of the SLTRC.[90] Apart from the TRC being stripped of its power to grant amnesty particularly in respect of persons falling within the jurisdiction of the Court,[91] its status changed from that of offering an alternative to prosecution to having a complementary relationship with it. In a letter to the United Nations Security Council, the Secretary-General stated that 'care must be taken to ensure that the Special Court for Sierra Leone and the Truth and Reconciliation Commission will operate in a "complementary" and mutually supportive manner '.[92]

As eventually became evident, the complementary role that the SLTRC was mandated to play divested it of its 'Africanness' and affected its ability to function effectively, as an instrument of reconciliation in post-conflict Sierra Leone, unlike its South African counterpart. Rather than the traditional atmosphere of contrition, penitence and reconciliation, the SLTRC's relationship 'complementary' with the SCSL created what was regarded as a quasi-judicial setting. As will be shown shortly, this did not help it in its assignment of enhancing reconciliation in post-conflict Sierra Leone.

The emerging transformation of African conflict resolution mechanisms is not without some serious implications. The use of these traditional mechanisms for the 'neotraditional' is not only troubling from the perspective of protecting fundamental human rights, but could extinguish the last flames of hope for reconciliation in post-conflict Africa.

85 Wilhelm Verwoerd, *Equity, Mercy, Forgiveness: Interpreting Amnesty within the South African Truth and Reconciliation Commission*, Peeters (2007), p. 2.

86 Drumbl, *supra* note 16, p. 145.

87 Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (RUF), Lome, 7 July 1999, article XXVI.

88 William A. Schabas, 'A Synergistic Relationship: The Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone', in William A. Schabas and Shane Darcy, *Truth Commissions and Courts: The Tension Between Criminal Justice and the Search for Truth*, Kluwer Academic Publishers (2004), p. 3.

89 UN Doc. S/RES/1315 (2000).

90 Schabas, *supra* note 88, p. 3.

91 'Report of the Secretary-General on the establishment of a Special Court for Sierra Leone', UN Doc. S/2000/915, paragraph 24.

92 'Letter dated 12 January 2001 from the Secretary-General addressed to the President of the Security Council', UN Doc. S/2001/40, paragraph 9.

D. 'Bringing the person concerned to justice': *gacaca* and the accused's right to fair trial

The idea of using African conflict resolution mechanisms as criminal courts for the prosecution of international crimes, as is being experimented with in the Rwandan *gacaca*, is disturbing, especially from the perspective of due process.[93] As traditional restorative mechanisms, their transformation into retributive institutions with jurisdiction over crimes to which are attached severe punishments clearly raises doubt about their ability to ensure that trials are fair and just. For instance, while the *gacaca* courts are clothed in the jurisdiction to 'order lengthy prison sentences – including life imprisonment – and other burdensome sanctions',[94] most of the members of the courts including 'judges'[95] have not been properly trained for their enormous task.[96] Even with the prospect of life imprisonment, accused persons are deprived of the right to a lawyer. The right of an accused to a trial, which is consistent with 'the principle of due process recognised by international law', is one which is sacrosanct regardless of the criminal institution before which he is prosecuted. Unfortunately, this is not the case in the *gacaca* proceedings. On this, Stahn observes:

> Quasi-judicial procedures should, first of all, guarantee rights of due process, including the right of perpetrators to be informed about the content of the allegations made against them, an opportunity to defend themselves, a possibility of legal representation and the right to call and question witnesses. It is questionable whether procedures such as gacaca trials in Rwanda, where the defendant has no lawyer... meet this requirement.[97]

The general endorsement of the *gacaca* trials by the international community, despite questions concerning their compliance with 'the principle of due process recognised by international law',[98] reinforces the notion that for the purpose of taking advantage of the principle of complementarity under the Statute, States'

93 Daly, *supra* note 70, at 382.

94 *Ibid.*

95 Judges are laypersons who have received limited training. See Drumbl, *supra* note 16, p. 85. The duration of their training was for a maximum of six months. See Daly, *supra* note 70, at 382 n.74.

96 According to Foundation Hirondelle:

> Judges must fulfil a series of conditions. They must be people of integrity, honesty, and good conduct who have never been sentenced to more than six months in prison and are above suspicion of involvement in genocide or crimes against humanity. They must be 'free of sectarian and discriminatory attitudes' and known for a spirit of encouraging dialogue.

See Daly, *supra* note 70, at 372, citing Foundation Hirondelle, 'Gacaca Judges to be Elected on October 4th'.

97 Carsten Stahn, 'Complementarity, Amnesties, and Alternative Forms of Justice: Some Interpretive Guidelines for the International Criminal Court', 3 *Journal of International Criminal Justice* (2005): 695, 713.

98 Article 17(2).

'willingness' is measured by convictions rather than acquittals.[99] Whereas the ICC readily rejects proceedings in which many who are accused of international crimes are acquitted, by reason of those trials being calculated to 'shield the persons concerned from criminal responsibility'[100] or for coming across as 'inconsistent with an intent to bring the persons concerned to justice',[101] the reverse is the case for proceedings in which sweeping convictions of accused persons are made regardless of the quality of their trials.[102] It is rather surprising that although the adoption of African mechanisms in the resolution of conflicts in the region may not meet the criteria for complementarity due to their restorative approaches, the prosecution of accused persons before them is acceptable to the Court as 'an intent to bring the person concerned to justice'.

E. The emerging transformation and its implication for reconciliation in the post-conflict African region

The greatest implication of the ongoing transformation of African conflict resolution mechanisms is the creation of a new paradigm of conflict management in the region. This is coming about through the systemic substitution of the region's preference for restorative approaches with the Western retributive form of punishing crime. For a region in search of peace and reconciliation in the face of escalating armed conflicts, an emphasis on retributive justice, as evident in the emerging transformation of traditional reconciliatory mechanisms, is not an attractive development. Speaking about the *gacaca* courts, one commentator argued that:

> Gacaca as presently envisioned has only limited ability to promote reconciliation. Although gacaca has the potential to rebuild communities, it does so under a cloud of punishment and retribution. These values are not necessarily conducive to building a new peaceful Rwanda. While gacaca does not necessarily exacerbate these problems, Rwanda's reliance on gacaca as presently envisioned

99 Enrique C. Rojo, 'The Role of Fair Trial Considerations in the Complementarity Regime of the International Criminal Court: From "No Peace without Justice" to "No Peace with Victor's Justice"', 18 *Leiden Journal of International Law* (2005): 829, 831.

100 Article 17(2)(a).

101 Article 17(2)(b).

102 Benzing puts it more clearly, thus:

> The ICC was not created as a human rights court *stricto sensu*. It was established to address situations where a miscarriage of justice and a breach of human rights standards works 'in favour' of the accused and he or she profits from this irregularity by evading a just determination of his or her responsibility. These are the cases envisaged by article 17, which attempts to capture and more closely define those scenarios.

See Markus Benzing, 'The Complementarity Regime of the International Criminal Justice between State Sovereignty and the Fight against Impunity', 7 *Max Planck Yearbook of United Nations Law* (2003): 591, 598.

> constitutes a wasted opportunity to promote values of reconciliation and reconstruction.[103]

The establishment of the SLTRC at the end of the armed conflict in Sierra Leone, initially modelled on the South African TRC, was viewed as a panacea to future conflicts in the state; however, the effectiveness of the SLTRC in delivering on its mandate of reconciliation was hampered by its strange 'complementary' relationship with the SCSL. For instance, concern by perpetrators of gross violations of human rights that their testimonies before the SLTRC could be used for criminal prosecution by the Court discouraged them from testifying.[104] Furthermore, even the request of a prisoner in the custody of the Court to testify in public before the SLTRC was refused by the Court in a ruling in which it described the exercise as a 'spectacle' and 'broadcast'.[105]

As has been demonstrated above, the ongoing transformation of traditional African conflict resolution mechanisms is damaging on two important fronts. First, from the perspective of due process and as shown by the *gacaca* courts, there is little guarantee of the right of accused persons to fair trial, more so when it is not clear whether such consideration is relevant for the purposes of admissibility under article 17 of the Statute; and second, and more importantly, it compromises the chances of post-conflict reconciliation in the affected states.

V. CONCLUSION

As one of the most important provisions of the Rome Statute of the International Criminal Court,[106] the concept of complementarity recognises the right of states to prosecute crimes that occur in their territories, subject to conditions stipulated in the Statute. These conditions are summed up in the twin but mutually exclusive concepts of 'unwillingness' and 'inability' by states genuinely to investigate or prosecute perpetrators of international crimes. Although there is a broad consensus on the circumstances under which states can be adjudged to be unable to prosecute, the concept of unwillingness has remained nebulous. Equally debatable is the extent to which amnesty granted by states to perpetrators of international crimes, either as part of a peace deal or through

103 Daly, *supra* note 70, at 385.

104 Schabas, *supra* note 88, p. 28.

105 *Prosecutor v Norman* (Case No. SCSL-2003-08-PT), Decision on the Request by the Truth and Reconciliation Commission of Sierra Leone to Conduct a Public Hearing with Samuel Hinga Norman, 29 October 2003. The Court stated:

> I cannot believe that the Nuremberg Tribunal would have allowed its prisoners to participate in such a spectacle, had there been a TRC in Germany after the war, or that the International Criminal Tribunals for Yugoslavia or Rwanda would readily permit indictees awaiting trial to broadcast in this way to the people of Serbia or Rwanda. If it is the case that local TRC's and international courts are to work together in efforts to produce post-conflict justice in other theatres of war in the future, I do not believe that granting this application for public testimony would be a helpful precedent.

Ibid., paragraphs 30–1.

106 Kleffner, *supra* note 20, at 86.

TRCs, is contemplated by articles 17 and 20 of the Statute which deals with complementarity.

Arguably, the impact of the foregoing uncertainty is greater in the Africa region. Apart from its susceptibility to armed conflicts[107] and, by implication, it being a greater potential target of ICC prosecutions,[108] its mechanisms for conflict resolution, which are essentially restorative, rely on the grant of amnesty as an effective means to achieving post-conflict reconciliation. Consequently, through a process of legal transplant, attempts to satisfy the complementarity requirement of the ICC by some states in the region has led to the transformation of some of those mechanisms from their traditionally restorative stance into Western retributive institutions. This is particularly true of *gacaca* in Rwanda, *mato oput* in Uganda and the South African model of the TRC.

As discussed earlier, the uncertainty surrounding the status of alternative conflict resolution mechanisms under article 17 of the Statute flows from a misconception or, rather, a narrow viewpoint regarding the concepts of justice and accountability. As the *gacaca* experiment shows, the failure of the international community to embrace the idea of restorative justice, as part of the gamut of accountability for international crimes, could lead to prosecutions that fail to live up to international due process standards. Except for some die-hard proponents of prosecution-driven justice, it is doubtful whether *gacaca* courts have ensured greater accountability than, for instance, the South African TRC when assessed in light of 'the principles of due process recognised by international law'.[109] The use of these alternative mechanisms for the prosecution of international crimes therefore raises a serious concern about the quality of the proceedings from the perspective of fair hearing.

For the African region, the emerging transformation of its restorative models of conflict resolution into adversarial prosecutorial institutions carries great consequences for peace and reconciliation at the micro and macro levels in the region. At the micro level, this change will not only lead to the demise of communities' traditional conflict resolution institutions relied upon for generations, but could also reorientate them towards embracing a new ideology: that of Western retribution as justice.

At the macro level, as demonstrated in the Sierra Leone situation, post-conflict reconciliation through a TRC could be impeded when the process is perceived by some of the parties as an extension of judicial decision making. Unlike the South African TRC, the SLTRC could not achieve effective reconciliation of the parties involved in the Sierra Leone armed conflict. This is because some of the alleged perpetrators of international crimes refused to testify in the absence of clear amnesty, and for fear that their testimonies might be used by the SCSL to

107 Guy Arnold, *Historical Dictionary of Civil Wars in Africa*, 2nd edn, The Scarecrow Press (2008), p. 8.

108 Chikeziri S. Igwe, 'The ICC's Favourite Customer: Africa and International Criminal Law', 1 *Comparative and International Law Journal of Southern Africa* (2008): 294.

109 Article 17(2).

prosecute them, while some who volunteered to testify were prevented from doing so by the Special Court.

The principle of complementarity reflects a realisation that states are in a better position to deal with crimes committed in their territories. Although article 17 is silent on whether alternative mechanisms constitute willingness by states to investigate or prosecute international crimes, for the African region an interpretation that recognises these mechanisms would enhance the development of international criminal justice, while preserving the integrity of those mechanisms as reconciliatory tools for post-conflict promotion of peace.[110]

110 According to Falk,

> The most promising avenues for the immediate actualisation of international justice involve sensitive adjustments to variations of state and society makeup, as in the numerous peace, reconciliation and accountability procedures established in a number of countries.

See Richard Falk, 'The Pursuit of International Justice: Present Dilemmas and an Imagined Future', 52 *Journal of International Affairs* (1999): 409, 410.