

PEACE, JUSTICE OR BOTH? PROSECUTORIAL DILEMMAS FACING THE INTERNATIONAL CRIMINAL COURT

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ABSTRACT

This paper discusses the extent to which there is any conflict or harm in the ICC Prosecutor's involvement in cases undergoing mediation by the international community, the majority of which occurred in Africa. The ICC Prosecutor's discretion, as per the Court's Statute, to hold a prosecution in abeyance in anticipation of the outcomes of mediating efforts which aim at ending a conflict is, at best, ambivalent. Recent practice suggests that stakeholders engaged in ending long-running African conflicts prefer the Prosecutor to decline to exercise jurisdiction in order to encourage the parties to reach some agreement. For obvious reasons, discussions on such matters are often held confidentially and not in the context of official debates. The African experience with the peace–justice nexus shows that the peace-versus-justice debate has not been resolved in favor of any camp. Even so, and in light of the ongoing Hamas–Israel mediation efforts, this paper suggests that no resolution process has been impeded by the indictment and prosecution of alleged offenders, and in equal measure, the withholding of prosecution has never culminated in effective conflict resolution.

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INTRODUCTION

It is still a matter of debate whether peace negotiation or mediation is a better alternative to criminal justice processes, as well as whether the former may substitute the latter. This is an issue that will not go away easily.¹ Political analysts, conflict

1. NAYEF R. F. AL-RHODAN, NEO-STATESCRAFT AND META-GEOPOLITICS: RECONCILIATION OF POWER, INTERESTS AND JUSTICE IN THE 21ST CENTURY 1–20 (2009); ERROL P. MENDES, PEACE AND JUSTICE AT THE INTERNATIONAL CRIMINAL COURT: A COURT OF LAST RESORT 103–04 (2010) (discussing the challenges the ICC faced during peace negotiations in Uganda); STERLING JOHNSON, PEACE WITHOUT JUSTICE: HEGEMONIC INSTABILITY OR INTERNATIONAL CRIMINAL LAW? 25–52 (2003); MARK FREEMAN, NECESSARY EVILS: AMNESTIES AND THE SEARCH FOR JUSTICE 19–31 (2009) (describing the positive and negative impacts of international prosecution); MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE

resolution experts, and lawyers, particularly international lawyers, share different, sometimes even sharply contrasting, views on this very issue. In the early years of the International Criminal Court (ICC), the peace-versus-justice debate found its battleground in a spate of African cases,² albeit the Hamas–Israel conflict has moved the same debate to the Middle East, thus demonstrating that the peace-versus-justice dilemma is universal and not regional in nature. It is clear that the ICC, as a distinct inter-governmental organization, is fragmented both legally and politically from the powers that negotiate or mediate international conflicts. A key question arises as to whether international law prevents the Court or national authorities from indicting or prosecuting those negotiating with the United Nations (U.N.) or Security Council members with a view to achieving peace.³ A second pertinent question is whether the U.N. and other stakeholders can negotiate with persons accused of serious international crimes and, in the process, offer them some kind of impunity.⁴ While there is no impediment under international law to peace negotiations, there is a clear duty on states to prosecute alleged perpetrators of crimes under international law.⁵ In practice, each stakeholder views its role through a different lens. For example, negotiators aim to achieve peace and are generally unconcerned with the issue of criminal

11–38 (1999) (discussing the dangers of retributive justice); MARK A. DRUMBL, *ATROCITY, PUNISHMENT AND INTERNATIONAL LAW* 10 (2007) (reviewing various approaches towards international justice).

2. PANEL OF THE WISE, AFRICAN UNION, *PEACE, JUSTICE, AND RECONCILIATION IN AFRICA: OPPORTUNITIES AND CHALLENGES IN THE FIGHT AGAINST IMPUNITY* 47–56 (2013).

3. It has been argued that there is a direct correlation between ICC involvement in a situation and the intensity of peace negotiations, including the willingness of warring parties to sit at the negotiating table. See Line E. Gissel, *Justice Tides: How and When Levels of ICC Involvement Affect Peace Processes*, 9 INT'L J. TRANS. JUST. 428, 429 (2015).

4. See Richard Goldstone & Nicole Fritz, *In the Interests of Justice and Independent Referral: The ICC Prosecutor's Unprecedented Powers*, 13 LEIDEN J. INT'L L. 655, 655–66 (2000); Hassan B. Jallow, *Prosecutorial Discretion and International Criminal Justice*, 3 J. INT'L CRIM. JUST. 145, 154–60 (2005).

5. See Bartholomiez Krzan, *International Criminal Court Facing the Peace to Justice Dilemma*, 2 INT'L COMPAR. JURIS. 81, 81 (2016) (accepting prosecution as the ICC's strongest tool); Janine N. Clark, *Peace, Justice and the International Criminal Court: Limitations and Possibilities*, 9 J. INT'L CRIM. JUST. 521, 534–35 (2011) (emphasizing the importance of strengthening the ICC's prosecutorial powers to establish peace).

liability, so they tend to consider criminal prosecutions as a hindrance to their primary task.⁶ In short, it is difficult to negotiate peace with those who have the power to make life-or-death decisions while being unable to promise them some kind of impunity. By contrast, national and international prosecutors are under a duty to investigate alleged offenses and to prosecute those responsible.⁷ The criminal justice system does not possess the authority to offer impunity to perpetrators of international crimes, unlike the limited plea-bargaining process in some national legal systems. This is not to say that international criminal tribunals never attempt to balance security interests (e.g., by offering reduced sentences to those coming forward with evidence about other atrocities), in which case they may be viewed as exercising a “diplomatic function.”⁸

International criminal tribunals may often have to collaborate with international negotiators, particularly where a peace agreement is imminent and what is requested is not an offer of permanent impunity. In these cases, a prosecutor may well agree to halt a particular indictment or otherwise agree not to unseal an indictment for a limited duration of time.⁹ However, it should not be forgotten that the ICC is not a party to peace proceedings and is in no way bound by the outcomes of such proceedings. It might well turn out that the mediators promised impunity from future prosecution, to which the ICC or any other international criminal tribunal is conceptually opposed because of the nature of their mandate.

The ICC Prosecutor and other international criminal tribunals must engage in peace processes not only initiated by the

6. See Payam Akhavan, *Are International Criminal Tribunals a Disincentive to Peace? Reconciling Judicial Romanticism with Political Realism* 31 HUM. RTS. Q. 624, 626–27 [hereinafter *Are International Criminal Tribunals a Disincentive to Peace?*] (2009) (demonstrating the bitter differences between the Hutu regime that gained power following Rwanda’s genocide and the UN concerning how and who should run the ICTR).

7. The ICC has long pondered about this itself and has not tried to downplay its importance to its ongoing prosecutions. See Review Conference on the Rome Statute, *Managing the Challenges of Integrating Justice Efforts and Peace Processes*, ¶¶ 4–6, Doc. RC/ST/PJ/INF.4 (May 30, 2010) [hereinafter Review Conference on the Rome Statute].

8. See Robert H. Mnookin, *Rethinking the Tension Between Peace and Justice: The International Criminal Prosecutor as Diplomat*, 18 HARV. NEGOT. L. R. 145, 146–50 (2013).

9. Review Conference on the Rome Statute, *supra* note 7, ¶¶ 6–12.

U.N. or inter-governmental actors but also by states plagued by ongoing civil strife. The Colombian peace process is instructive and was, in fact, a success story in many respects.¹⁰ National amnesties have played a significant role in ending long-standing conflicts in South America, as well as bringing about regime changes.¹¹ This has given rise to a new socio-legal discipline under the aegis of international law and at the crossroads of peace and justice, known as transitional justice.¹² The point of this discipline is to achieve peace and stability in post-war society.¹³ Local courts and reconciliation mechanisms have been central in setting forth a coherent body of law supporting amnesty processes. Besides the South African Truth and Reconciliation Commission,¹⁴ Colombia's constitutional court, in fact, following the American Court of Human Rights in the *Mozote* case,¹⁵ set out a general

10. Courtney Hillebrecht, et al., *The Judicialization of Peace*, 59 HARV. INT'L L. J. 279, 318 (2018).

11. Naomi Roht-Arriaza, Professor, Univ. Calif., *Truth Commissions and Amnesties in Latin America: The Second Generation*, Address at the Annual Meeting of the American Society of International Law (Apr. 4, 1998), in 92 AM. SOC'Y INT'L L. PROC. 313, 313 (1998) (describing various amnesty programs in Latin America).

12. Lisa J. Laplante & Kimberly Theidon, *Transitional Justice in Times of Conflict: Colombia's Ley de Justicia y Paz*, 49 MICH. J. INT'L L. 49, 50–53 (2006) (highlighting the tensions in the Colombian political scene arising from attempts to enforce an amnesty in favor of FARC rebels, despite popular sentiment to the contrary).

13. Ronald Slye, *The Legitimacy of Amnesties Under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible?*, 43 VA. J. INT'L L. 173, 174 (2022); but see Mariano Gaitan, *Prosecutorial Discretion in the Investigation and Prosecution of Massive Human Rights Violations: Lessons from Argentine Experience*, 32 AM. UNIV. INT'L L. REV. 539 (2017) (emphasizing the limitations of transitional justice).

14. It was set up in 1993 on the basis of the 1993 Interim Constitution and the Promotion of National Unity and Reconciliation Act 34 of 1995. It was comprised of three branches: a Committee on Human Rights Violations (HRV), a Committee on Amnesty, and a Committee on Reparation and Rehabilitation (R & R). The mandate of the HRV Committee has been to investigate human rights abuses that took place between 1960 and 1994, based on statements made to the TRC. Its aim is to establish the identity and fate of victims, the nature of the crimes suffered, and whether the violations were the result of deliberate planning by the prior regimes or any other organization, group, or individual. The report of the Truth and Reconciliation Commission is available at: <https://www.justice.gov.za/trc/report/finalreport/volume%201.pdf>. See generally Peter Parker, *The Politics of Indemnities: Truth Telling and Reconciliation in South Africa*, 17 HUM. RTS. L. J. 1, 1–7 (1996).

15. *Massacres of El Mozote and Nearby Places v. El Salvador*, Preliminary Exceptions, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 252, ¶ 292 (Oct. 25, 2012).

right to peace in order to entrench, in part, the amnesties in the country's constitutional order.¹⁶ This entitlement now is of a constitutional nature and is largely considered as having put an end to Colombia's long-standing war with a multitude of rebel groups.¹⁷

The key position underlying this paper is that with the exception of national reconciliation mechanisms, there is no evidence that the withholding of indictments and prosecution by international criminal tribunals has brought about a viable peace. Moreover, if the ICC Prosecutor was mandated to be a constituent part of the U.N.'s or others' peace efforts, its judicial and independent character would not only be highly compromised but largely defeated.¹⁸

The article is organized as follows: Section 2 examines the legality of the peace-versus-justice (accountability) argument from the perspective of international law. Section 3 takes stock of the ICC's formative years wherein it was largely concerned with African situations. That section goes on to explore the reactions of African states to these indictments in the face of ongoing peace efforts in the continent. Section 4 explores the effects of ICC indictments on these peace efforts. Section 5 looks at the Hamas-Israel mediation efforts and the reactions of the various stakeholders, some downright hostile, to the indictment issued by the ICC Prosecutor against three leading Israeli officials. Section 6 examines whether or not international indictments ultimately lead to the marginalization and global isolation of those indicted.

16. Constitutional Court Judgment C-08/18 (15 August 2018) INTER-AM. COMM'N H.R., ANNUAL REPORT 2018 522-23 (2018); Wash. Off. Lat. Am., *Constitutional Court Upholds, Modifies Law Governing Transitional Justice System*, COLOM. PEACE (Aug. 23, 2018), <https://colombiapeace.org/last-week-in-colombias-peace-process-week-of-august-12-18/>.

17. CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 22.

18. No doubt, this is conditioned by the authority of the U.N.S.C. to curtail prosecutions. See Ademola Abbas, *The Competence of the Security Council to Terminate the Jurisdiction of the International Criminal Court*, 40 TEX. INT'L L. J. 263, 266 (2005).

II. PEACE-VERSUS-ACCOUNTABILITY AS A POLITICAL AND LEGAL ARGUMENT

When international criminal justice mechanisms were institutionalized in the early 1990s, starting with the International Criminal Tribunal for the Former Yugoslavia (ICTY) in 1993,¹⁹ there was no debate in the international community as to whether these should be supplemented with other restorative justice processes. It was thought that the type of retributive justice pursued by international criminal tribunals would ultimately produce restorative justice for post-war communities. However, given that indictments tend to disproportionately target members of one rival group over those of others, the prosecutorial work of these early international criminal tribunals likely polarized members of rival groups rather than fostered a sense of community.²⁰ In the Former Yugoslavia, this state of affairs persists to the present day.²¹ Even so, prosecutors were not mandated to serve restorative justice aims and simply did what they were expected to do, namely investigate, indict, and diligently prosecute. Until recently, the institutionalization of retributive justice mechanisms at the international level was not directly concerned with goals related to deterrence, reconciliation, and the rule of law in the afflicted country. Certainly, many of these benefits materialized in the process, but only as indirect side effects, which the U.N. Security Council (U.N.S.C.) had not generally planned, let alone envisaged.²² Thus, international criminal justice mechanisms were largely self-contained institutions that were unrelated to other parallel processes, particularly peace negotiations.²³ They were set up because the international community reached a

19. *See Are International Criminal Tribunals a Disincentive to Peace?*, *supra* note 6, at 626–27 (comparing the ICTY and ICTR to other criminal tribunals).

20. Among the vast literature, *see, e.g.*, RUTI G. TEITEL, *TRANSITIONAL JUSTICE* 75–77 (2002) (describing the dangers of politicized criminal tribunals).

21. TEITEL, *supra* note 20, at 51–52.

22. Memorandum from Rachel Lehr to the Extraordinary Chambers in the Cts. of Cambodia 16–17 (2017) (on file with Case Western Reserve University).

23. Even so, peace negotiations behind formal prosecutorial procedures have been frequent and certainly not isolated or discouraged. *See Human Rights in Peace Negotiations*, 18 HUM. RTS. Q. 249, 249 (1996).

unanimous consensus that it could no longer stomach particular instances of impunity and widespread human rights violations, and no other reaction was obvious to the international policymakers of the day.²⁴

For example, despite the fact that alleged perpetrators partook in the negotiations to end the Bosnian conflict through the Dayton Peace Accords of 1995, it was nonetheless uncontested that all accused persons be referred to the jurisdiction of the ICTY.²⁵ The historical record of the time provides no evidence that the U.N.S.C. and its negotiators thought there was any connection between the peace process at Dayton and the role of the ICTY. This was perhaps a well-thought-out stratagem by the negotiators in that they purposely allowed the leadership of the Bosnian Serbs to believe that they would be gifted with impunity. Equally, neither the ICTY nor the ICTR were envisaged as truth-telling institutions in the tradition of truth and reconciliation commissions. It should, of course, be emphasized that at the time of their creation, the institutions were not perceived as narrators of historical events²⁶ or indeed as platforms for giving a voice to the victims. The absence of truth-telling processes was demonstrated by the fact that neither tribunal allowed victim participation in the proceedings (at least in terms of seeking reparation), and the narrative of events incident to such proceedings was generally limited to the

24. Existing human rights mechanisms and bodies, whether regional or UN-based, are not generally adapted to deal with urgent situations of mass crimes, and their role is extremely limited in response to such events. See Hardeep S. Puri, *Human Rights, Mass Atrocity Prevention and the United Nations Security Council: The Long Ahead*, 53 UN Chronicle 28, 30 (2017) (highlighting the importance of human rights mechanisms, but noting that they are not as effective as desired in response to urgent situations and mass atrocities).

25. General Framework Agreement for Peace in Bosnia and Herzegovina, annex 1(a), Dec. 14, 1996, 35 I.L.M. 75; *id.* annex 6, art. XIII, ¶ 4.

26. By contrast, the preambular proclamation 40/92 for the establishment of Ethiopia's Special Prosecutor's Office, discussed presently, stated that prosecution of the Derg regime was "in the interest of a just historical obligation to record for the posterity the brutal offences committed and the embezzlement of property perpetrated against the people of Ethiopia and to educate the people to make them aware of those offences in order to prevent the recurrence of such a system of government." See *A Proclamation to Provide for the Establishment of the Special Prosecutor's Office*. Proclamation No. 22, Negarit Gazetta, Year 1992, No. 18.

particular crime.²⁷ Furthermore, hardly any interest was shown in the personal reflections of the victims and ordinary people, and it was only in the course of the judicial proceedings that anthropology was utilized—and only in order to construct a broader definition of genocide.²⁸

The ICTY and ICTR model was later developed to encompass a framework of seemingly supplementary mechanisms, which consisted of a criminal tribunal, a truth commission, the parallel deployment of peacekeepers, and the introduction of a comprehensive peace plan on the basis of international mediation. This is true in various degrees with respect to the Sierra Leone Special Court, the Extraordinary Chambers of Cambodia, and the East Timor Special Panels.²⁹ These judicial institutions, although supreme in the territory where the alleged crimes were committed, were nonetheless weak in their relations with international actors. An ancillary objective of this inherited weakness concerned the disinclination of the international community to allow a criminal tribunal to interfere in or impede its other efforts of ongoing post-conflict restoration or which had been settled by agreement under its aegis. It is not that the U.N.S.C., as the principal driver of the international community, desired to create weak courts; rather, it did not wish to undermine its other peace and rule-of-law efforts by providing supreme judicial review powers to a court or tribunal. There is some evidence to suggest that some powerful nations in the U.N.S.C. regarded peace deals with powerful local warlords as one of several viable mechanisms for the restoration of peace and the

27. If the ICTY was directly interested in providing a historical record, it could have adopted some kind of decision in respect of the material collected during its oral and written examination of the Milošević case, which abruptly ended with the death of the accused just months before the Court could pass judgment. See *Slobodan Milošević Trial—The Prosecution’s Case*, U.N. INT’L CRIM. TRIB. FOR FORMER YUGOSLAVIA <https://www.icty.org/en/content/slobodan-milo%C5%A1evi%C4%87-trial-prosecutions-case> (last visited Jan. 6, 2025).

28. See Ilias Bantekas, *Explaining Mass Atrocity through Culture: The Missing Link for International Criminal Justice?*, 39 BERK. J. INT’L L. 180, 180, 194-95 (2022).

29. INT’L CRIM. TRIBUNAL FOR THE FORMER YUGOSLAVIA, ICTY MANUAL ON DEVELOPED PRACTICES 3 (2009).

rule of law.³⁰ In this light, they were willing to offer considerable concessions to alleged criminals in exchange for their complete withdrawal from hostilities.³¹ In retrospect, this peace-versus-accountability argument seems to have been foreseen by the drafters of international tribunals, whether as a result of secret deals or the establishment of “weak” courts, and was subsequently made explicit in Article 53(2)(c) of the Rome Statute, albeit in uncertain terms.³² Article 53(2)(c) calls upon the Prosecutor to consider, prior to the initiation of an investigation, whether there does not, in fact, exist a sufficient basis for prosecution. This should be undertaken where it is in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims, the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime.³³

This is a radical provision that was never imposed on the prosecutors of ad hoc or hybrid tribunals in the past. It seems to render the ICC Prosecutor an arbiter of political matters and, moreover, formally subjugates the pursuit of justice in certain cases in favor of ongoing peace negotiations. It is also in direct conflict with the U.N.’s understanding and application of the rule

30. See Richard Lardner, *As U.S./U.N Now Negotiate with Warlord: CIA Warned that Gen. Aideed Was Not to Be Trusted, Urged His Ouster*, 5 *INSIDE THE ARMY* 1, 13 (Oct. 1993) (noting that President Clinton utilized peace negotiations with Somalia’s General Aideed as an instrument for orchestrating peace within the country).

31. When the political leader of the Bosnian Serbs, Radovan Karadžić, was arrested in 2008 and brought before the ICTY, one of the first arguments he put forward was that he was entitled to immunity from prosecution by the ICTY because he had concluded a secret agreement with US negotiator Richard Holbrooke following the Dayton Accords. This alleged agreement envisaged the accused’s perpetual immunity if he agreed to disappear from public life from 1996 onwards. Karadžić further argued that Holbrooke brokered the agreement under actual or apparent authority from the Security Council; consequently, the legal and actual effect of the agreement was directly applicable to the Tribunal. The ICTY did not examine the veracity of these allegations because it found them of no legal significance given that the Security Council had not demanded that it refrain from prosecuting the accused. See *Prosecutor v. Karadzic*, Trial Chamber Decision on the Accused’s Holbrooke Agreement Motion, No. IT-95-5/18-T, ¶¶ 1–19, 33–37 (ICTY July 8, 2009).

32. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90, art. 53, ¶ 2(c) [hereinafter “Rome Statute”].

33. *Id.*

of law.³⁴ The ICC Office of the Prosecutor has attempted to depoliticize and downplay the exceptionalism personified by “interests of justice” considerations by modeling a balancing test that takes into account the gravity of the crime, the interests of the victims, and the particular circumstances of the accused.³⁵ Its policy paper on this matter is ambivalent and obscure, but it is clear that the Prosecutor would certainly heed the demands of the U.N.S.C. to refrain from investigating a particular case where it was locked in peace negotiations with the feuding parties.³⁶ Without specifically referring to Article 53(2)(c), the African Union (AU) Assembly has strongly demanded on several occasions that the ICC Prosecutor refrain from indicting African leaders and that AU member states accept indicted leaders into their territory in the pursuit of peace and security.³⁷

In the Darfur situation, for example, an ICC Pre-Trial Chamber was seized by a motion of two pro-government Sudanese non-governmental organizations (NGOs) who claimed the prosecution of the Sudanese president and his co-accused was not in the interests of justice because it would have significant ramifications for the country’s peace-building efforts and national security and would entrench negative public sentiment with respect to the ICC’s activities in Sudan.³⁸ The ICC missed a golden opportunity to elaborate on this principle but did

34. See U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶¶ 10, 64, U.N. Doc. S/2004/616 (Aug. 23, 2004). The Report does concede the limitations of international tribunals and supports alternative justice mechanisms and capacity-building. It does not in any manner, however, sanction impunity regimes for the restoration of peace.

35. OFF. OF PROSECUTOR, INT’L CRIM. CT., POLICY PAPER ON THE INTERESTS OF JUSTICE 4–6 (2007).

36. Rome Statute, *supra* note 32, art. 16.

37. Africa has extended the power of personal immunity to international courts “which is contrary to established customary international law.” Examples include the African Union’s extension of this power in the Amendment Protocol and Sudan’s attempt to escape treaty obligations under the U.N. Charter. See Sascha-Dominick D. Bachmann & Naa A. Sowatey-Adjei, *The African Union- ICC Controversy Before the ICJ: A Way Forward to Strengthen International Criminal Justice?*, 29 WASH. INT’L L.J. 247, 247, 294, 300 (2020).

38. Lutz Oette, *Peace and Justice, or Neither? The Repercussions of the al-Bashir case for International Criminal Justice in Africa and Beyond*, 8 J. Int’l Crim. Just. 345, 350–55 (2010).

emphasize that the enumerated circumstances in Article 53(2)(c) are indicative and not exhaustive,³⁹ and ultimately, the ascertainment of a situation as being detrimental to the interests of justice is entrusted to the Prosecutor.⁴⁰ Thus, it effectively argued that it does not have the authority to ascertain whether or not the Prosecutor has acted in the interests of justice in a particular case by refraining from prosecution.⁴¹ Instead, that ascertainment is a matter that falls exclusively within the competence of the Office of the Prosecutor.

There are mixed responses to the peace-versus-accountability argument. On one end, NGO campaigners take the view that the impact of justice mechanisms is often undervalued in resolving prolonged conflicts, and the supposed achievement of peace through impunity usually results in protracting conflicts.⁴² On the other hand, political analysts opine that in certain circumstances, the arraignment of heads of state or prominent leaders does not necessarily lead to their isolation, whether internally or externally, at least immediately. The case of Sudanese President Omar al-Bashir (Al-Bashir) is distinctly reflective of this tension. In July 2009, the U.S. Special Envoy to Sudan, Scott Gration, stated that while the U.S. would engage with the Sudanese president, this “d[id] not mean that [Al-Bashir] d[id] not need to do what [wa]s right in terms of facing the International Criminal Court and those charges.”⁴³ Mixed signals were received from Sudan’s domestic front. In particular, the Sudan People’s Liberation Movement, then the Southern foes of the Al-Bashir regime, released a statement saying that “Sudan should stand with [Al-]Bashir at this hard time[;]” some of its

39. Situation in Darfur, ICC-02/05-185, Decision on Application Under Rule 103 ¶ 18 (Feb. 4, 2009).

40. *Id.* ¶ 22.

41. See Solon Solomon, *Broadening International Criminal Jurisdiction? The Rome Statute “Interests of Justice” Clause as a Prosecutorial Platform*, 4 INT’L HUM. RTS. L. REV. 53, 53 (2015) (arguing that “interests of justice” effectively provide a broad discretion to the ICC Prosecutor to initiate a prosecution and that this was intentional rather than merely accidental).

42. HUM. RTS. WATCH, *SELLING JUSTICE SHORT: WHY ACCOUNTABILITY MATTERS FOR PEACE* 4 (2009) [hereinafter *SELLING JUSTICE SHORT*].

43. ALEXIS ARIEFF ET AL., CONG. RSCH. SERV., RL34665, INTERNATIONAL CRIMINAL COURT CASES IN AFRICA: STATUS AND POLICY ISSUES 1 (July 14, 2009).

officials were reportedly concerned that the indictment could endanger the comprehensive peace talks that would determine the political status of South Sudan. Ultimately, this was not the case, as South Sudan became independent in early 2011.⁴⁴

Equally, it has also been claimed—and this is the fundamental premise against the justice argument—that those with the greatest responsibility for atrocities, while still yielding significant power, will not think twice about intensifying their criminal activity (as opposed to laying down their arms) if they believe or know that they are going to be prosecuted.⁴⁵ It is thus evident that the supporters of the peace argument are not exclusively political and military leaders who have a personal interest in ICC prosecutions; rather, the list also includes persons who are otherwise hostile to indicted leaders.⁴⁶

At the close of this section, it should be noted that the dilemma between peace and justice is apparent only in the political arena. In international law, particularly regarding the obligations of states, it is now settled that states have a duty to prosecute all serious international crimes, impose appropriate punishment, and offer some degree of reparation to the victims.⁴⁷ As a corollary to this obligation, states are generally prohibited from granting blanket amnesties to persons that have committed serious or widespread offenses, and a number of countries in Africa have taken steps to promulgate laws to that effect,⁴⁸ although as the

44. *Id.* at 14.

45. Andrew Natsios, *Beyond Darfur Sudan's Slide Toward Civil War*, 87 FOREIGN AFFS. 77, 82 (2008).

46. See Freeman, *supra* note 1, at 23–24 (arguing that amnesties of the broadest scope are sometimes defensible when adopted as a last recourse in contexts of mass violence).

47. Velazquez-Rodriguez v. Honduras, Merits, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 174; Aksoy v. Turk., App. No. 21987/93, 23 Eur. H.R. Rep. 553, 593 (Dec. 18, 1996). See also Prosecutor v. Kondewa, No. SCSL-2004-14-AR72(E), Sierra Leone Special Court, ¶ 57 (May 25, 2004) (separate opinion by Robertson, J.) (holding that a rule had emerged under customary international law that “nullifies amnesties given to persons accused of bearing great responsibility for serious breaches of international law”).

48. Article 10 of the Statute of the Special Court for Sierra Leone does not consider amnesties granted with respect to offences included in Articles 2–4 of the Statute as posing a bar to prosecution. This provision necessarily refers to, and essentially purports to invalidate, Article IX of the 1999 Lome Peace Agreement, which indeed granted amnesties to all combatants as long as the terms of that Agreement were adhered to, but to which

long-drawn-out saga leading to the establishment of the Extraordinary African Chambers for Hissène Habré demonstrated, many African nations are resistant to trying former leaders, even for the most heinous of crimes.⁴⁹ It is clear that the granting of amnesties of this nature would be incompatible with the duty to prosecute, although, in all its decisions, the AU Assembly makes it clear that it is opposed to any kind of impunity. As a result, if the peace-over-justice argument is to be legitimized, it must be divorced from its legal dimension and presented in a format that is not seen as being in juridical conflict with the duty of states to prosecute. Where this has been achieved, it has succeeded in two ways: first, by denouncing the extraterritorial criminal jurisdiction of the courts of foreign states on the basis of immunity privileges;⁵⁰ or second,

the Special Representative of the U.N. Secretary-General appended a reservation to the effect that amnesties under Article IX shall not apply to international crimes. See U.N. Secretary-General, *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, ¶ 22, U.N. Doc. S/2000/915 (Oct. 4, 2000); Ordonnance no 2007-457 du 12 avril 2007 portant amnistie [Ordonnance no 2007-457 of April 12, 2007 Concerning Amnesty], *Journal Officiel de la Republique de Cote D'Ivoire* [Official Journal of the Ivory Coast], 2007-05-10, at 294, cited in SELLING JUSTICE SHORT, *supra* note 42, at 15; Decret-Loi N° 03-001 du 15 avril 2003 portant amnistie pour faits de guerre, infractions politiques et d'opinion [Decree-Law N° 03-001 of April 15, 2003 on Amnesty for Acts of War, Political Offenses and Offenses of Opinion], *Journal Officiel De La Republique Democratique Du Congo* [Official Journal of the Democratic Republic of the Congo], 2003-04-17, no Special, 5.

49. The Extraordinary African Chambers is based on a 2012 agreement between the AU and Senegal, which was later endorsed and implemented by the Senegalese National Assembly. However, Senegal had long been found by international bodies to have failed in its duty to prosecute or extradite Habré. See Comm. Against Torture, CAT/C/36/D/181/2001, ¶ 10 (May 19, 2006); Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment, 2012 I.C.J. Rep. 423, ¶¶ 106, 121 (July 20). In contrast, the ECOWAS Community Court of Justice in *Habré v Senegal*, held that Senegal lacked appropriate legislation to try persons accused of international crimes, and hence his prosecution before ordinary Senegalese courts would offend the principle of retroactivity. See *Habré v. Senegal*, No. ECW/CCJ/JUD/06/10, The Court of Justice of the Economic Community of States of West Africa (Ct. J. Econ. Cmty. Sts. W. Afr.), ¶ 58 (Nov. 18, 2010). This conclusion has, no doubt, been severely criticized as being incompatible with contemporary notions of criminal liability. Valentina Spiga, *Non-retroactivity of Criminal Law: A New Chapter in the Hissène Habré Saga*, 9 J. INT'L. CRIM. JUST. 5, 19–20 (2011).

50. See Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.) 2002 I.C.J. Rep. 3, ¶¶ 54, 58, 60 (Feb. 12) (iterating that according to the ICJ, the incumbent foreign

by countering that international tribunals are but one component of a larger spectrum of peace efforts and their operations must therefore be consistent with the general aim of bringing about peace. The first of these arguments is of little-to-no relevance to this discussion because local criminal courts exercising universal jurisdiction have no interest in the peace negotiations of other countries.⁵¹ It is, in fact, the latter argument that is of significance to this paper because it represents the legal justification in favor of peace over justice.

III. AFRICAN CONCERNS ON THE NATURE AND LIMITATIONS OF JUSTICE AND THE ROLE OF THE ICC

In the previous section, it was explained that negotiators fear that international and local indictments endanger the likelihood of engagement, let alone agreement, in ongoing and fragile peace negotiations. This is particularly true where the key aim is the voluntary disarming of rebel groups and a return to transitional civilian life. Arguments of this nature are common among negotiators and have been leveled against existing and intended prosecutorial efforts in the African context.⁵² If impunity indeed served to instill long-lasting peace at the expense of justice in a post-conflict society, should this alternative not be given careful consideration? Truly, if peace and justice were absolute and mutually exclusive values, the attainment of peace would seem to outweigh the benefits of justice. But is this really the case? Although some empirical data has been compiled, it cannot be said with any degree of accuracy that it can fully explain whether international indictments can or cannot culminate in lasting peace. Nonetheless, certain conclusions may be drawn by virtue

minister of the DRC enjoyed immunity for serious international crimes before the courts of other nations).

51. They may, however, be instructed to abandon the case by their executives under the act of state doctrine, because the matter is already being handled at the political level. See Alfonso Iglesias, *Act of State Doctrine-International Law*, OXFORD BIBLIOGRAPHIES (Apr. 22, 2020), <https://www.oxfordbibliographies.com/display/document/obo-9780199796953/obo-9780199796953-0207.xml>.

52. See e.g., Christopher Gosnell, *The Request for an Arrest Warrant in Al-Bashir: Idealistic Posturing or Calculated Plan?*, 6 J. INT'L. CRIM. JUST. 841, 844 (2008) (arguing that arresting Al-Bashir with a sealed warrant would have reignited violence in Sudan).

of logical deductions. First, peace negotiations and efforts are no guarantee of peace; therefore, it is unreasonable for parties to nullify all justice mechanisms in the belief that negotiations will definitely culminate in a lasting peace agreement. Second, a lasting peace agreement is unattainable unless power imbalances are removed, ex-soldiers are reinstated in society, and rebel leaders agree to lay down their arms. Third, lasting peace requires some form of reconciliation between victims and the abusing faction—especially in the context of a civil war—and a generalized feeling of human safety, which would make redundant the need to form militias or paramilitary groups. Human security is impossible without reconciliation, and the latter has many faces. Fourth, whereas indicted persons in power—particularly governmental power—merely face some degree of inconvenience as a result of being indicted, persons no longer in power typically go into hiding and do not engage in hostilities or crimes. It is, of course, possible that said inconvenience may marginalize or delegitimize the indicted individual, but this is not a certain and predictable outcome in all cases.⁵³

Certainly, the majority position among African leaders (prior to Al-Bashir's downfall) was that the indictment of African governmental leaders by international tribunals is not welcome where it endangers ongoing peace negotiations.⁵⁴ This position was echoed in the AU's condemnation of Al-Bashir's indictment by the ICC. Paragraph 4 of its decision was adamant that no cooperation with the ICC would be forthcoming because the indictment against him⁵⁵ was a publicity-seeking spectacle, and

53. One commentator has argued that the Al-Bashir public arrest warrant was meant to ensure that the accused be surrendered on a voluntary basis, and that it could be used as a bargaining chip until the time was ripe for his surrender. *See id.* at 841.

54. In fact, the AU seldom refers to the international criminal liability of perpetrators when addressing peace efforts. For example, the AU Assembly's Declaration on the Activities of the Peace and Security Council of the African Union and the State of Peace and Security in Africa omitted to mention the liability of those responsible for attacks against peacekeepers and only offered its sympathies to the victims and their families. *See African Union [AU], Declaration on the Activities of the Peace and Security Council of the African Union and the State of Peace and Security in Africa*, ¶ 7, AU Doc. Assembly/AU/Decl.3 (VI) (Jan. 24, 2006).

55. *Prosecutor v. Al Bashir*, ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest Against Omar Al Bashir, ¶ 4 (Mar. 4, 2009).

the Security Council had refused to entertain the AU's request for deferral in order for an African solution to be negotiated.⁵⁶ The Commission of the African Union (AUC), however, was even more to the point with regard to the prevalence of peace over justice. It stated:

The decision bears testimony to the glaring reality that the situation in Darfur is too serious and complex an issue to be resolved without recourse to a harmonized approach to justice and peace, neither of which should be pursued at the expense of the other. Furthermore, the decision was taken after due evaluation of the situation in Darfur informed by the commitment of member States to finding a lasting solution to the problem in Darfur with a view to restoring peace, security and stability in the Sudan and the whole region and prevent further displacement and killings in that country.⁵⁷

Equally, following a decision by the ICC Appeals Chamber, which held that genocide charges may be brought in the Darfur case,⁵⁸ and especially against Al-Bashir,⁵⁹ the AUC issued a communiqué which condemned the amendment of the indictment to include genocide, emphatically adding:

56. Mary Kimani, *Pursuit of Justice or Western Plot?*, UN: AFRICA RENEWAL (Oct. 2009), <https://www.un.org/africarenewal/magazine/october-2009/pursuit-justice-or-western-plot>.

57. See Press Release, African Union, Sudan: Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC) (July 14, 2009) (responding to international criticism of African Union Commission [AUC], *Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court* (ICC), ¶ 10, AU Doc. Assembly/AU/Decl.245 (XIII) (July 14, 2009)).

58. Charging an incumbent government and its leader with genocide is certainly not devoid of wider political connotations, even if the charges are ultimately not substantiated at trial. See Andrew Cayley, *The Prosecution's Strategy in Seeking the Arrest of Sudanese President Al-Bashir on Charges of Genocide*, 6 J. INT'L CRIM. JUST. 829, 829–30 (2008).

59. Prosecutor v. Al Bashir, ICC-02/05-01/09-OA, Appeals Chamber Judgment on the Appeal of the Prosecutor Against the Decision on the Prosecution's Application for a Warrant of Arrest Against Al Bashir, ¶¶ 41–42 (Feb. 3, 2010).

The African Union has always emphasized its commitment to justice and its total rejection of impunity, in line with the relevant provisions of its Constitutive Act. At the same time, the AU reiterates that the search for justice should be pursued in a manner not detrimental to the search for peace. The latest decision by the ICC runs in the opposite direction.⁶⁰

This decision by the AU is reflective of the sentiment among African leaders and some African scholars that the enforcement of international criminal law, particularly through the ICC and universal jurisdiction, is geared exclusively towards Africa with a view to regime change. This animosity against what is seen as an extreme employment of the universality principle⁶¹ culminated in the establishment of a joint commission between the EU and Africa that would assess the possibility of a streamlined and certainly less invasive procedure.⁶² African critics view the proliferation of universal jurisdiction and the ICC's preoccupation with Africa as a Eurocentric approach to international law to which African values have an insignificant degree of input. This argument is no longer true given the Prosecutor's *proprio motu* investigations in Georgia, Palestine, Myanmar, Afghanistan, and the Philippines.⁶³

Certain strands of these critical views further argue in favor of an undercurrent which posits that certain types of conduct are

60. African Union Commission [AUC], *Communique on the 3 February 2010 Judgment of the ICC Appeals Chamber on Darfur*, ¶ 4 (Feb. 4, 2010).

61. African Union [AU] Assembly, *Decision of the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction*, ¶ 5, AU Doc. Assembly/AU/Dec.199 (XI) (July 1, 2008); African Union [AU] Assembly, *Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction*, ¶¶ 8–9, Doc. Assembly/AU/3 (XII) (Feb. 3, 2009); African Union [AU] Assembly, *Decision on the Abuse of the Principle of Universal Jurisdiction*, ¶ 4, Doc. EX/CL/640 (XVIII) (Jan. 30, 2011).

62. Rep. of the Council Secretariat, *The AU-EU Expert Report on the Principle of Universal Jurisdiction*, ¶ 46, EU Doc. 8672/1/09/REV 1 (Apr. 16, 2009); Julia Geneuss, *Fostering a Better Understanding of Universal Jurisdiction: A Comment on the AU-EU Expert Report on the Principle of Universal Jurisdiction*, 7 J. INT'L CRIM. JUST. 945, 946–47 (2009).

63. *Situations Under Investigation*, INT'L CRIM. CT., <https://www.icc-cpi.int/situations-under-investigations> (last visited Sept. 1, 2024).

not traditionally crimes under African custom. By way of illustration, it has been (unconvincingly) argued by defendants before the ICC that the war crime of forcibly enlisting children into the armed forces should not be applied to the African context because of the traditional and generally “voluntary” conscription of children into military bands affiliated with their tribal group.⁶⁴ As a result, the proponents of this view claim that child recruitment was in no way forced and the enlists did not consider their actions as legally or morally culpable.⁶⁵ These antiquated notions of cultural relativism are unconvincing for the sole reason that, despite their European origin, the relevant rules are prescribed in the laws of all African States.⁶⁶ Moreover, even where consent was given by the child, this was conditioned by illiteracy, abject poverty, loss of all family members, defense of family or community from attacks, or tacit approval by parents and elders.⁶⁷ Of course, all this debate unmasks the cultural ignorance of the West in relation to Africa and the treatment of

64. REDRESS, VICTIMS, PERPETRATORS OR HEROES? CHILD SOLDIERS BEFORE THE INTERNATIONAL CRIMINAL COURT 7–11 (2006).

65. See TIM KELSALL, *We Cannot Accept Any Cultural Consideration: The Child Soldiers Charge*, in CULTURE UNDER CROSS-EXAMINATION: INTERNATIONAL JUSTICE AND THE SPECIAL COURT FOR SIERRA LEONE 146, 152–70 (2009) (detailing the first international court to try defendants for enlisting child soldiers under age fifteen); David M. Rosen, *Child Soldiers, International Humanitarian Law, and the Globalization of Childhood*, 109 AM. ANTHROPOLOGIST 296, 300 (2007) (speaking to the “anemic” treaty language).

66. African Charter on the Rights and Welfare of the Child, art. 2, 22.

67. This does not mean that cultural relativism has no part to play in international criminal proceedings. Its utility is particularly evident in the law of evidence and procedure, which is alien to traditional societies. In Africa, for example, it is common for people to prize secrecy and convey evidence in narrative form, thus rendering testimony a sensitive and challenging operation. See Robert Cryer, *A Long Way from Home: Witnesses before International Criminal Tribunals*, 4 INT’L COMMENT ON EVIDENCE 1, 1–4 (2006). Such problems may easily be countered by analogy to best practices in other areas of law. In respect of indigenous land rights, a number of countries relax their evidentiary rules when relying on indigenous testimonies. Australia, for example, recently adopted its Evidence Amendment Act of 2008, which exempted all evidence relating to traditional law and custom from its regular hearsay and opinion evidence rules. The law similarly permitted the courts to extract evidence wholly or partially in narrative form, rather than in the usual format of questions and answers. See AUSTRALIAN HUM. RTS. COMM’N, NATIVE TITLE REP. 19–20 (2009). Additionally, the Malaysian High Court has admitted oral tradition evidence of native customary rights as hearsay, rejecting the arguments of the defendants. *Nor Anak Nyawai v. Borneo Pulp Plantation*, 6 M.L.J. 241, ¶ 29 (2001).

its problems without due concern for its culture and context. A minor but poignant example is the issue of cannibalism that surfaced in several cases before the Sierra Leone Special Court and which the Court took for granted, whereas anthropologists were adamant that cannibalism is but a powerful metaphor in West Africa and acts of cannibalism had not taken place.⁶⁸

Much of the hostility against the jurisdiction of the ICC stems from African states' perception that they are unable to control the relevant processes⁶⁹ and from the fact that the Security Council was largely inactive in relation to the Rwandan genocide, which it was aware was impending.⁷⁰ Indeed, the AU has always commended non-African nations where they have assisted their African counterparts in exercising extraterritorial jurisdiction against Africans, as was the case with Hissène Habré.⁷¹ By and large, self-referrals to the ICC were motivated by the relevant governments' animosity against the group alleged to have committed the crimes charged. The history of the ad hoc and hybrid tribunals shows that the territorial States were eager for full or partial control over the proceedings. In fact, while the post-genocide Rwandan government, itself the victim of Hutu atrocities, was initially a staunch supporter of the ICTR, it later withdrew its cooperation because it did not receive the authority and control over the proceedings that it had demanded.⁷² The AU has also criticized the Security Council, albeit on other grounds;⁷³

68. Gerhardt Anders, *Testifying About 'Uncivilized Events': Problematic Representations of Africa in the Trial Against Charles Taylor*, 24 LEIDEN J. INT'L L. 937, 954–56 (2011).

69. It is indicative that the AU Assembly emphasized its preference for an African mechanism as a matter of priority. See African Union [AU] Assembly, *Decision on the Hissène Habré Case and the African Union*, ¶ 3, AU Doc. Assembly/AU/8(VI) Add. 9 (Aug. 2, 2006).

70. Report of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda (1999), transmitted by Letter dated 5 December 1999 from the U.N. Secretary-General Addressed to the President of the Security Council, 30, 35–38, 50–51, 53–54, UN Doc. S/1999/1257 (Dec. 16, 1999).

71. African Union [AU] Assembly, *Decision on the Hissène Habré Case*, ¶ 5, AU Doc. EX/CL/866 (XXVI) (Jan. 31, 2015).

72. Payam Akhavan, *The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment*, 90 AM. J. INT'L L. 501, 504–05 (1996).

73. The OAU—as it was then named—initially criticized the establishment of the ICTR under a Chapter VII resolution instead of through a treaty, but by 1997, its prior

this experience was subsequently put to use in the case of the Sierra Leone Special Court, which ceded some local ownership to the people of Sierra Leone, although without any of the Chapter VII powers of the ICTY and ICTR.⁷⁴ This was indeed a sensible compromise and one that was praised by the AU-appointed High Level Panel on Darfur, which was headed by former South African president Thabo Mbeki.⁷⁵ The Mbeki Report saw the ICC indictment against Al-Bashir as a catalyst for justice,⁷⁶ but was reluctant to confirm the appropriateness of the ICC as a forum for resolving the Darfur crisis. The Report was careful to emphasize that:

Criminal justice will play an important role, but not an exclusive one, and must be underpinned by procedures that allow for meaningful participation of victims, as well as reparations and other acts of conciliation. Within the criminal justice system, the investigations, prosecutions, defen[s]e and judiciary must work in tandem, or in smooth sequence. Weaknesses in any one element of a criminal justice process would undermine the prospects of a successful outcome . . . In order to respond effectively to the violations in Darfur, the system will need to draw upon Sudan's rich legal heritage, including Sharia (Islamic) law and practice, to the extent that Sharia emphasi[z]es the participation of victims in proceedings and the making of reparations. Traditional justice models with their focus on conciliation and wider participation of the community also provide viable mechanisms for dealing with the past. Truth-telling and an independent and informed analysis

hesitation had given way to full cooperation. See Dijena Wembou, *The International Criminal Tribunal for Rwanda: Its Role in the African Context*, 321 INT'L REV. RED CROSS 685, 688–89 (1997).

74. Stephen J. Rapp, *The Compact Model in International Criminal Justice: The Special Court for Sierra Leone*, 57 DRAKE L. REV. 11, 20–23 (2008).

75. Rep. of the Afr. Union High-Level Panel on Darfur (2009), ¶ 268, AU Doc. PSC/AHG/2(CC VII) (Oct. 29, 2009) [hereinafter Mbeki Report].

76. *Id.* ¶¶ 244–45.

of the past, in order to draw out the lessons of Darfur for Sudan, should also be given priority.⁷⁷

It was not a leap too far, on the basis of these conclusions, for the Panel to suggest that the best possible mechanism was an independent *sui generis* hybrid tribunal.⁷⁸ The Mbeki Panel, therefore, implicitly rejected the appropriateness of the ICC on the grounds that it lacked local ownership, was unable to impose customary conciliatory mechanisms, and could not operate as an equal partner with other Sudanese justice initiatives, including sharia courts and customary courts dispensing *diya* or blood money.⁷⁹ The Panel was mindful not to state that ICC proceedings were injurious to the ongoing peace efforts in Sudan, but it is clear that it viewed the ICC's processes as far too rigid and remote for the exigencies of Darfur and the cultural experiences of its people. The Mbeki Report thus once again returned to validating the cultural relativist argument over and above the justice-versus-accountability dilemma. In its view—which reflects that of the AU, which endorsed its findings—it is the nature of the criminal proceedings that is relevant to the attainment of peace.

By implication, the question as to whether the imposition of justice mechanisms is generally detrimental to peace efforts was answered in the negative. As a result, the Panel did not wholly approve of the Special Criminal Court on the Events in Darfur

77. *Id.* ¶ 205.

78. *Id.* ¶¶ 252–54.

79. The general concept of blood money predates Islam and was practiced extensively in the Arabian Peninsula well before the advent of the Prophet Mohammed. In most Muslim criminal justice systems, the legislation on *diya* and *qisās* (essentially a claim for retaliation) is preceded by a detailed annex specifying the monetary value of each human organ or limb in terms of retaliation. See Oman Royal Decree No. 118/2008 Amending Blood Money and Royalties (issued Nov. 7, 2008, published Nov. 15, 2008) OG 875. It should be noted that *diya* is not a criminal punishment but merely civil compensation and belongs in the realm of private law, since in many cases it may be exacted from the perpetrator's male relatives. See RUDOLPH PETERS, CRIME AND PUNISHMENT IN ISLAMIC LAW: THEORY AND PRACTICE FROM THE SIXTEENTH TO THE TWENTY-FIRST CENTURY 7–8 (2006).

(SCCED)⁸⁰ established by the government of Sudan as a reaction to the Security Council referral.⁸¹ The SCCED and the relevant legislation of Sudan have rightly been viewed as inadequate by the international community outside Africa, given that the Court instigated a handful of investigations over minor crimes, such as theft,⁸² at a time when the situation in Darfur was being described as one of the worst humanitarian crises to have engulfed Africa.⁸³ However, despite the fact that the SCCED is unwilling to exercise effective criminal jurisdiction, the AU Assembly has challenged the ICC and those states exercising universal jurisdiction against Africans not only on the grounds of sovereignty and restricting local ownership but also on the grounds of peace.⁸⁴ It noted that by receiving Al-Bashir on their territory, the governments of Chad and Kenya were acting in “pursuit of peace and stability in their respective regions.”⁸⁵ There can be no doubt that this is also reflective of the power struggle between the AU and the ICC (and by extension the referral power of the Security Council under Article 16 of the Rome Statute),⁸⁶

80. See Mbeki Report, *supra* note 75, ¶¶ 215–27. The SCCED was established pursuant to a decree by the Chief Justice of Sudan. See Chargé d'affaires a.i. of the Permanent Mission of the Sudan to the United Nations, Letter dated June 18, 2005 from the Chargé d'affaires a.i. of the Permanent Mission of the Sudan to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2005/403 (June 22, 2005).

81. See S.C. Res. 1593 (Mar. 31, 2005) (emphasizing “the need to promote healing and reconciliation and encourag[ing] in this respect the creation of institutions, involving all sectors of Sudanese society”).

82. Unlike the Mbeki Report, which noted that Sudan’s rich local legal tradition is beneficial for the attainment of justice, Human Rights Watch was of the opinion that a diverse and conflicting legal tradition such as that of Sudan makes prosecution opaque and vague. See Mbeki Report, *supra* note 75, ¶ 205; HUM. RTS. WATCH, LACK OF CONVICTION: THE SPECIAL CRIMINAL COURT IN THE EVENTS IN DARFUR 2 (2006) [hereinafter LACK OF CONVICTION].

83. Despite attempts to revive the SCCED, nothing had changed at the time of writing; prosecutions were still ongoing in 2016, but several cases concerned political opponents, and none related to major international crimes. This is hardly surprising given the lack of political commitment and the Court’s staffing with lay people with limited legal training, as they were directly recruited from the military. See DARFUR JOINT ASSESSMENT MISSION, DEVELOPING DARFUR: A RECOVERY & RECONSTRUCTION STRATEGY 76 (2013).

84. LACK OF CONVICTION, *supra* note 82, at 1, 8, 26.

85. African Union [AU] Assembly, *Decision on the Implementation of the Decisions on the International Criminal Court*, ¶ 5, AU Doc. EX/CL/639(XVIII) (Jan. 30, 2011).

86. See, e.g., African Union [AU] Assembly, *Decision on the Progress Report of the Commission on the Implementation of the Decisions on the International Criminal Court*,

given that the AU Assembly regularly takes the position that AU member states are justified in ignoring Security Council resolutions and ICC indictments calling on all states to arrest and surrender particular African leaders because they are acting in conformity with their commitments under the AU Charter.⁸⁷

From a purely legal point of view, the imposition of conciliatory mechanisms, such as *diya*, to deal with serious international crimes is contrary to State obligations to punish offenders.⁸⁸ These mechanisms are also incompatible with the obligations of African States under the Rome Statute and other major international treaties, such as the 1948 Genocide Convention⁸⁹ and the 1949 Geneva Conventions.⁹⁰ Yet there is no reason why they cannot constitute supplementary processes alongside the operation of an independent and impartial hybrid

AU Doc. Assembly/AU/13(XXII) (Jan. 31, 2014) (expressing disappointment that the African Union's requests to the U.N. Security Council to defer the proceedings against the Presidents of Kenya and Sudan under Article 16 of the Rome Statute of ICC had not been acted upon).

87. African Union [AU] Assembly, *Decision on the Progress Report of the Commission on the Implementation of the Assembly Decisions on the International Criminal Court*, ¶ 7, AU Doc. EX/CL/710(XX) (Jan. 30, 2012); African Union [AU] Assembly, *Decision on the International Criminal Court*, ¶ 3, AU Doc. EX/CL/952(XXVIII) (Jan. 31, 2016).

88. This is not to say that monetary compensation is generally rejected as a form of punishment. Rather, criminal theorists such as Duff argue that while it may communicate formal censure and be appropriate for certain crimes, such as offences of greed, it is not suited to the richer communicative purposes which punishment should serve in respect of serious crimes such as rape. See ANTHONY R. DUFF, *PUNISHMENT, COMMUNICATION AND COMMUNITY* 146–47 (2003).

89. See Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (requiring that “persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals”).

90. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31 (obligating conflicting parties during wartime to protect and respect members of the field armed forces who have fallen into the hands of the enemy); Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85 (obligating conflicting parties during wartime to protect and respect wounded, sick, and shipwrecked persons who have fallen into the hands of the enemy); Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135 (stating the obligations and restrictions of states in cases concerning prisoners of war); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287 (obligating states to offer certain protections to civilian persons during wartime).

tribunal or other local courts, as was the case with so-called Gacaca courts in Rwanda.⁹¹ Of course, in practice, Gacaca courts failed the test of objectivity because they were manipulated by the Rwandan government.⁹² However, sound, reliable, and independent justice mechanisms, whatever their form or structure, can play a primary or supplementary role in meting out justice. There is no shortage of adequate judges who can satisfy the demands against cultural bias. The Mbeki Report suggested that exiled or ousted legal experts and former judges be brought in as judges in a potential hybrid court or other Sudanese courts.⁹³ Some empirical data, however, suggests that only a small percentage of Africans believe that traditional justice mechanisms are sufficient to address large-scale crimes, although generally, peace with amnesty is the preferred choice for afflicted communities.⁹⁴ It is telling that in the particular circumstances of General Ntaganda, Rwandese officials were reported as telling U.N. experts that “Bosco contributes to peace and security to the region, which converges with Rwanda’s aims.”⁹⁵

91. These are transitional justice mechanisms that operated at cellule (village) level in Rwanda and which co-existed in parallel with domestic Rwandan courts. Although this mechanism was traditionally established to deal with minor offences and family disputes at the community level on the basis of African customary law, the Gacaca courts established in the aftermath of the country’s genocide were constituted and activated under Rwandan law to prosecute those responsible for the lesser categories of the genocide. See Organic Law No. 40/2000 of 26/01/2001 Setting Up Gacaca Jurisdictions and Organizing Prosecutions for Offenses Constituting the Crime of Genocide or Crimes against Humanity Committed between October 1990 and December 31, 1994, (2001).

92. HUM. RTS. WATCH, *JUSTICE COMPROMISED: THE LEGACY OF RWANDA’S COMMUNITY-BASED GACACA COURTS* 3 (2011) [hereinafter *JUSTICE COMPROMISED*].

93. Mbeki Report, *supra* note 75, ¶ 206.

94. Of those surveyed in Northern Uganda, 29% preferred the ICC, 28% preferred Ugandan courts, 20% preferred the amnesty commission, and only 3% preferred the sole use of traditional justice mechanisms. When asked if they preferred peace with amnesty or peace with trials, 80% of the respondents preferred peace with amnesty. See PATRICK VINCK ET. AL, UNIV. CALIF. BERKELEY HUM. RTS. CTR., *RESEARCH NOTE ON ATTITUDES ABOUT PEACE AND JUSTICE IN NORTHERN UGANDA* 2 (2007).

95. Final Rep. of the Group of Experts on the Democratic Republic of the Congo (2004), Letter dated 29 November 2011 from the Chairman of the Security Council Comm. Established Pursuant to Resolution 1533 (2004) Concerning the Democratic Republic of the Congo Addressed to the President of the Security Council, 194, U.N. Doc. S/2011/738 (Dec. 2, 2011) [hereinafter *Final Rep. of the Group of Experts on the Democratic Republic of the Congo* (2011)].

In the opinion of this author, although the ICC is not a *sine qua non* condition for the judicial determination of serious crimes committed in Africa, it is necessary to the degree that other independent courts are unavailable. This conveniently brings us to the final argument among African nations that helps to explain their animosity towards the ICC in that, unlike their powerful European and North American counterparts, they are not allowed to uphold their primacy of jurisdiction. This argument is largely premised on the fact that the Prosecutor of the ICC disregarded the establishment and operation of the SCCED in Sudan.⁹⁶ Many African States, particularly those governed by dictatorial or autocratic regimes, are therefore concerned that a possible *proprio motu* investigation by the Prosecutor⁹⁷ may culminate in a rejection of the principle of complementarity on the ground that the criminal courts of the territorial State are unable or unwilling to prosecute.⁹⁸ This apprehension is further strengthened by the perception that the litmus test for inability and unwillingness employed by the ICC⁹⁹ is predicated on the Western model of criminal justice which is, moreover, rich in resources and staff as compared to local courts in Africa. This argument is not wholly viable as the practice of the international community is to sanction only "genuine" unwillingness and inability, as seen via the Libyan investigation of the Lockerbie bombers, who were acting under orders from that country (unwillingness)¹⁰⁰ and in post-genocide Rwanda, whose legal system had fully collapsed (inability).¹⁰¹

IV. THE EFFECTS OF INTERNATIONAL CRIMINAL JUSTICE INITIATIVES ON AFRICAN PEACE PROCESSES

There is no certain way to measure the effects of arrest warrants or the commencement of investigations on ongoing peace processes. The result in any particular case is dependent on

96. Mbeki Report, *supra* note 75, ¶ 239.

97. Rome Statute, *supra* note 32, art. 15.

98. Rome Statute, *supra* note 32, art. 17, ¶ 1(a).

99. *Id.*, art. 17.

100. S.C. Res. 748, ¶ 4 (Mar. 31, 1992).

101. JUSTICE COMPROMISED, *supra* note 92, at 131.

the personalities of the relevant actors, their comparative military and political capacity, their popular support, and the range of supplementary measures and policies put in place to counter the impact of criminal justice initiatives. Regardless, some fundamentals must be incorporated from the outset at the negotiating table, chief among these being the rule of law.¹⁰² Recent events have shown that where peace negotiations are driven by the feuding parties themselves, there is a strong tendency in favor of wide-ranging amnesties as a natural enticement for those in hiding to lay down their arms and return to civilian life.¹⁰³ This is generally the result of military parity between the parties, which naturally leads to more concessions by the established government. The primary concession typically concerns the granting of a general amnesty.¹⁰⁴ The involvement of the international community in peace negotiations has provided an additional dimension that was absent in the past—namely, an imbalance of political power between the parties in favor of the established government.

In theory, the combined forces of the government and the international community need not make wide-ranging concessions to rebel forces. In practice, results have been mixed and not always predictable. By way of illustration, although Article IX of the 1999 Lome Convention granted amnesties to all rebel combatants as long as the terms of the agreement were adhered to, this did not stop the international community from establishing the Sierra Leone Special Court, which subsequently

102. For an overview of some of the facets of this concept in international law, see JEREMY M. FARRALL, UNITED NATIONS SANCTIONS AND THE RULE OF LAW 16–20 (2007).

103. *Disarmament, Demobilization and Reintegration*, U.N. INST. FOR TRAINING & RSCH., <https://unitar.org/sustainable-development-goals/peace/our-portfolio/disarmament-demobilization-and-reintegration> (last visited Aug. 31, 2024).

104. African experience demonstrates that where one group has subjugated its foe militarily, one of its first governmental actions is to initiate criminal proceedings in order to restore the rule of law. We have already discussed the Rwandan example at length. Another interesting example of this phenomenon is the Transitional Government of Ethiopia's establishment of a Special Prosecutor's Office in 1992, following the deposition of the Derg regime. This process eventually led to the prosecution of the ex-president. See generally, Girmachew Alemu Aneme, *The Anatomy of Special Prosecutor v. Colonel Mengistu Hailemariam et al. (1994-2008)*, 4 INT'L J ETHIOPIAN STUD. 1 (2009). For a thorough analysis, See Firew K. Tiba, *The Mengistu Genocide Trial in Ethiopia*, 5 J. INT'L CRIM. JUST. 513, 525 (2007).

ruled that Article IX had been effectively abrogated because the rebel leaders had violated the terms of the agreement.¹⁰⁵ Moreover, as has already been stated, the Special Court ruled that amnesties in respect of international crimes were, in any event invalid under customary international law.¹⁰⁶ This result—that is, the gradual overturning of the precise terms of an amnesty under a peace agreement—would be unattainable in the context of a strict *inter partes* agreement, irrespective of a subsequent power imbalance between them.¹⁰⁷ This is clearly exemplified by the outcome of the Truth and Reconciliation Commission in South Africa following the dissolution of the apartheid regime, as well as by the practice of the amnesties offered in South and Central America in the 1980s and 1990s.¹⁰⁸ On the other hand, the involvement of international negotiators—supported by the U.N. or other intergovernmental organizations—in local peace efforts from their inception up until late in the period of post-conflict reconstruction has, in the majority of cases, resulted in the prosecution of those responsible for international crimes, irrespective of whether the peace package included an amnesty.¹⁰⁹ This is certainly true of all

105. Kondewa, *supra* note 47, ¶ 28. See also Prosecutor v. Kallon, No. SCSL-2004-15-AR72(E), Sierra Leone Special Court, ¶ 1 (Mar. 13, 2004) (stating that the Special Court should not assert jurisdiction over crimes committed prior to July 1999 when an amnesty was granted by virtue of the Lomé Agreement).

106. Kallon, *supra* note 104, ¶¶ 42, 44.

107. Lucio Parada Cea et al., Case 10.480, Inter-Am. Comm'n H.R., Report No. 1/99, OEA/Ser.L/V/II.102, doc. 6 rev. ¶ 116 (1999); Prosecutor v. Furundžija, Trial Chamber Judgment, No. IT-95-17/1-T, ¶ 155 (ICTY Dec. 10, 1998); U.N. Hum. Rts. Comm., CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), U.N. Doc. HRI/GEN/1/Rev.1, at 30–33 (Mar. 10, 1992).

108. For more on truth commissions, see Priscilla B. Hayner, *Fifteen Truth Commissions 1974 to 1994: A Comparative Study*, 16 HUM. RTS. Q. 597, 633, 635–36 (1994); see also Thomas Buergenthal, *The United Nations Truth Commission for El-Salvador*, 27 VAND. J. TRANS. L. 498, 535–36 (1994).

109. See, e.g., Comprehensive Peace Agreement Between the Government of Liberia and the Liberians United for Reconciliation and Democracy (LURD) and the Movement for Democracy in Liberia (MODEL) and Political Parties, August 18, 2003. The agreement is available at: https://www.usip.org/sites/default/files/file/resources/collections/peace_agreements/liberia_08182003.pdf. It should be noted that this is an agreement between a government and a rebel (non-state entity the object of which is to persuade the latter to

existing hybrid tribunals—East Timor, Cambodia, and Sierra Leone—whose establishment was preceded by some form of peace agreement.¹¹⁰ Hence, the involvement of the international community politically weakens the party committing crimes during the negotiating rounds or otherwise renders it susceptible to criminal prosecution in the post-conflict phase.

The ICC Prosecutor's involvement in African crimes should primarily be assessed from the point of view of the aforementioned involvement of the international community in regional peace efforts. There certainly does seem to exist some degree of linkage between ICC prosecutions and UN-AU mediation initiatives. Strictly speaking, such a relationship would be otherwise incompatible with the terms of the Prosecutor's independence. This does not, of course, mean that the Prosecutor's discretion is not somehow affected by ongoing peace negotiations, although his decisions to prosecute have so far been based exclusively on referrals and not on the basis of *proprio motu* initiatives. Nonetheless, the Prosecutor could have declined to entertain some of these referrals if he believed that they were politically motivated and contrary to the wider interests of justice. This is especially important to consider in light of referrals to the Prosecutor by the Security Council, which is a quintessential political organ that adopts decisions based primarily on political criteria. Hence, if the Prosecutor ever chose to exercise his discretion, it conceivably encompassed Council resolutions clearly and blatantly antithetical to the interests of justice and which a comparatively independent prosecutor would have been under no duty to entertain.

V. THE ICC AND THE HAMAS-ISRAEL MEDIATION

Although mediation efforts between Israel and Hamas were not uncommon, the post-October 7 mediation involving the two sides has been lengthy, complex, and unprecedented. It is because

end its armed struggle and provide amnesty to the rebels. Although the Agreement drew U.N. support, ultimately, one of the architects, Charles Taylor, was prosecuted.

110. Jennifer Gavron, *Amnesties in the Light of Development in International Law and the Establishment of the International Criminal Court*, 51 INT'L & COMPARATIVE L. Q. 91, 94–99 (2002).

of these protracted mediatory efforts, at least in part, that when the ICC Prosecutor indicted the three most senior Israeli politicians, alongside their Hamas counterparts,¹¹¹ the U.S. President, Joe Biden, attacked both the office and the character of the ICC Prosecutor.¹¹² Other members of Congress, irrespective of political affiliation, were even more critical,¹¹³ and ultimately, both the Prosecutor and members of the ICC judiciary were told in explicit terms that if they persisted with the indictment, they would suffer personalized sanctions.¹¹⁴ During that time, it was revealed that the head of the Israeli secret services, the Mossad, had approached the former ICC Prosecutor several times and threatened her to abandon the war crimes investigation.¹¹⁵ However, by May 2024, there was a real dilemma that was not necessarily present in all of the other situations examined in this article: a) there was a real likelihood that the U.S., Qatar, and Egypt could broker a peace agreement between Hamas and Israel;¹¹⁶ b) there was mounting internal pressure within Israel for a semi-permanent ceasefire;¹¹⁷ and c) the continuation of the conflict, unlike African conflicts, was dependent largely, if not exclusively, on a state entity.

111. ICC, Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for Arrest Warrants in the Situation in the State of Palestine (May 20, 2024).

112. Robert Tait, *Biden Attacks Request by ICC Prosecutor for Netanyahu Arrest Warrant*, THE GUARDIAN (May 21, 2024), <https://www.theguardian.com/us-news/article/2024/may/20/biden-icc-warrant-netanyahu>.

113. Jacob Magid, *Republican Senators Warn ICC Prosecutor: Target Israel and We Will Target You*, TIMES OF ISRAEL (May 6, 2024), <https://www.timesofisrael.com/republican-senators-warn-icc-prosecutor-target-israel-and-we-will-target-you/>.

114. See H.R. 8282, 118th Cong. (2024) (claiming that the indictment against Israeli officials is baseless and illegitimate and that, should the ICC Prosecutor go forward, a number of sanctions are to be imposed by the U.S. President).

115. Harry Davies, *Revealed: Israeli Spy Chief Threatened ICC Prosecutor Over War Crimes Inquiry*, THE GUARDIAN (May 28, 2024), <https://www.theguardian.com/world/article/2024/may/28/israeli-spy-chief-icc-prosecutor-war-crimes-inquiry>

116. Felicia Schwartz & Andrew England, *US, Egypt and Qatar in Urgent Push to Secure Israel-Hamas Ceasefire*, THE FIN. TIMES LTD. (Aug. 9, 2024), <https://www.ft.com/content/c6c44c73-ab05-4871-be10-45b75768532b>.

117. *Bring Them Home Now*, HOSTAGES AND MISSING FAMILIES FORUM, <https://stories.bringthemhomenow.net> (last visited Aug. 31, 2024) (illustrating focus on the safe return of all Israeli citizens held hostage by the terrorist organization Hamas).

Despite key differences from African conflicts, in which the ICC was asked or decided to intervene, this article does not subscribe to the U.S. view that the ICC should have allowed the mediation efforts to take their course or that the indictment inflamed the situation on the ground in Gaza. The starting point for this perspective can be found in Security Council Resolution 2133, which calls “upon all Member States to prevent terrorists from benefiting directly or indirectly from ransom payments or from political concessions and to secure the safe release of hostages.”¹¹⁸

Since at least 2014, there seems to have been a consensus that states should not make political concessions to terrorists.¹¹⁹ Thus, by extension, any mediation effort between Hamas and Israel cannot, in any way, prevent the prosecution of those involved in international offenses. Even the Non-Aligned Movement subscribed to the prohibition of material support and political concessions to terrorist kidnappings in its Final Document of the 16th Summit of the Heads of State or Government in 2013.¹²⁰ The U.S. position, at least overtly, was no different. Since the Clinton administration, despite the U.S. supporting the so-called Middle East peace effort, especially through the prohibition of material support to terrorist groups,¹²¹ it became evident that there was a real need to engage with key terror groups, if only because their defeat was impossible and they enjoyed significant public support.¹²²

The problem was that these entities, including Hamas, had been officially designated as terrorist organizations that were

118. S.C. Res. 2133, ¶ 3 (Jan. 27, 2014).

119. Yvonne M. Dutton, *Funding Terrorism: The Problem of Ransom Payments*, 53 SAN DIEGO L. REV. 335, 345 (2016); Marc J. Randazza, *Getting to Yes with Terrorists*, 4 MICHIGAN STATE L. REV. 823, 826 (2002).

120. 16th Summit of Heads of State or Government of the Non-Aligned Movement, *Final Document*, ¶ 225(6), NAM 2012/Doc.1/Rev.2 (Aug. 31, 2012).

121. See Exec. Order No. 12,947 60 Fed. Reg. 5,079 (Jan. 23, 1995). This Order was expanded by subsequent orders, such as Exec. Order No. 13,099, 63 Fed. Reg. 45,167 (Aug. 25, 1998), which imposed sanctions on any person or entity dealing with designated terrorist organizations.

122. *Israeli Military Spokesman's Hamas Defeat Remarks Widen Rift with Netanyahu*, AL-JAZEERA (June 20, 2024), <https://www.aljazeera.com/news/2024/6/20/israeli-military-spokesmans-hamas-defeat-remarks-widen-rift-with-netanyahu>.

subject to sanctions.¹²³ The fact that the U.S. set up channels of communication with such entities did not in any way impede the prosecution of these groups or individual members thereof. As a result, there is no practice, let alone legal compulsion, whereby states are prevented from indicting and prosecuting individuals accused of serious crimes simply because their underlying organization is involved in a ceasefire, peace talks, or other negotiation/mediation.

The October 7, 2023, attacks by Hamas resulted in the death of around 1,200 Israelis (the vast majority being innocent civilians) and the taking of more than 200 hostages.¹²⁴ The Israeli Defense Forces (IDF) initiated a military operation in Gaza which involved one of the largest bombing campaigns in history, at least in terms of firepower, and which was largely indiscriminate. Although the numbers are disputed, it is generally argued that by late June 2024, the civilian death toll in Gaza had reached almost 40,000.¹²⁵

When the crisis broke out, it was clear to all stakeholders, including the US, Israel, and Gulf states, that Qatar was willing to mediate.¹²⁶ A little bit of background is important because it is not clear why Qatar volunteered in the first place and what made it an ideal, if at all, mediator in the dispute. After all, it was the only country in the Gulf that did not subscribe to the Abraham Accords by which to normalize relations with Israel.¹²⁷ Qatar had long aspired to be the key mediating voice in the Gulf, the Middle East, and Asia (and beyond if possible). In the last two decades, Qatar had carefully erected a dynamic foreign policy and

123. *Foreign Terrorist Organizations*, U.S. DEPARTMENT OF STATE, <https://www.state.gov/foreign-terrorist-organizations/>. See also Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001) (designating terrorist entities in real time, as it is a “live” order and, as such, is regularly subject to change).

124. *2023-2024 Hostilities and Escalating Violence in the OPT | Account of Events*, DIAKONIA INT’L HUMANITARIAN L. CTR. (Jan. 12, 2024), <https://www.diakonia.se/ihl/news/2023-hostilities-in-gaza-and-israel-factual-account-of-events/>.

125. Ishaan Tharoor, *Israel Shrugs at Palestinian Civilian Casualties: So Does Hamas*, WASH. POST (June 12, 2024), <https://www.washingtonpost.com/world/2024/06/12/hamas-death-toll-gaza-sinwar-messages/>.

126. Sultan Barakat, *Qatar’s Mediation – Motivations, Acceptance and Modalities*, ACCORD, Feb. 2024, at 37, 39 (2024).

127. Abraham Accords, Isr.-U.A.E., Sept. 15, 2020, 3378 U.N.T.S. 56565.

diplomacy infrastructure.¹²⁸ Despite its small size, Qatar effectively thwarted the blockade against it, which was instituted by the likes of Saudi Arabia, the UAE, and Egypt, demonstrating major diplomatic skills.¹²⁹ It is also one of the biggest donors to the U.N.¹³⁰ Its experience with the US-Taliban negotiations,¹³¹ as well as other less high-profile mediations concerning hostages, had given its diplomats valuable experience.¹³²

128. In fact, “mediating disputes between conflicting parties to achieve peaceful resolutions” is a stated priority in Qatar’s official foreign policy. See *Foreign Policy*, GOV’T COMM’NS OFF., <https://www.gco.gov.qa/en/focus/foreign-policy-en/> (last visited Oct. 5, 2024) (Qatar). See also *Trump Praises Qatar’s Efforts on Combating Terrorist Financing*, BBC (Apr. 11, 2018), <https://www.bbc.com/news/world-middle-east-43724576>. This was a significant statement because Gulf states were routinely accused by the West for filtering financial resources to terror groups.

129. See Kristian Coates Ulrichsen, *QATAR AND THE GULF CRISIS: A STUDY OF RESILIENCE* 1-25 (2020). Several scholars have maintained that Qatar has positioned itself as a key “norm entrepreneur” in international affairs. See also Nicolas Fromm, *CONSTRUCTIVIST NICHE DIPLOMACY: QATAR’S MIDDLE EAST DIPLOMACY AS AN ILLUSTRATION OF SMALL STATE NORM CRAFTING* (2019); Kristian Coates Ulrichsen, *QATAR AND THE ARAB SPRING* (2014). See also Alex MacDonald, *Qatar Blockade: What Caused It and Why Is It Coming to an End?*, MIDDLE EAST EYE (Jan. 5, 2021), <https://www.middleeasteye.net/news/qatar-blockade-saudi-arabia-lift-cause-end>.

130. *Qatar Announces Half a Billion USD in Funds to UN Agencies*, DOHA FORUM (Dec. 16, 2018), <https://dohaforum.org/press-releases/2019/04/28/qatar-announces-half-a-billion-usd-in-funds-to-un-agencies>.

131. In 2013, the U.S. requested Qatar to host a Taliban high delegation in Doha so that Qatar could serve as mediator. See Bruce Riedel, *Why Karzai Suspended Negotiations after Taliban Opened Doha Office*, BROOKINGS INST. (June 20, 2013), <https://www.brookings.edu/articles/why-karzai-suspended-negotiations-after-taliban-opened-doha-office/>. Qatar’s mediatory role was very successful, particularly because in 2020 it managed to broker a U.S.-Taliban agreement. See *Agreement for Bringing Peace to Afghanistan*, Ta-U.S., Feb. 29, 2020, <https://www.state.gov/wp-content/uploads/2020/02/Agreement-For-Bringing-Peace-to-Afghanistan-02.29.20.pdf>.

132. The crises in Lebanon, Yemen, Eritrea/Djibouti, and Sudan were key mediating battlegrounds for Qatar in the 2010s. See Mehran Kamrava, *Mediation and Qatari Foreign Policy*, 65 MIDDLE EAST J. 539, 539–56 (2011); Sultan Barakat, *Qatari Mediation: Between Ambition and Achievement*, BROOKINGS INST. (Nov. 2014), <https://www.brookings.edu/wp-content/uploads/2016/06/final-pdf-english.pdf>. But see Kristian Coates Ulrichsen & Giorgio Cafiero, *Qatar’s Role in Sudan’s Crisis: Limited Influence and Humanitarian Engagement*, GULF INT’L F., <https://gulffif.org/qatars-role-in-sudans-crisis-limited-influence-and-humanitarian-engagement/> (last visited Sept. 13, 2024). In the post-2021 Sudan crisis, Qatar’s involvement reflected its limited influence amidst competing regional powers. Qatar’s focus on post-conflict recovery and investment positions it for a bigger role in Sudan’s future when peace is achieved.

It is in light of these underpinnings—and consistent with its Taliban-related experience—that Qatar consented to the opening of a representative Hamas office in Doha in 2012, following a *direct* request from the U.S. with a view of keeping communications channels open.¹³³ Hence, while the U.S. was putting Hamas on its list of terror groups, it nonetheless tweaked its no-concession policy with the knowledge that Hamas was a key stakeholder in Middle Eastern politics. Even so, the U.S. did not want to be viewed as directly engaged with this organization, so Qatar, a country relatively unknown to the American public, could undertake this role under the (false) guise of intra-Islamic relations. Even so, and despite the fact that Qatar made it clear that it does not endorse Hamas¹³⁴ (while fully in support of Palestinian self-determination), the U.S. seems to be distancing itself from its request to Doha to host a representative Hamas office on its territory. This has led to unfounded accusations (which not even the American government supports) of links between Hamas and Qatar, many of which are nonetheless widespread in American media¹³⁵ and via Israeli-backed American think tanks.¹³⁶ Nonetheless, it is clear to all that Qatar's past mediatory role was successful, particularly since it brokered at least three ceasefires between Hamas and Israel in 2014, 2021, and 2022.¹³⁷ In light of this background, Qatar was the obvious and only choice for the mediator, as negotiations between Hamas and Israel had long been taken off the table, and

133. Meshal bin Hamad Al-Thani, *Qatar is the Mid-East's Honest Broker*, WALL ST. J. (Oct. 29, 2023), <https://www.wsj.com/articles/qatar-is-the-mideasts-honest-broker-hamas-israel-america-middle-east-conflict-peace-19e3cc0f>.

134. *Id.*

135. Kate Havard & Jonathan Schanzer, *By Hosting Hamas, Qatar is Whitewashing Terror*, NEWSWEEK (May 11, 2017), <https://www.newsweek.com/qatar-hosting-hamas-whitewashing-terror-606750>.

136. See Richard Goldberg, *How America and its Allies Can Stop Hamas, Hezbollah and Iran from Evading Sanctions and Financing Terror*, FOUND. DEF. DEMOCRACIES (Oct. 25, 2023), <https://www.fdd.org/analysis/2023/10/25/how-america-and-its-allies-can-stop-hamas-hezbollah-and-iran-from-evading-sanctions-and-financing-terror/> (suggesting that U.S. foreign policy has enabled Turkey and Qatar to “become state sponsors of Hamas”).

137. *Palestinian Joy as Israel Agrees Gaza Truce*, AL JAZEERA (Aug. 27, 2014), <https://www.aljazeera.com/news/2014/8/27/palestinian-joy-as-israel-agrees-gaza-truce>; Statement on the Cease-Fire in Gaza, Daily Comp. Pres. Docs., 2022 DCPD No. 00698 (Aug. 7, 2022).

the process of mediation itself had been pre-destined for the eventuality of such a circumstance.

The Hamas–Israel standoff of 2023-2024 exemplifies why the ICC should not halt prosecution for serious crimes even in the face of ongoing negotiations or mediation between the warring parties. What started off as a legitimate response by Israel to the Hamas attack quickly turned into an indiscriminate bombing campaign against all of Gaza. It was not surprising, therefore, that the International Court of Justice (ICJ) went on to issue an order against Israel, compelling it to take measures to prevent what it saw as *prima facie* evidence of genocide.¹³⁸ The key political ally of Israel, the U.S., which is also among the mediators in the conflict, has justified the violation of international humanitarian law (IHL). Additionally, in the first U.S. Presidential Debate in 2024, former President Donald Trump accused incumbent President Biden of not allowing Israel to “finish the job.”¹³⁹ A year into the conflict, at the time of this writing, it is not clear which of the warring parties is stalling a definitive ceasefire and whether or not the U.S. and Israel desire a ceasefire.¹⁴⁰

A ceasefire agreement was announced on November 22, 2023. It involved a four-day ceasefire and a limited exchange of hostages.¹⁴¹ The ceasefire was extended a few more times for one or two days upon the release by Hamas of ten or more hostages.¹⁴²

138. Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (S. Afr. v. Isr.), Order for Provisional Measures, 2024 I.C.J. 192, ¶ 86 (Jan. 26).

139. Kanishka Singh, *Trump Criticized for ‘Palestinian’ Insult in Debate with Biden*, REUTERS (June 28, 2024), <https://www.reuters.com/world/us/trump-criticized-palestinian-insult-debate-with-biden-2024-06-28/>

140. *UN Security Council Still at Loggerheads over Pause Versus Ceasefire After Gaza Meet*, THE ISR. TIMES (Nov. 7, 2023), <https://www.timesofisrael.com/un-security-council-still-at-loggerheads-over-pause-versus-ceasefire-after-gaza-meet/>. Ultimately, the U.N.S.C. adopted a resolution aimed at all parties involved. S.C. Res. 2712, (Nov. 15, 2023) (“demand[ing] [...] that all parties comply with their obligations under international [humanitarian] law[, ...] notably with regard to the protection of civilians[; ...] call[ing] for urgent and extended humanitarian pauses[.]”).

141. *Israel and Hamas Reach Hostage Deal, Temporarily Halt Fighting in Gaza*, OPEN ACCESS GOV'T (Nov. 22, 2023), <https://www.openaccessgovernment.org/israel-and-hamas-reach-hostage-deal-temporarily-halt-fighting-in-gaza/170502/>.

142. Scott Neuman, et al., *Israel and Hamas Extend Temporary Truce for Another Day*, NPR (Nov. 30, 2023), <https://www.npr.org/2023/11/29/1215762834/hostages-israel-hamas-ceasefire-truce-gaza-war>.

As of the time of writing, nothing else has happened despite the U.S. Foreign Secretary, Anthony Blinken, attending summits and visiting leaders in the Middle East and Israel constantly.¹⁴³ In fact, Israel has gone far beyond its initial justification of self-defense without any respite of the hostilities in sight or the plight of civilians in Palestine. Even if an agreement is to be reached between the warring parties, it is not at all clear what such agreement will look like, and certainly this will not in any way justify or settle the impunity of those involved in the negotiations or their subordinates. In equal measure, given the hard position of both Hamas and Israel, it is highly unlikely that either party would be deterred by an ICC indictment in a manner that would culminate in an abrupt end to the mediation effort. Going a step further, an ICC indictment and the ICJ's involvement in the dispute, unlike all the African conflicts where parties are unconcerned with their image, Israel has certainly used the ICC indictment to elicit sympathy from its support base in the U.S., chiefly through funding political candidates¹⁴⁴ and promoting Israel-friendly advertisement campaigns.¹⁴⁵

VI. MARGINALIZATION

One of the contemplated potential impacts of ICC arrest warrants is that of 'marginalization.'¹⁴⁶ It is argued that a

143. *Secretary Blinken's Travel to Saudi Arabia, Jordan and Israel, April 29-May 1, 2024*, U.S. DEP'T OF STATE (Apr. 27, 2024), <https://www.state.gov/secretary-travel/secretary-blinkens-travel-to-saudi-arabia-jordan-and-israel-april-29-may-1-2024/>; *Anthony Blinken in Middle East Says He Is Focused on Gaza Ceasefire*, AL-JAZEERA (June 10, 2024), <https://www.aljazeera.com/news/2024/6/10/antony-blinken-in-middle-east-says-he-is-focused-on-gaza-ceasefire-deal>.

144. Christ McGreal, *The Pro-Israel Groups Planning to Spend Millions in US Elections*, THE GUARDIAN (Apr. 22, 2024), <https://www.theguardian.com/world/2024/apr/22/aipac-pro-israel-lobby-group-us-elections>.

145. Liv Martin et al., *Israel Floods Social Media to Shape Opinion Around the War*, POLITICO (Oct. 17, 2023), <https://www.politico.eu/article/israel-social-media-opinion-hamas-war/>; see also Laura Silver et al., *Majority in US Say Israel Has Valid Reasons for Fighting: Fewer Say the Same About Hamas*, PEW RES. CTR. (Mar. 1, 2024), <https://www.pewresearch.org/2024/03/21/majority-in-u-s-say-israel-has-valid-reasons-for-fighting-fewer-say-the-same-about-hamas/> (indicating the success of such Israel-friendly advertising campaigns).

146. Marginalization is meaningless without a solid understanding of so-called "warlordism" and the power yielded by warlords in the communities in which they operate.

probable effect of an arrest warrant weakens the negotiating power of the target party, decreases its popular base, and, by extension, marginalizes it both domestically and internationally. The test cases in support of this argument are the Darfur and Lord's Resistance Army (LRA) indictments. The former, as has already been stated, has been the subject of mixed reviews, with some actors claiming a degree of marginalization while other actors, particularly from within the AU, seem to have rallied around Al-Bashir while he was in power.¹⁴⁷ Meanwhile, the LRA case is interesting from the point of view of the target group, which is a rebel entity. The LRA is accused of widespread crimes over the course of the late 1990s and 2000s in Northern Uganda and, until the fall of Al-Bashir, was assisted by his government through some degree of financing and the provision of safe havens in Southern Sudan (before its independence in 2011) as the base for their operations.¹⁴⁸ The Ugandan government's failure to successfully negotiate a peace settlement with the leaders of the LRA forced the country's president, Yoweri Museveni, to refer the situation to the ICC, which proceeded to unseal its arrest warrants in October 2005; less than a year later, however, in July 2006, Museveni announced a complete amnesty for all LRA combatants under the condition that they renounce terrorism and accept peace.¹⁴⁹ In response to the unsealing of the indictments and the active involvement of the ICC, severe criticism was meted out by all local actors, including the Acholi people, who were the subject of attacks and forced child recruitment; the Catholic Archbishop in Uganda; former and current mediators; and many

See Kimberly Marten, Warlordism in Comparative Perspective, 31 INT'L SEC. 41, 41 (2006).

147. See *African Union Refuses to Cooperate with Bashir Arrest Warrant*, AMNESTY INT'L (July 6, 2009) <https://www.amnesty.org/en/latest/news/2009/07/african-union-refuses-cooperate-bashir-arrest-warrant-20090706/> (describing the AU's refusal to acknowledge the ICC's war crimes arrest warrant against Bashir); see also Luke Moffett, *Al-Bashir's Escape: Why the African Union Defies the ICC*, THE CONVERSATION (June 15, 2015) <https://theconversation.com/al-bashirs-escape-why-the-african-union-defies-the-icc-43226>.

148. *Ugandan Army Says Sudan is Backing Joseph Kony's LRA*, BBC NEWS (April 30, 2012) <https://www.bbc.com/news/world-africa-17890432>.

149. Manisuli Ssenyonjo, *The International Criminal Court and the Lord's Resistance Army Leaders: Prosecution or Amnesty?*, 54 NETH. INT'L L. REV. 51, 53–54 (2007).

others.¹⁵⁰ This is consistent with the attitudes of most Africans trapped in the midst of internal strife, who naturally prefer peace with amnesty over peace with trials. Moreover, despite the Security Council's stern position against impunity, it seems that those members of the international community involved in the ongoing peace process did not exactly herald the ICC indictments.¹⁵¹ They were generally viewed as untimely and uncondusive to the peace negotiations. Some NGOs claim that the indictments, in fact, led the LRA to the negotiating table in the Juba talks between 2006 and 2008 and furthermore prompted Sudan to adopt a Protocol with Uganda, which allowed the latter's armed forces to attack LRA camps in southern Sudan.¹⁵²

This author is not aware of the momentum and prospects of the pre-indictment peace efforts, but it is evident that the indictments were viewed as part of a coordinated campaign to deprive the LRA and its leadership of any worthwhile deal. It is imperative that, while retaining his independence, the ICC Prosecutor maintains some degree of coordination and joint policy with international mediators, if for no other reason than the purposes of timing and execution in respect of peace efforts and the ongoing delivery of humanitarian assistance.¹⁵³

On the other hand, the successful marginalization and delegitimization of former Liberian dictator Charles Taylor may, to a large degree, be attributed to his indictment by the Sierra Leone Special Court despite the ongoing peace process at the time. It is claimed that Liberians could not support a leader who was susceptible to arrest and prosecution every time he traveled abroad.¹⁵⁴ In the opinion of this author, the marginalization of Charles Taylor is exceptional because, unlike in the LRA case, he was a beleaguered leader with opposing rebel forces dangerously closing in on Monrovia and, being president, he had nowhere to

150. SELLING JUSTICE SHORT, *supra* note 42, at 29.

151. *Id.* at 29–30.

152. *Id.* at 31–33.

153. JACQUELINE GEIS & ALEX MUNDT, WHEN TO INDICT? THE IMPACT OF TIMING OF INTERNATIONAL CRIMINAL INDICTMENTS ON PEACE PROCESSES AND HUMANITARIAN ACTION 13–14 (2009).

154. SELLING JUSTICE SHORT, *supra* note 42, at 22–23.

hide.¹⁵⁵ In contrast, a rebel entity intentionally engaged in a protracted armed struggle would not be susceptible to an indictment. It is doubtful that an indictment would have prompted a premature departure had Taylor enjoyed full control over Liberian territory and, moreover, had he appeased his neighbors. Nonetheless, the Special Court indictment is an excellent example of how to put pressure on a beleaguered leader and speed up his deposition from power.¹⁵⁶

In the case of Al-Bashir, although he seemed invincible, his demise came about as a result of austerity and hardship caused by decade-long sanctions, which effectively made prices skyrocket to such a degree that life in Sudan had become impossible.¹⁵⁷ This led to unprecedented public unrest in Sudan, resulting in the Al-Bashir regime no longer being able to sustain itself in power.¹⁵⁸ There is no evidence that the long-standing indictments against Al-Bashir played any significant role in his demise. The fact that a coup was staged against him from within his own ranks demonstrates that sustained sanctions are a powerful weapon of political coercion against any regime.¹⁵⁹

In the case of the Hamas-Israel conflict, following the indictment of the three Israeli officials, there were two very different types of responses from the international community. These Israeli officials were invited to visit the U.S. on several occasions, even to speak before Congress,¹⁶⁰ in addition to the aforementioned U.S. threats to ICC staff.¹⁶¹ On the other side of

155. CHARLES JALLOH, *THE LEGAL LEGACY OF THE SPECIAL COURT FOR SIERRA LEONE* 107–49 (2020).

156. *Id.* at 338–45.

157. *Sudan Coup: Why Omar Al-Bashir was Overthrown*, BBC (Apr. 5, 2019), <https://www.bbc.com/news/world-africa-47852496>.

158. *Id.*

159. Muhamad Osman, *Sudan's Omar Al-Bashir is Ousted by Military After 30 Years in Power*, WASH. POST (Apr. 11, 2019), https://www.washingtonpost.com/world/africa/sudans-military-expected-to-announce-overthrow-of-president-following-months-of-popular-protests/2019/04/11/bedcc28e-5c2b-11e9-842d-7d3ed7eb3957_story.html

160. Abubakr Al-Shamahi, *Gallant's US Trip Strengthens Potential Challenge to Israel's Netanyahu*, AL-JAZEERA (June 26, 2024), <https://www.aljazeera.com/news/2024/6/26/gallants-us-trip-strengthens-potential-challenge-to-israels-netanyahu>.

161. *US Threatens International Criminal Court*, HUM. RTS. WATCH (Mar. 15, 2019), <https://www.hrw.org/news/2019/03/15/us-threatens-international-criminal-court>.

the spectrum, a good number of countries have assumed hostile acts against Israel, including the revocation of ambassadors,¹⁶² the official recognition of Palestinian statehood,¹⁶³ or joining in subsequent litigation before the International Court of Justice.¹⁶⁴

The above examples constitute thin red lines in respect of which no definitive statement of policy may be made with any degree of accuracy. At best, one can say that ICC indictments and investigations in the midst of ongoing peace negotiations, without any coordination with the international community and the mediators themselves, are unconvincing as to their projected outcomes.¹⁶⁵ This should not be construed as a statement in support of impunity but rather as a rallying call to all relevant actors to come with concrete, sound, and integrated mechanisms and processes. However, in situations where the alleged perpetrators no longer hold significant military power but elements have been incorporated into the reigning government as a result of a bilateral concession—as was the case with the DRC¹⁶⁶—the ICC Prosecutor should not hesitate to indict and investigate. Not only is the Prosecutor not obliged to accept bilateral concessions, but it also should be noted that the

162. Lauren Sforza, *These 8 Countries Have Pulled Ambassadors from Israel Amid Hamas War*, THE HILL (June 11, 2024), <https://thehill.com/homenews/4296621-these-8-countries-have-pulled-ambassadors-from-israel-amid-hamas-war/>.

163. *Mapping Which Countries Recognize Palestine in 2024*, AL-JAZEERA (May 22, 2024), <https://www.aljazeera.com/news/2024/5/22/mapping-which-countries-recognise-palestine-in-2024>.

164. See *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem: Written Proceedings*, INT'L CT. JUST., <https://www.icj-cij.org/case/186/written-proceedings> (last visited Jan 6, 2025) (listing countries that contributed statements to the written proceedings).

165. See generally Louise Mallinder, *Amnesties in the Pursuit of Reconciliation, Peacebuilding, and Restorative Justice*, in RESTORATIVE JUSTICE, RECONCILIATION AND PEACEBUILDING 138–73 (2014).

166. By way of example, the transitional DRC government appointed Laurent Nkunda to the position of General in its army despite extensive evidence of serious violations of international humanitarian law. Following his appointment in 2003, he continued to commit serious violations, and the Security Council issued two resolutions to the DRC authorities to ensure that those responsible were brought to justice. See S.C. Res. 1565 (2004); S.C. Res. 1649 (2005).

incorporation of alleged criminals in a government structure breeds impunity and a breakdown of the rule of law.¹⁶⁷

A. Complementary and Reinforcing Mechanisms

Perhaps the best paradigm of marginalization is that which combines a variety of complementary and reinforcing mechanisms. A combination of targeted sanctions (financial sanctions and restrictions of movement),¹⁶⁸ political isolation, and an unsealed indictment may ultimately culminate in a situation where the targeted person is isolated from their support bases, namely the local civilian population, military comrades or subordinates,¹⁶⁹ former political or business allies, and others. The case of General Ntaganda is perhaps instructive in that his surrender to the U.S. Embassy in Rwanda (with a view to being surrendered to the ICC) seems to have been triggered in part by a sustained campaign of targeted sanctions against his financial resources (e.g., control of mines) and freedom of movement, despite the fact that the sanctions against him were originally counter-productive.¹⁷⁰ More specifically, the sanctions had caused

167. This author does not believe that soft law instruments such as the Belfast Amnesty and Accountability Guidelines are particularly useful, given that, besides iterating the current international law, they add no concrete propositions towards the peace-versus-justice options of transitional governments and international lawmakers.

168. The literature supports this line of thinking and was aptly demonstrated in the Al-Bashir case. See generally Abel Escriba-Folch, *Dealing with Tyranny: International Sanctions and the Survival of Authoritarian Rulers*, 54 INT'L STUD. Q. 335 (2010); Jaleh Dashti-Gibson, et al., *On the Determinants of the Success of Economic Sanctions: An Empirical Analysis*, 41 AM. J. POL. SCI. 608 (1997).

169. Alexander Galetovic & Ricardo Sanhueza, *Citizens, Autocrats, and Plotters: A Model and New Evidence on Coups d'État*, 12 ECON. & POL. 183 (2000).

170. Indeed, successive U.N. Sanctions Committee reports show instances of targeted persons continuing to bypass the consequences of sanctions and continuing their criminal activities unimpeded. However, as in the case of Ntaganda, after several years and without any apparent connection to the sanctions, the targeted person may suddenly lose their popular bases and become vulnerable to infighting. See generally Final Rep. of the Group of Experts on the Democratic Republic of the Congo (2011), *supra* note 95, ¶¶ 278–331. Another report noted that while military action was used against targeted groups in Rwanda and the DRC, the operations had limited success and failed to dismantle the targeted groups. Armed groups continued to pose a threat to the peace and stability of the area. Moreover, natural resources continue to be trafficked illegally, and armed groups, as well as named individuals, have benefited from the exploitation and taxation of the resources. Mineral tracing tags conceived to ensure the traceability of minerals

Ntaganda to defect from the DRC government forces and President Kabila to demand his arrest.¹⁷¹ Ntaganda fled with several hundred loyal rebels, but a lack of funds and an inability to buy further loyalty led to subsequent infighting between group members, thus leading Ntaganda to fear for his life—especially since Rwanda, his last refuge, provided him with no political or other cover and in fact urged him to surrender.¹⁷²

There is very little, if any, empirical evidence linking complementary and reinforcing processes to self-surrender, arrests, or weakening of one's popular bases. No doubt, more detailed and concrete empirical research is needed in order for anyone to reach safer conclusions.¹⁷³ Thus, while Allied Democratic Forces (ADF) leader Jamil Mukulu was arrested in 2015, the hierarchy of the group remained intact despite military operations by U.N.-led forces.¹⁷⁴ Despite a military defeat for the ADF in 2013, the ADF, FDLR, Nduma Defence for Congo (led by sanctioned individual Sheka Ntabo Ntaberi), and other armed groups continued to recruit, train, and use child soldiers in 2014.¹⁷⁵

continue to be sold on the black market in Rwanda. *See generally* Midterm Rep. of the Group of Experts on the Democratic Republic of the Congo (2004), Letter dated October 16, 2015 from the Group of Experts Extended Pursuant to Security Council Resolution 2198 (2015), addressed to the President of the Security Council, U.N. Doc. S/2015/797 (Oct. 16, 2015) [hereinafter Midterm Rep.].

171. *Congo's Terminator: Kabilla Calls for Ntaganda's Arrest*, BBC (Apr. 11, 2012), <http://www.bbc.com/news/world-africa-17683196>.

172. *ICC: Trial of Bosco Ntaganda for Alleged Crimes in the Democratic Republic of Congo*, HUM. RTS. WATCH (Aug. 27, 2015), <https://www.hrw.org/news/2015/08/27/icc-trial-bosco-ntaganda-alleged-crimes-democratic-republic-congo>.

173. *See* Jennifer Gandhi & Adam Przeworski, *Authoritarian Institutions and the Survival of Autocrats*, 40 COMPAR. POL. STUDS. 1279, 1287 (2007) (noting authoritarian regimes from 1946 to 1996 and analyzing the effect of democratic institutions on their political longevity).

174. Midterm Rep., *supra* note 170, ¶¶ 9–17.

175. Final Rep. of the Group of Experts on the Democratic Republic of the Congo (2004), Letter dated January 12, 2015 from the Chairman of the Security Council Comm. Established Pursuant to Resolution 1533 (2004) Concerning the Democratic Republic of the Congo Addressed to the President of the Security Council, ¶¶ 118–31, U.N. Doc. S/2015/19 (Jan. 12, 2015).

VII. CONCLUSION

The debate as to whether ongoing and sustained peace efforts should prevail over criminal investigations against those allegedly responsible for serious international crime is of a political nature. Law plays little or no part in this debate. This is because the function and mandate of criminal law is to investigate crimes, especially those of a serious nature, without regard to any consequences arising from a potential prosecution. The authorities would, of course, protect vulnerable victims and witnesses through anonymity, witness protection, or other measures, but prosecution would not be halted simply because certain persons may be exposed to countermeasures by the perpetrators. It is exactly because of the likelihood of these repercussions to victims and witnesses that prosecution becomes even more compelling. In equal measure, negotiators and mediators are attuned towards a very specific goal, and naturally, anything that hinders the desired outcome is not welcome. Hence, the peace versus justice dilemma is juxtaposed against two opposite views that are not reconcilable.

If one were to argue that a person accused of killing his neighbor in a developed country should be allowed to evade the grasp of justice in order to avoid a deadly family feud that was brewing, no one would take him seriously. The social consequences of crime and punishment are irrelevant to the function of domestic criminal justice systems. This approach is correct because it presupposes that the enforcement capacity of the State suffices to quell any ensuing social unrest. In the case of ongoing internal armed conflicts, the State does not possess the capacity to enforce criminal justice and hence is faced with two opposing options: repress the enemy, albeit with limited chances of success and significant casualties, or negotiate with it. The fact that a target group—in the sense described in this paper—enjoys some power and is thus under no imminent compulsion to surrender to a domestic or international prosecutor does not mean that the international community must refrain from criminal prosecutions in respect of persons accused of serious

crimes.¹⁷⁶ Rather, a methodical, timely, coordinated, and non-invasive strategy is required in order to bring a powerful party to the table for peace talks while leaving open the possibility of future indictments and investigations.

It has been argued throughout this paper that ICC indictments have not proved successful in isolating or delegitimizing their targeted addressees, whether State or rebel leaders. Even so, it is somewhat absurd that the plethora of international enforcement mechanisms (e.g., U.N. sanctions regimes, ICC and other indictments, U.N. and AU military contingents, and others) and the undisputed will of the international community (whether the AU, the U.N., or a combination thereof) cannot find ways of making arrests, ending impunity, and marginalizing criminal groups and their leaders. Even the disposition of particular populations towards peace rather than justice mechanisms is something that is determinative and can be overturned for several reasons. First, such populations are not usually a party to the bigger picture of events nor to sufficient information to make an informed judgment; second, they have been afflicted with so much suffering, and hence, their desire to end such suffering prevents them from realizing that a fragile peace may ultimately return to haunt them; finally, such persons have never witnessed strong and effective institutions, capable of delivering on promises made or of defeating warlords. As a result, they are content even with a fragile and short-lived peace rather than an illusionary 'enduring' justice.

Quite clearly, the fragmentation of international law has, unfortunately, culminated in a fragmentation of other forms of international life, such as relief efforts, international cooperation, justice initiatives, donor initiatives, and others. To a large degree this is the result of political squabbles, such as that between the ICC and the AU.¹⁷⁷ Although some coordination is evident,

176. See generally BARBARA GEDDES, *PARADIGMS AND SAND CASTLES* (2003) (providing a compelling account of authoritarian regimes being dismantled almost overnight on account of extraneous circumstances, such as sanctions, leading to popular universal revolt).

177. See Emile Hafner-Burton & Kiyoteru Tsutsui, *Justice Lost! The Failure of International Human Rights Law to Matter Where Needed Most*, 44 J. PEACE RES. 407, 423

particularly in the context of peace and security under Chapter VII of the U.N. Charter, justice and peace efforts have generally proceeded and been perceived as discrete initiatives and perhaps even as incompatible. This explains why the ICC Prosecutor is not privy to mediation initiatives in situations where his or her Office might have an interest. I find no ethical nor human rights (right to a fair trial) concern in the establishment of a coordination mechanism with a tripartite structure involving prosecutorial, military, and peace components, all of which work together in order to achieve a particular aim. It is beyond the purview of this paper to elaborate on the contours of such a (standing) structure, but the independence of the ICC Prosecutor need not be compromised—in fact, there are numerous safeguards in the ICC Statute to this effect—and is rather strengthened through his or her full involvement and appraisal of other efforts and initiatives.¹⁷⁸ The three components will agree in advance as regards their aims and objectives and shall decide by consensus. Each has significant weapons within its armory. For example, the military component encompasses the authorization of armed force, deployment of troops, targeted sanctions, demilitarization, forcing pertinent groups and governments to take particular action, and others. The justice component is not necessarily limited to the ICC Prosecutor; rather, with the ICC Prosecutor as the coordinating entity for the justice component, he or she can equally work alongside national prosecutors and other international tribunals, such as the criminal chamber of the African Court of Justice.¹⁷⁹ In short, the establishment of a

(2007) (describing a pessimistic account about the failure of human rights mechanisms to ensure accountability and consequently leading to political solutions that do not serve notions of justice).

178. OFF. OF PROSECUTOR, INT'L CRIM. CT., POLICY PAPER ON CASE SELECTION AND PRIORITISATION 12 (2016) ("Considerations relating to the interests of justice will continue to be assessed on a case-by-case basis as a matter of best practice in the exercise of prosecutorial discretion over case selection. [...] [T]he interests of victims include the victims' interest in seeing justice done, but also other essential interests such as their protection, which the Court as a whole is obliged to ensure pursuant to article 68(1) of the Statute.").

179. Some coordination is inevitable if entities with "competing" interests desire to fulfil their mandates meaningfully. This is the case, for example, with the formation of the "open-ended Ministerial Committee of Ministers of Foreign Affairs," convened pursuant to African Union [AU] Assembly, *Decision on the Update of the Commission on the*

standing coordination mechanism will render papers such as this largely irrelevant because justice and peace will ultimately become what they actually are—inseparable.

Implementation of Previous Decisions on the International Criminal Court, ¶ 4, AU Doc. Assembly/AU/Decl.586(XXV) (June 15, 2015).