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Peace and 'Justice' Sequencing in Management of Violence in the Malabo Protocol for the African Court

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1. THE MALABO PROTOCOL: PEACE AND JUSTICE SEQUENCING

One of the central transitional justice debates has been encapsulated by the phrase, 'peace versus justice'.[1] Today, the interplay between 'peace and justice' remains one of the most difficult debates, especially in Africa. Those adopting a more fundamentalist approach to prosecution typically hold the view that retributive justice prevents impunity of the perpetrators through direct punishment, and serves to deter those inclined to commit future atrocities.[2] They typically articulate arguments that insist that: (1) the destabilizing effects of pressing for accountability are overstated and they may in fact prevent further atrocities; (2) the failure to prosecute reinforces a culture of impunity, which has negative long term impacts on peace; (3) international law obliges countries to prosecute war crimes, genocide, and crimes against humanity; and (4) fair trials can assist in acknowledging victims' suffering while at the same time creating a legitimate historical record that protects against revisionism.

On the opposing side, various scholars argue that international criminal tribunals often impede peace settlements and prolong atrocities because leaders facing threats of prosecution no longer have incentives, such as

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[1] The debate has also been characterized as retributive vs. restorative justice, judicial romantics vs. political realists, etc.

[2] T. Muthiri, 'The African Union and the International Criminal Court: An Embattled Relationship?', Policy Brief, *Institute for Justice and Reconciliation* (IRC) (2013), at 2.

immunity, to end atrocities and therefore continue to prolong conflicts to keep themselves in power.[3] By calling into question the meaning of justice, they suggest that justice does not always require prosecutorial action.[4] They typically argue that: (1) prosecutions are an obstacle to peace talks and do not, in fact, act as a deterrent to future atrocities; instead they escalate them; (2) they are expensive and take a long time to complete; (3) they do not necessarily serve the interests of the victims or individual states; and (4) they do not address the root causes of violence.

While these two camps seem to represent opposing ends of the debate, the reality is that there exists no binary choice between peace on one hand and justice on the other.[5] The juxtaposition highlights a 'paradox' rather than a debate.[6] This paradox is important to highlight as the debate is imbued with an artificial division between peace and justice, politics and adjudication. With such a paradox in mind, this chapter explores the way that the Malabo Protocol for the African Court for Justice and Human and People's Rights (African Court) conceptualizes justice through a more gradual approach that is predicated on allowing time for peace building and reconciliation in African transitional justice settings.[7] According to this logic, the false tension between peace and justice is collapsed into a 'transitional justice' strategy that requires a different logic for understanding the development of Africa's justice strategies underway.[8] Making sense of the conceptualization of peace–justice sequencing in the Malabo Protocol for the African Court

[3] P. Akhavan, 'Are International Criminal Tribunals a Disincentive to Peace?: Reconciling Judicial Romanticism with Political Realism', 31 *Human Rights Quarterly* (2009) 624, at 625.

[4] H. Cobban, 'Think Again: International Courts' (Foreign Policy), 20 October 2009, available online at: http://foreignpolicy.com/2009/10/20/think-again-international-courts/; E.B. Ludwin King, 'Does Justice Always Require Prosecution? The International Criminal Court and Transitional Justice Measures', 45 *The George Washington International Law Review* (2013) 85; O. Oko, 'The Limits of Prosecutions', (Oxford Transitional Justice Research Working Paper Series), 19 March 2010, available online at: http://otjr.crim.ox.ac.uk/materials/papers/122/Justice_in_Africa.pdf.

[5] See for example, L. Mallinder, 'Beyond the Courts? The Complex Relationship of Trials and Amnesties', *SSRN Electronic Journal* (2011), available online at: www.researchgate.net/profile/Louise_Mallinder/publication/228157753_Beyond_the_Courts_The_Complex_Relationship_of_Trials_and_Amnesties/links/00b7d5333f758b8931000000.pdf; R.H. Mnookin, 'Rethinking the Tension between Peace and Justice: The International Criminal Prosecutor as Diplomat', 18 *Harvard Negotiation Law Review* (2013) 145; T.D. Olsen, L.A. Payne and A.G. Reiter, 'The Justice Balance: When Transitional Justice Improves Human Rights and Democracy', 32 *Human Rights Quarterly* (2010) 980.

[6] N. Eisikovits, 'Peace versus Justice in Transitional Settings', 32 *Quinnipiac Law Review* (2013) 707, at 715.

[7] T. Muthiri, supra note 2, at 2–3.

[8] Ibid. at 717.

involves recognizing that the authors of the protocol saw that the political stakes were higher in transitional contexts, making the conflict between peace approaches and legal justice approaches further pronounced. Yet, this development in the crafting of the Malabo Protocol has also unfolded alongside the profound rise in prominence of international prosecutorial approaches to violence that have led to the re-emergence of the debate concerning whether the interest of justice should yield to the need to secure peace in situations of conflict or transition periods.[9]

The duty in international law to prosecute serious international crimes was first established in a series of treaties recognizing specific atrocities as international crimes that states had a duty to prosecute under international law. The *Convention on the Prevention and Punishment of the Crime of Genocide* (*Genocide Convention*) recognizes genocide as an international crime, imposes individual responsibility, and requires States Parties to try and punish perpetrators of genocide.[10] The Conventions require States to 'search for persons alleged to have committed, or have ordered to be committed ... grave breaches [of the *Geneva Conventions*] ... and bring such persons, regardless of their nationality, before [their] own courts."[11] 'Grave breaches' include, *inter alia*, wilful killing, torture or inhuman treatment, biological experiments, and making civilian populations or individual civilians the object of attack.[12] Similarly, the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* emphasizes the 'grave nature' of the crime of torture requiring States Parties to prosecute or extradite its perpetrators.[13]

In addition, the duty to investigate and prosecute has been reaffirmed on several occasions by the United Nations Security Council and other UN

[9] I. Bantekas, 'Sequencing Peace and Justice in Post-Conflict Africa', in C. Jalloh and I. Bantekas eds., *The International Criminal Court and Africa* (Oxford University Press, 2017) Chapter 4 91, at 91 [Bantekas].

[10] UN General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 UNTS 277.

[11] *Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, Art. 49; See also *Geneva Convention II for the Amelioration of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea*, 12 August 1949, Art. 50; *Geneva Convention III relative to the Treatment of Prisoners of War*, 12 August 1949, Art. 129; *Geneva Convention IV relative to the Protection of Civilian Persons in Time of War*, 12 August 1949.

[12] For full list, see International Committee of the Red Cross, 'Grave breaches specified in the 1949 Geneva Conventions and in additional Protocol I of 1977' online at: www.icrc.org/eng/resources/documents/misc/57jp2a.htm.

[13] UN General Assembly, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 UNTS 85, Arts. 4–8.

bodies, as well as international, regional, and national courts in finding amnesties for war crimes and crimes against humanity unlawful.[14] This duty has coalesced in the *Rome Statute of the International Court*, which defines international crimes and emphasizes 'the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.'[15] The duty has been recognized with such a high degree of prevalence that the International Committee of the Red Cross asserts that there is an obligation under customary international law for states to investigate and prosecute international crimes.[16]

The Malabo Protocol, and the eventual effort to extend the criminal jurisdiction of the African Court and bring it into force has raised a new set of issues related to how to address the interplay between various peace–justice dilemmas in post-violence contexts. This debate has been clarified with an articulated framework for Transitional Justice in Africa advocated by the Panel of the Wise and promoted by the African Union. Its relevance is critical in Africa,[17] where a number of states have protested the Prosecutor of the International Criminal Court's (ICC) decision to investigate and issue arrest warrants in the midst of peace talks. However, as developed in the operationalization of the ICC, though the drafters of the *Rome Statute* envisaged the need for the ICC to yield to peace processes through Article 53(2)(c), which requires the Prosecutor to consider whether pursuing a case would be 'in the

[14] See International Committee of the Red Cross, 'Rule 158. Prosecution of War Crimes' online at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule158 [ICRC Rule 158]; See also I. Bantekas, supra note 10 at 96, footnotes 21–22 for some examples.

[15] *Rome Statute of the International Criminal Court*, preamble, Arts. 5–8.

[16] ICRC Rule 158, supra note 15,

[17] See, e.g., International Peace Institute, *Peace, Justice and Reconciliation in Africa: Opportunities and Challenges in the Fight against Impunity* (Report of the AU Panel of the Wise, February 2013) at 10–11 [Panel of the Wise]: 'The question of whether peace should take precedence over justice where human rights violations and war crimes have taken place constitutes the core of the debates in the growing field of 'transitional justice,' which includes the complex ethical, legal, and political choices that various actors confront to end conflict, restore peace, and prevent the recurrence of conflict. Africa's multiple conflicts have underscored the dilemma between peace and justice, and have challenged local and international actors to craft solutions that sometimes compromise these values. In recent years, the ability of mediators and other interveners in conflicts to grant immunity has been curtailed by the evolving international legal obligations and the international justice architecture, including the Rome Statute, which prohibits amnesty for crimes against humanity, war crimes, and genocide. Despite these international norms, African states confront difficult choices in the task of balancing the imperatives of justice and reconciliation with the political realities of managing impunity.' Online at: https://reliefweb.int/sites/reliefweb.int/files/resources/ipi_e_pub_peacejusticeafrica.pdf.

interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims, and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime,'[18] article 53(2)(c) provides an opportunity for the ICC Prosecutor to consider political matters in the pursuit of justice – especially in relation to ongoing peace negotiations.[19]

However, the ICC Prosecutor has moved away from such an interpretation, taking the position in a 2007 policy paper that the interest of justice 'should not be conceived of so broadly as to embrace all issues related to peace and security' and stating that the 'Office will seek to work constructively with and respect the mandates of those engaged in other areas but will pursue its own judicial mandate independently.'[20] A decade later, it does not appear that the Office of the Prosecutor plans on broadening its position on 'interests of justice.'[21]

However, the emerging African system being led by the AU is distinguishing itself in this regard. There is a vocal insistence that a premature emphasis on prosecutions can frustrate the search for a peaceful resolution, leading to continued conflict that prolongs the misery of affected communities.[22] There is a recognition that a leader – even one compromised by complicity in the perpetration of abuses – may be necessary to bring a faction to the negotiating table, maintain unity, and convince the faction to accept the negotiated resolution to the conflict.[23] The second position is that criminal indictments may undermine the will of such leaders to pursue peace and entrench warring

[18] Art. 53(2)(c); I. Bantekas, supra note 10 at 94.

[19] Ibid. at 94.

[20] Policy Paper, 'The Interests of Justice' (September 2007) at 8 online: www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPInterestsOfJustice.pdf.

[21] B. Sander, 'Is the ICC Reconsidering its Policy on the "Interests of Justice"?' (29 September 2016) online: https://justiceinconflict.org/2016/09/29/is-the-icc-reconsidering-its-policy-on-the-interests-of-justice/ [Sander].

[22] *See* Panel of the Wise, Peace, Justice, and Reconciliation in Africa, at 72; *see also* Mbeki and Mamdani, *Courts Can't End Civil Wars* ('To call simply for victims' justice, as the I.C.C. does, is to risk a continuation of civil war').

[23] For example, South Sudan's President Salva Kiir Mayardit has said that to reach peace with Sudan, he needs Sudanese President Omar al-Bashir at the negotiating table, not in a court room at the ICC. T. Mbeki, 'Justice Cannot Trump Peace', *Al Jazeera*, 4 May 2017, available online at www.aljazeera.com/programmes/talktojazeera/2013/11/thabo-mbeki-justice-cannot-trump-peace-201311221065878328 6.html. Speaking about his own country, Mbeki also stated that the idea of prosecuting former President FW de Klerk for apartheid in the 1990s would have been anathema to a peaceful resolution because de Klerk was necessary to lead the white population of the country into a democratic agreement. *Id.*

factions in their positions, complicating peace processes.[24] And third, premature prosecutions may exacerbate atrocities.[25]

A recent study by Michael Broache found that that rumours that a rebel leader in the Democratic Republic of Congo was about to be arrested pursuant to an ICC arrest warrant motivated the leader to foment a new revolt that resulted in 'serious atrocities,' including murder, pillage, and sexual violence.[26] And in Uganda, the issuance of ICC indictments against leaders of the Lord's Resistance Army not only caused a temporary halt to peace negotiations, but was also cited, along with arrest warrants, as the reason a final peace agreement was never signed.[27]

The conflict in Northern Uganda initially began as a rebellion of the Ugandan People's Democratic Army (UPDA), a group of army officers who fled Uganda Kampala in 1986 when President Yoweri Museveni took power

[24] For example, the joint AU-UN mediator on Darfur stated that 'the process to find a political solution to the crisis in Darfur has been significantly slowed and even compromised' by the ICC's issuance of arrest warrant for Sudan's President. P. Worsnip, 'Darfur Mediator Says Bashir Warrant Imperils Talks', *Reuters*, 26 March 2009, available online at www.reuters.com/article/us-sudan-darfur-un/darfur-mediator-says-bashir-warrant-imperils-talks-idUSTRE52P7FO20090326. The African Union likewise has expressed 'grave concern' about the effect of premature prosecutions 'on the delicate peace processes underway in The Sudan,' which are 'undermin[ing] the ongoing efforts aimed at facilitating the early resolution of the conflict in Darfur.' Decision on the meeting of African States Parties to the Rome Statute of the International Criminal Court, Doc. Assembly/AU/13(XIII) (2009), available online at https://au.int/sites/default/files/decisions/9560-assembly_en_1_3_july_2009_auc_thirteenth_ordinary_session_decisions_declarations_message_congratulations_motion_0.pdf; *see also* Assembly of the African Union, Decision on the Application by the International Criminal Court (ICC) Prosecutor for the Indictment of the President of the Republic of The Sudan, Doc. Assembly/AU/Dec.221(XII) (2009), available online at https://au.int/sites/default/files/decisions/9559-assembly_en_1_3_february_2009_auc_twelfth_ordinary_session_decisions_declarations_message_congratulations_motion.pdf.

[25] M. Broache, 'Beyond Deterrence: The ICC Effect in the DRC', *Open Democracy*, 19 February 2015, available online at www.opendemocracy.net/openglobalrights/michael-broache/beyond-deterrence-icc-effect-in-drc; A. Vines, 'Does the International Criminal Court End Conflict or Exacerbate It?', *The Guardian*, 22 February 2016 (observing that 'the ICC can prolong conflict as indicted individuals see no incentive to compromise' and describing the indictment of Charles Taylor as having undermined Liberian peace talks), available online at www.theguardian.com/global-development/2016/feb/22/international-criminal-court-help-to-end-conflict-or-exacerbate-it.

[26] M, Broache, supra, note 26.

[27] Panel of the Wise, Peace, Justice, and Reconciliation in Africa, 48–9; Sarah Nouwen, 'The International Criminal Court: A Peacebuilder in Africa?', in D. Curtis and G. Dzinesa, *Peacebuilding, Power, and Politics and Africa*, 171, 181 (Ohio University Press, 2012) (explaining how ICC arrest warrants in Uganda were 'an apparently insurmountable obstacle to the conclusion of a[peace] agreement').

after a five-year war.[28] The rebellion eventually transformed into a cult-like rebel group known as the Lord's Resistance Army (LRA), led by Joseph Kony.[29] With financial and military support from the Sudanese government, the LRA increasingly began targeting civilians in Northern Uganda, many of whom were from the Acholi tribe, who they perceived to be government supporters.[30] The LRA crimes have been widely documented and include murders, abductions, rapes, forced marriage, and mutilations. In December 2003, the government of Uganda referred the situation to the ICC because it could not arrest the LRA, which was operating from bases in South Sudan.[31] The prosecutor opened an investigation on 29 July 2004, and on 8 July 2005, the ICC issued arrest warrants for five senior members of the LRA.[32]

At the same time, ongoing peace negotiations were also taking place through meetings between Betty Bigombe, an Acholi member and government minister, and the LRA.[33] In 2005, the LRA moved its base to the DRC, pursuant to the signing of the Comprehensive Peace Agreement (CPA) between northern and southern Sudan.[34] In 2006, the LRA and the Ugandan government signed the first Cessation of Hostilities (CoH) Agreement.[35]

The subsequent negotiations lasted two and a half years and were fraught with setbacks. The CoH was continuously breached, the LRA did not honour timelines to meet and disarm, and Kony refused to sign any peace agreement until arrest warrants of the ICC were withdrawn.[36] In response, the Ugandan government provided a variety of alternatives to all of the perpetrators, ranging from blanket amnesties to punishment for only those who committed the most serious crimes.[37] As part of this strategy, the government also raised the issue of a deferral under Article 16. The government promised that it would approach the UNSC to ask for a deferral of the proceedings if and when the LRA signed the final peace agreement.[38] Finally, on 29 June 2007, the government and the LRA signed the Agreement on Accountability and Reconciliation, with an

[28] M. Otim and M. Wierda, 'Uganda: Impact of the Rome Statute and the International Criminal Court', *International Centre for Transitional Justice (ICTJ)*, May 2010, available online at: www.ictj.org/Uganda-Impact-ICC-2010.
[29] Ibid.
[30] Ibid.
[31] Ibid. at 2.
[32] Ibid.
[33] Ibid.
[34] Ibid.
[35] Ibid.
[36] Ibid. at 5; Rashid, supra note 5, at 65.
[37] Rashid, supra note 5, at 65.
[38] Otim and Wierda, supra note 29, at 5.

annex to the agreement signed in February 2008. A final peace agreement was due to be concluded in late November 2008. It was not signed because Kony did not show up at the final signing ceremony.[39]

Based on this and other evidence, scholars have concluded that although judicial action may sometimes have preventive effects on atrocities, it may also 'backfire, generating perverse incentives for leaders to escalate violence.'[40]

By contrast, countries such as Argentina and Guatemala demonstrate the potentially positive power of sequencing. During the transition from military dictatorship in Argentina, for example, the government worked to build a solid foundation for peace by strengthening democratic institutions.[41] Once that foundation was in place, the country's amnesty laws were annulled, permitting victims to seek justice before the courts.[42] Similarly in Guatemala, the 1996 peace accords were accompanied by a national reconciliation law that provided amnesty for most crimes.[43] Instead of prosecutions, the country invested in truth commission, officially known as the Historical Clarification Commission.[44] It was not until 2009 that the Inter-American Commission on Human Rights observed that, under international law, the 1996 amnesty law

[39] Ibid.

[40] Broache, *Beyond deterrence*; *see also* Snyder and Vinjamuri, at 5 (concluding, based on a study of 32 civil wars, that 'the prosecution of perpetrators of atrocities . . . risks causing more atrocities than it would prevent'); H. Carey and S. Mitchell, 'Trials and Tribulations of International Prosecution' 130 (Martinus Nijhoff Publishers, 2013) (noting that indictments by the ICC led to further conflict by emboldening the rebels and inducing Gaddafi to 'fight on'), 312 (violence in the Great Lakes region was 'aggravated and prolonged . . . by international prosecution' while indictments of Sudanese officials led to 'deepen[ed] ethnic cleansing'); Nouwen, *The International Criminal Court: A Peacebuilder in Africa?*, at 182 (describing how ICC charges against individuals in Sudan increased the reluctance of certain rebel movements to engage in peace talks), 187 ('the ICC, operating in ongoing conflicts, is used as an instrument of war, with which to delegitimize and incapacitate enemies, thereby intesnsifying conflict'); D. Rothe and V. Collins, 'The International Criminal Court: A Pipe Dream to End Impunity?' in D. Rothe et al., *The Realities of International Criminal Justice*, 191, 203 (The African Union Series, New York: International Peace Institute, 2013) ('prosecution offers no incentive to end hostilities rather it may well be a major factor in the continuation of and displacement of the conflict').

[41] Panel of the Wise, Peace, Justice, and Reconciliation in Africa, at 12.

[42] Human Rights Watch, *World Report, Argentina* (2006) (Argentina's legislature voted to annul the law in 2003), available online at www.hrw.org/world-report/2006/country-chapters/argentina.

[43] C. Evans, 'The Right to Reparation in International Law for Victims of Armed Conflict' 155 (Cambridge University Press, 2012). The national reconciliation law was in addition to an earlier 1986 law that granted amnesty for crimes committed during the administrations of General Óscar Humberto Mejía Victores and his predecessor Ríos Montt. Guatemala, Decree No. 8–86, 10 January, 1986.

[44] Ibid. at 149.

could not be applied to serious human rights violations.[45] Four years later, the Guatemalan Constitutional Court, considering a different but similar amnesty law, held that amnesty decrees do not apply to genocide, crimes against the duties of humanity, and forced disappearances,[46] opening the door to prosecutions.[47]

In keeping with the prioritization of peace and the sustenance of life, the African Union's (AU) Panel of the Wise issued a statement in 2013 that declared that:

> Africa has legitimate concerns and reservations about the modalities of implementing some provisions of the international criminal justice system today, but improving these mechanisms requires adherence to the core principles that undergird international law. In the increasingly fragmented and divisive atmosphere that characterizes the current debates on impunity, striking an appropriate balance between the demands of international law and those of national sovereignty will be one of the hallmarks of African statesmanship.[48]

The Panel recommended the establishment of an 'African Transitional Justice Framework' (ATJF) which, *inter alia* would include a declaration that

> peace, justice, and reconciliation are interconnected, mutually interdependent, and equally desirable. However, it is also equally self-evident that in an on-going conflict the most urgent desire to the affected population is to cease hostilities, restore peace and security. Nevertheless, when stability is restored and victims protected, there is need for concerted action to strengthen institutions, including creating new ones to deliver justice and hold certain categories of perpetrators accountable to consolidate the pursuit of sustainable peace.[49]

The resultant ATJF recognizes that states have a 'positive duty' to satisfy the goals of transitional justice: truth, justice, reparations, institutional reform, and

[45] Case of the *'Las Dos Erres' Massacre* v. *Guatemala, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R.* (ser. C) No. 211, ¶ 129 (24 November 2009), available online at www.corteidh.or.cr/docs/casos/articulos/seriec_211_ing.pdf.

[46] Guatemala, Constitutional Court, Expediente 1933–2012, Apelación de Sentencia de Amparo, at 5 (2013), available online at https://app.vlex.com/#vid/470258858.

[47] For example, in 2016, a Guatemalan court found two former military officers guilty of crimes against humanity for acts of rape, sexual slavery, and murder. See 'Sepur Zarco: In Pursuit of Truth, Justice, and Now Reparations', *UN Women* (22 October 2017), available online at www.unwomen.org/en/news/stories/2017/10/feature-guatemala-sepur-zarco-in-pursuit-of-truth-justice-and-now-reparations.

[48] Ibid. at 3.

[49] Ibid. at 80.

public accountability.[50] However, the ATJF acknowledges that these goals may be difficult for states to fulfil simultaneously, and recommends that

> states should seek to develop complementary mechanisms sequencing them when appropriate rather than fulfilling certain legal obligations at the expense of others. Fulfilling these positive obligations should take account of broader policy objectives to achieve justice, such as ending the conflict or repression; restoring public order and stability; establishing democratic structures and the rule of law; dealing with the underlying causes of the conflict or repression; ending exclusion and discrimination, achieving equality, repairing broken relationships, obtaining compensation and restitution, rehabilitation, promoting reconciliation and sustainable peace as well as other similar objectives.[51]

According to the ATJF, 'Justice and peace' … should not be seen as conflicting or contradictory forces. Rather, properly pursued, they promote and sustain one another. The question should not be: whether to pursue justice and accountability, but when and how. In reality, this emerging approach to the management of violence in Africa could be seen as being about keeping alive the possibility of justice and accountability and finding the right combination and right sequence in each specific context.'[52] By highlighting the importance of an inter-related justice architecture that includes economic justice, political justice (entailed in constitutional and other legal reforms) and justice for crimes committed from the perspective of criminal and reparative justice,[53] peace is seen as the first measure for the management of violence and the sustenance of life and is understood as establishing the pre-conditions for justice in Africa.

[50] African Union *Transitional Justice Framework (ATJF)* at E.1.1, E.2 available online at: www.legal-tools.org/doc/bcdc97/pdf/ [ATJF].

[51] Ibid. at E.2.

[52] Ibid. at E.3.

[53] See T. Smith, 'Moral Hazard and Humanitarian Law: The International Criminal Court and the Limits of Legality', (2002) 39 *International Politics* 2, 175–92 (making a case for humanitarian intervention in Darfur, noting that legal (judicial) responses have limits and their role should be contextualized); G Musila, 'The role of the African Regional and Sub-Regional Organizations in International Criminal Justice' at 15–17 available at www.ssrn.com (on responses to the Darfur conflict and the role of the AU); see also N. Grono, 'Briefing: The International Community's Failure to Protect', (2006) 105 *African Affairs* 421, 621–31; On humanitarian intervention, see N. Udombana, 'Still Playing Dice with Lives: Darfur and Security Council Resolution 1706' *Third World Quarterly*, Vol. 28 No. 1 (2007) 97–116; D. Kuwali, 'The end of humanitarian intervention: an evaluation of the African Union's right of intervention' Carr Center for Human Rights Policy, Harvard University, www.operationspaix.net/DATA/DOCUMENT/5163~v~The_End_of_Humanitarian_Intervention__Evaluation_of_the_African_Union__8217s_Right_of_Intervention.pdf.

As outlined in page two of the report by the Panel, 'Justice, peace, good governance, and reconciliation. . .thrive where sturdy and stable democratic values and impulses prevail, and where there is a culture of constitutionalism to constrain arbitrariness and abuse of power.' From the violence of traditional empires, to colonial imperial rule, to new domains of territorial, legal, and social reordering, to contemporary postcolonial struggles, this pronouncement highlights a resolve to using politically relevant solutions to addressing violence in Africa. The Malabo Protocol for the African Court is seen as operating within this point of departure in which justice includes peace and is not separate from it. Such a formulation for addressing post-violence justice is emerging within an AU Transitional Justice framework and represents an intertwined conceptualization of justice with its commitments to life as a key locus through which peace–justice sequencing is taking shape.

Thus, the criminal jurisdiction of the Malabo Protocol is seen as one of many components of the AU transitional justice framework. This means that seeing the work of an African court with extended criminal jurisdiction to prosecute a small number of perpetrators deemed most responsible for mass atrocity violence must be seen as one of a range of tools available to intervene in conflict situations and re-establish peace, stability and reconciliation in regions recovering from mass atrocity violence. This approach compares with the debates related to peace–justice sequencing in relation to the rise of the international criminal accountability, especially in the context of the International Criminal Court (ICC), a court established to prosecute crimes committed by those deemed most criminally responsible. However, in contrast, as we shall see in Section two, the second half of the chapter will explore how justice explored through the myriad approaches to managing violence in Africa can be understood both as the application of various peace strategies embedded in larger socio-political architectures.

In examining the nature of the debates related to peace–justice strategies and reflecting on the predominant anti-impunity model being articulated by various prosecutorial mechanisms, this chapter will focus on the design of the African Court infrastructure underway. What we shall see is that the Malabo Protocol is structured to allow for significant nationally driven post-violence forms of closure toward the establishment of peace while also making available of diplomatic processes. One might say that the Protocol for the African Court allows for the frontloading of "political" action through peace–justice sequencing and includes two provisions in the Protocol – Article 34A(1) and Article 29 – that have their own internal mechanisms for the management of violence. Beyond these provisions, the AU transitional justice architecture

privileges sequencing as an important way to conceptualize legal justice within the larger AU Transitional Justice strategy.

The legal issues related to Article 34A(1), 29 are worth highlighting because they underscore the Court's position in the larger African Union framework and set the tone for the ways in which the African Union is likely to relate to the Court more generally. First, the Malabo Protocol amends article 29 of the Statute of the African Court of Justice and Human and Peoples' Rights to permit two additional entities – the Peace and Security Council and the Office of the Prosecutor – to submit cases to the Court on any issue or dispute within the Court's jurisdiction.[54] When combined with the pre-existing provisions in article 29 of the Statute, this would enable three types of entities to have broad access to the African Court on any matter within its jurisdiction: The State Parties to the Protocol, Certain organs of the African Union, namely the Assembly, the Peace and Security Council, the Parliament and Other organs of the Union authorized by the Assembly; and the Office of the Prosecutor.[55]

Second, in Article 34A (1), the revised Statute of the African Court of Justice and Human and Peoples' Rights requires the Registrar of the African Court to notify the Chairperson of the Commission of all criminal cases instituted before it.[56] When combined with article 49 of the Statute, such notice will enable the African Union, a continental intergovernmental body, and its various organs, to submit a request to intervene in a case if the organ believes it has an interest of a legal nature that may be affected by the decision in that case.[57]

[54] Malabo Protocol, Annex art. 15 (amending article 29 of the Statute of the African Court of Justice and Human Rights).

[55] Ibid.; African Union Protocol on the Statute of the African Court of Justice and Human Rights, art. 29, July 1 2008 [hereinafter Merger Protocol], available online at https://au.int/en/treaties/protocol-statute-african-court-justice-and-human-rights. In addition to these three types of entities, article 29 of the Merger Protocol permits staff members of the African Union to submit appeals of disputes to the Court provided the dispute is within the limits and under the terms and conditions laid down in the Staff Rules and Regulations of the Union. Merger Protocol, art. 29(1)©. These will generally be limited to the terms and conditions of employment of African Union staff.

[56] Malabo Protocol, Annex art. 17 (adding article 34(A)(2) to require the Registrar to give notice to the Chairperson of the Commission of the institution of proceedings before the International Criminal Law Section); Merger Protocol, art. 33(3) (pre-existing provision requiring the Registrar to give notice to the Chairperson of the Commission of the institution of proceedings before the General Affairs section), 34(2) (same with respect to the Human Rights Section). In cases brought before the General Affairs Section, the Chairperson must also ensure that all Member States are notified. Merger Protocol, art. 33(3).

[57] Merger Protocol, art. 49. Member States of the African Union are granted the same right of intervention. *Id.*

What we shall see is that The Malabo Protocol solidifies the status of the African Court of Justice and Human and People's Rights as a key institution in the African Union's larger peace and security architecture. By granting the Peace and Security Council, along with the Assembly and Parliament, the authority to bring, and the possibility of intervening in, a case before any chamber of the African Court, the Malabo Protocol helps to ensure that decisions about whether and when to bring cases before the Court are informed by the African Union's wider efforts to prevent, manage, and resolve conflicts on the Continent.[58] These efforts recognize that criminal prosecutions, though important, are just one of many interventions that must be coordinated and carefully sequenced if there is to be a lasting transformation in countries emerging from mass atrocities. The Malabo Protocol facilitates that coordination and sequencing by providing the chief peace and security institutions of the African Union – the Assembly, the Parliament, and the Peace and Security Council – with a vital role in the initiation and continuation of cases.

The third section works through a number of examples to highlight successful representations of sequencing. What we see in the final section is that there is no single 'one-size-fits-all' approach to sequencing. Rather, a number of considerations should be reflected on that will affect the success of transitional justice/sequencing measures.

2. A DIFFERENTIATED APPROACH TO THE MANAGEMENT OF VIOLENCE

The African continent has experienced some of the worst atrocities of the modern era,[59] forcing its leaders to develop innovative and comprehensive

[58] See African Union, Protocol Relating to the Establishment of the Peace and Security Council of the African Union, art. 2(1), 9 July 2002 (establishing the Peace and Security Council as the 'standing decision-making organ for the prevention, management and resolution of conflicts'), available online at https://au.int/en/treaties/protocol-relating-establishment-peace-and-security-council-african-union.

[59] See Kofi Annan, Address to the Security Council on The Situation in Africa: the impact of AIDS on peace and security (10 January 2000) ('Out of two dozen or more conflicts raging around the world, roughly half are in Africa.'), www.un.org/sg/en/content/sg/speeches/2000-01-10/address-kofi-annan-security-council-situation-africa-impact-aids; C. Jalloh, 'Regionalizing International Criminal Law', 9 Int'l Crim. L. Rev. 445 (2009) ('The [African] continent has thus become the most conflict affected and conflict prone region in the world.'); Protocol Relating to the Establishment of the Peace and Security Council of the African Union, preamble (expressing 'concern[] about the continued prevalence of armed conflicts in Africa').

institutions and strategies to prevent, manage and resolve conflicts.[60] Historically, the Organization of African Unity (OAU) held a policy of non-interference with the political affairs of other Africa states. However, this left the African continent without resources for managing mass violence crises (citation).

Shaped by constitutive act, the African Union of the post 2004 period has been engaged in shaping a new justice model for Africa that involves ways to operationalize peace and justice interests that directly contravene this model.[61] The African Union's Constitutive Act that transformed the AU from the OAU outlines the existence of seven organs of the Union: The Assembly; Executive Council; Pan-African Parliament (PAP;[62]) The Court of Justice; The Commission; Permanent Representatives Committee; Specialized Technical Committees[63]; the Economic, Social and Cultural Council and Financial Institutions.[64] Article 6 of the Constitutive Act, identifies the Assembly, composed of Heads of States and Government and their representatives, as the apex decision-making body of the Union. It is seen as the de facto executive of the Union. Its functions and powers are often identified as making and monitoring the implementation of the common policies of the Union. The Executive Council is the alternate to the Assembly[65] and both organs are served by the Commission and constitute the AU's executive bureaucracy. The Assembly works closely with the Peace and Security Council (PSC), a fifteen (15) member body elected on a regional basis, which serves as the AU's standing decision-making organ responsible for the maintenance of continental peace and security.[66]

[60] African Union, Panel of the Wise, Peace, Justice, and Reconciliation in Africa: Opportunities and Challenges in the Fight against Impunity 27 (2013) ('Since the early 1990s, Africa has served as a vast testing ground for new policies to address impunity, seek truth and justice, and enable reconciliation in fractured societies'), available online at https://reliefweb.int/sites/reliefweb.int/files/resources/ipi_e_pub_peacejusticeafrica.pdf.

[61] Ibid.

[62] Article 17 and the Protocol to the treaty establishing the African Economic Community relating to the Pan-African Parliament. On PAP generally, see G. Musila, 'United States of Africa: Positioning the Pan-African Parliament and Court in the Political Union Debate' ISS Paper 142 (2007) [Download].

[63] Arts 14, 15 and16 Constitutive Act

[64] The African Commission on Human and Peoples Rights, though established by a separate instrument, is regarded an organ of the Union, while the African Court on Human and Peoples Rights is to be subsumed in the proposed African Court of Justice and Human and Peoples Rights established by the Malabo Protocol. The Peace and Security Council, another organ of the union was established by a separate instrument, the Protocol Relating to the establishment of the Peace and Security Council of the African Union.

[65] Arts 10–13 Constitutive Act

[66] AU, 'PSC' available online at www.peaceau.org

The AU's PSC, established in 2002, was established as a 'decision-making organ for the prevention, management and resolution of conflicts.'[67] To achieve these objectives, the PSC has a wide mandate to promote peace, security and stability; anticipate and prevent conflicts; promote and implement peace-building and post-conflict reconstruction activities; combat terrorism; and encourage democratic practices, good government, the rule of law, and the protection of human rights.[68] The PSC may also recommend that intervention in a Member State where there are war crimes, crimes against humanity, or genocide,[69] consistent with the Constitutive Act of the African Union.[70] To pursue these objectives, the PSC works closely with other AU and African entities, including the Parliament, Commission, Panel of the Wise, Continental Early Warning System, African Standby Force, and regional mechanisms.[71]

The PSC was established before the creation of the African Court, and well before the proposal to extend its jurisdiction to international crimes, therefore, the PSC does not have an explicit mandate with respect to the African Court or international criminal processes. Nonetheless, combating impunity and ensuring justice for international crimes would certainly fall within the PSC's mandates to encourage the rule of law, protect human rights, and promote respect for the sanctity of human life and international humanitarian law.[72] From its first intervention in Burundi, to recent ones in Kenya[73] Sudan, South Sudan, Mali and Central African Republic, some of the activities undertaken by the AU have attempted to de-escalate conflicts, monitor ceasefires, or negotiate power-sharing agreements following the cessation of hostilities.[74]

[67] Protocol Relating to the Establishment of the Peace and Security Council of the African Union, art. 2(1).

[68] Ibid. art. 3.

[69] Ibid. art. 7(1)(e).

[70] Constitutive Act of the African Union, art. 4(h).

[71] Protocol Relating to the Establishment of the Peace and Security Council of the African Union, art. 2(2), 16, 18.

[72] Ibid. art. 3(f).

[73] On the AU mediation in Kenya, see G. Musila, 'Learning on the Job: The Role of the AU in Transitional Justice in Kenya' available at www.ssrn.com. See also E. Lindenmayer and J. Kaye, 'A Choice for Peace? A Story of Forty-One Days of Mediation in Kenya', *International Peace Institute*, August 2009.

[74] Two key features of these AU peacekeeping missions are worthy highlighting. The first feature of AU peacekeeping missions is that unlike the United Nations, which typically deploys following the signing of peace agreements, African Union peace operations have tended to be enforcement missions that are fielded to enforce ceasefire agreements and peace agreements. Second, AU peace keeping missions tend to deploy troops in situations of ongoing hostilities. This differs from UN missions, which for the most part (with few exceptions) operate under more stringent rules on the use of offensive force.

Since its first peace-keeping mission in Burundi with the African Mission in Burundi (AMIB),[75] in 2002 the practice has although with challenges become a staple of AU responses in situations of ongoing conflict. After the deployment in Burundi, the AU has fielded a number of missions including African Union Mission in Sudan (AMIS); AU Mission for Support to the Elections in the Comoros (AMISEC); African Union Mission in Somalia (AMISOM); AU Electoral and Security Assistance Mission to the Comoros (MAES); AU Military Observer Mission in the Comoros (MIOC); United Nations African Union Mission in Darfur (UNAMID Hybrid force); African-led International Support Mission to Mali (AFISMA) and; Africa-led International Support Mission to the Central African Republic (MISCA) which transformed into the UN Multidimensional Integrated Stabilization Mission[76] to the Central African Republic (MINUSCA).[77]

The PSC and the associated institutions that support its work, together with the Regional Economic Communities (RECs), jointly constitute what is commonly referred to as the African Union's Peace and Security Architecture (APSA).[78] They range from implementing various actions, mechanisms, and approaches entailed in the functioning of the PSC and by which relevant AU actors engage in the resolving of conflict, including violent conflicts.

Relatedly, the African Governance Architecture (AGA) is the AU's institutional framework established to coordinate action undertaken by AU organs, institutions and the regional economic communities (RECs) to support member states in strengthening democracy, governance and human rights. AGA was mandated by the AU Assembly in July 2010 at its 14th Ordinary session[79] and arose out of a series of deliberations within the AU (between the

[75] On the AU's earliest peace missions, see generally F. Aboagye, 'The African Union in Burundi: Lessons from the AU's first peacekeeping operation' and T. Murithi, 'The African Union's Evolving Role in Peace Operations: The African Union Mission in Burundi, the African Union Mission in Sudan and the African Union Mission in Somalia', *African Security Review* 17.1 Institute for Security Studies 70–82.

[76] On the AFISMA, MINUSCA and on UN-AU cooperation in peacekeeping in general, see generally P. Williams and S. Dersso, 'Saving Strangers and Saviours: Advancing UN-AU Cooperation on Peace Operations', *International Peace Institute* (2015).

[77] On features of AU peacekeeping missions, see Norwegian Institute of International Relations, 'Strategic Options for the Future of African Peace Operations 2015–2025' NUPI Seminar Report (2015) 11–13.

[78] On APSA, see generally K. Powell, 'The African Union's Emerging Peace and Security Regime', *ISS Monograph* 119 (May 2005);

[79] See AU, 'Decisions' 14th Ordinary session of the AU Assembly; see also 'Decision on the Theme, Date and Venue of the Sixteenth Ordinary Session of the Assembly of the African Union' adopted during its 15th Ordinary Session held between 25–7 July in Kampala, Uganda, Assembly/AU/Dec.304(XV).

DPA and AUC) driven by the desire to 'facilitate policy and programme convergence on Governance amongst AU Member States as a means to accelerate deeper integration.'[80]

The African Union's PSC is at the centrepiece of the effort to manage African violence and the AGA complements the African Peace and Security Architecture (APSA), which addresses the AU's peace and security agenda. The AGA and APSA were designed to bring together principles of democratic governance, peace, and security as interrelated and mutually reinforcing.[81]

In 2004, then Secretary-General Kofi Annan asserted in 2004 that '[j]ustice, peace and democracy are not mutually exclusive objectives, but rather mutually reinforcing imperatives. Advancing all three in fragile post-conflict settings requires strategic planning, careful integration and sensible sequencing of activities.'[82] This statement has paved the way for the development of 'a range of judicial and non-judicial processes to meet the complex challenges facing many countries in varying types of transition.'[83] It is also reflected in the ATJF, which recognizes that

> [t]ransitional justice does not require or advocate a 'one-size-fits-all' formula but recognizes the need for mechanisms and processes to be defined in accordance with national assessments involving broad citizen participation and which are therefore responsible to their needs and aspirations and which are also compliant with international standards. Processes should incorporate the right to know, the right to justice, the right to reparations and the guarantee of non-recurrence.[84]

This approach was reinforced in the Report of the African Union High-Level Panel on Darfur (AUPD), which stated that, in the context of Sudan,

> [c]riminal 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, defence 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

[80] On AGA the history and structure of AGA, see AU 'Framework of the African Governance Architecture' available online at www.iag-agi.org/IMG/pdf/aga-framewor9183.pdf

[81] G. Mukundi, 'Consolidating the African Governance Architecture', *SAIIA Policy Brief* 96, June 2014

[82] *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, Report of the Secretary General*, UN Doc. S/2004/616, 23 August 2004, summary.

[83] Panel of the Wise, supra note 61, at 13.

[84] ATJF, supra note 51 at E.2.

> successful outcome. Thus, inadequate investigations will not result in effective prosecutions; an under-resourced judiciary on the other hand would be unable to cope with the work generated by effective investigations. 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 emphasizes 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 of the past, in order to draw out the lessons of Darfur for Sudan, should be given priority, as an investment in the stability of Sudan. All these components, as well as any additional justice and reconciliation mechanisms, need to work together to achieve effective response to the situation in Darfur.[85]

To guide the work of the AU organs and the PSC, the African Union's Transitional Justice Policy assists African societies emerging from violent conflicts or authoritarianism in pursuing peace, justice, and accountability.[86] At the heart of this policy is the understanding that in 'fragile post-conflict setting[s], a … balance … must be struck between peace and reconciliation on the one hand and responsibility and accountability on the other.'[87] In contrast to other approaches, the AU's transitional justice policy recognizes that societies emerging from conflict often have multiple needs, including ensuring peace, catalyzing democratic transformation, and pursuing reconciliation and accountability, and that it is ultimately the people of the affected society who must determine the appropriate combination of transitional justice mechanisms based on their unique circumstances.[88] By focusing on the larger range of measures open to societies in transition, the AU's Transitional Justice Policy allows affected societies and the AU to determine how and when to fit prosecutions into a larger, holistic transitional justice program. Such an approach does not negate the importance of accountability measures, but acknowledges that peace and reconciliation are equally important and desirable goals.[89]

[85] AU Peace and Security Council, Report of the African Union High-Level Panel on Darfur (AUPD) (29 October 2009) PSC/AHG/2(CVII) at § 205.

[86] African Union, Draft Transitional Justice Policy, §§ 1, 5 (on file with the author).

[87] Ibid. § 22.

[88] Ibid. §§3, 27–9.

[89] Ibid. §§ 23–4; *see also* Panel of the Wise, Peace, Justice, and Reconciliation in Africa, at 72; *see also* African Union, Report of the African Union High-Level Panel on Darfur iv, 3 (2009), online at www.refworld.org/docid/4ccfde402.html.

Indeed, for countries still in the midst of conflict, 'the most urgent desire of the affected population is to cease hostilities, restore peace and security.'[90] In the eyes of many of these affected communities, peace itself 'constitute[s] a first measure of justice in Africa.'[91] An exclusive focus on prosecutions, as is often the case in the West, detracts from this broader understanding of justice, reducing the idea of justice to the prosecution of a handful of individuals rather than addressing the root causes of mass atrocity crimes.[92] But ensuring that such atrocities are not repeated requires much more than prosecutions; it requires changes in the political, economic, and cultural structures of society that contributed to the atrocities in the first place.[93]

The AU's Transitional Justice Policy recognizes advancing peace, reconciliation, and accountability requires careful planning and strategic sequencing of transitional justice measures.[94] Particularly for countries still engaged in or just emerging out from conflict, this sequencing approach recognizes that it is not always possible to achieve peace and justice at the same time.[95] As Thabo Mbeki and Mahmood Mamdani have written, '[t]here is a time and a place for courts, as in Germany after Nazism, but it is not in the midst of conflict or a nonfunctioning political system.'[96] Where mass atrocities are ongoing, the initial focus must be to stop the fighting, implement a ceasefire, and negotiate a solution to the crisis.[97] This does not mean that all

[90] Panel of the Wise, Peace, Justice, and Reconciliation in Africa, at 80; *see also* ibid. at 80.

[91] Ibid. at 83. For example, when asked what factors would facilitate justice and reconciliation, affected community members in Darfur included 'peace, a secure environment free of weapons, demobilization and reintegration of combatants, [and] stability' in their list. Report of the African Union High-Level Panel on Darfur, at 48.

[92] S. Dersso, 'The ICC's Africa Problem' in K. Clarke, A. Knottnerus, and E. de Volder (eds), *Africa and the ICC: Perceptions of Justice* 61, 68–9 (2016).

[93] See ibid.; see also A. Sachs, *The Strange Alchemy of Life and Law* 84 (2009).

[94] AU Draft Transitional Justice Policy, at §§ 22–3; see also Panel of the Wise, Peace, Justice, and Reconciliation in Africa, at 13 (observing that '[j]ustice, peace, and democracy are not mutually exclusive objectives, but rather mutually reinforcing imperatives' and that '[a]dvancing all three in fragile post-conflict settings requires strategic planning, careful integration and sensible sequencing of activities').

[95] Panel of the Wise, Peace, Justice, and Reconciliation in Africa, at 11, 14.

[96] T. Mbeki and M. Mamdani, 'Courts Can't End Civil Wars', *New York Times*, 5 February 2014, available online at www.nytimes.com/2014/02/06/opinion/courts-cant-end-civil-wars.html.

[97] Panel of the Wise, Peace, Justice, and Reconciliation in Africa, at 11–2; AU Chairman Back's Sudan's Bashir Over Court, *Reuters*, 8 September 2008 (stating, in relation to Darfur: 'Justice has to be done. Justice must be seen to be done. What the AU is simply saying is that what is critical, what is the priority, is peace. That is priority number one now.'), available online at www.reuters.com/article/idUSL8101824.

accountability measures are suspended, but that they may be more limited until a political settlement has concluded.[98]

3. LEGAL INTERESTS IN PEACE: JUSTICE SEQUENCING

As established, since its transformation from the Organization of African Unity, the African Union, has demonstrated a renewed energy and growing capacity to resolve conflicts around the continent using particular peace–justice sequencing strategies. While on one hand, in March 2009, the AUC commissioned the Pan African Lawyers' Union (PALU) to prepare a draft protocol to expand the criminal jurisdiction of the African Court which resulted in the production of the Malabo Protocol for the African Court whose innovations are in the introduction of new international crimes, on the other hand, central to its justice emphasis was the incorporation of that structure in a larger transitional justice architecture.

The emergence of an African Court of Justice and Human Rights, therefore, is not to be mistaken as another example of a blind move toward criminal accountability in the twenty-first century in which court proceedings are deemed the only venue for addressing violence. Rather, the emergence of the African Court should be seen in relation to Africa's unfolding transitional justice domain underway. The assumption is that in mass atrocity violence situations, if peace and a functioning government cannot be achieved, the very effort to create a new state will suffer. In such situations (especially when compared to a specific crisis in a consolidated democracy), the political stakes are also higher, making the conflict between the peace-versus-justice dilemmas even more acute. This highlights the importance of understanding the way that the Malabo is part of a larger African transitional justice infrastructure that sees peace–justice sequencing as central to the relevance of political settlements in deeply unequal social fields.

Articles 29 and 34A of the revised Protocol provide a mechanism for assimilating the African Union's peace and justice sequencing strategy by providing the African Union's key peace and security organs an important role in the initiation and continuation of cases. In situations where criminal prosecutions may encourage peace by bringing all parties to the table, the Assembly, the Parliament, or the Peace and Security Council would have the authority to make an early referral of a case to the African Court under article

[98] AU Draft Transitional Justice Policy, at § 23. For example, even if prosecutions are temporarily suspended, it may be possible to conduct preliminary criminal investigations and identify and preserve evidence. Ibid.

29 to pressure the relevant parties to negotiate. By contrast, where prosecutions risk derailing peace processes by removing key actors critical to the negotiations or by encouraging parties to dig into the fighting in order to win at all costs, these institutions could delay referral of a case to the Court, thereby facilitating the search for a mediated political solution.[99]

A. *Article 29 and 34A: Sequencing*

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Once a case has been referred to the African Court under any of the referral mechanisms, articles 33, 34, and 34A would provide the AU's peace and security organs – via notification to the Chairperson of the African Union – with the information necessary to assess whether those bodies should intervene in the case. This is particularly crucial with respect to the expanded criminal jurisdiction since criminal prosecutions, as described above, have the potential to impact ongoing peace processes. By receiving notification of the initiation of a case under article 34A, the Assembly, Parliament, and Peace and Security Council, among other bodies, would be able to assess whether to submit a request for intervention under article 49. A right of intervention is not guaranteed, but rather is left to the discretion of the Court.[101]

[99] M. Sirleaf, 'Regionalism, Regime Complexes, and the Crisis in International Criminal Justice', 54 *Colum. J. Transnat'l L.* 699, 761 (2016) (noting that 'the emphasis in the AU on negotiating political solutions to deeply intractable conflicts may mean that a quick resort to judicial measures is de-emphasized').

[100] Ibid.

[101] Merger Protocol, art. 49.

B. *Articles 33, 34, 44A: Registrar's Notification of Chair of AU: Article 34A(1)*

Article 34A(1) obliges the registrar of the court to notify the Chairperson of the African Union of proceedings initiated before the criminal section and through which one of the triggers of jurisdiction could anchor considerations of sequencing of peace and justice by the African court and the AU. By obliging the registrar of the court to notify the Chairperson of the African Union of proceedings initiated before the criminal section, Provision 34A(1) also provides an opening to allow an AU agent to intervene in a prosecution or situation in the interests of peace.

It is possible that Art 34A(1), as basis for AU intervention in the work of the Court, could be seen as controversial in that it could be seen as having the potential to undermine the perceived independence of the prosecutor. Once a case has been referred to the African Court under any of the referral mechanisms, Articles 33, 34, and 34A would provide the AU's peace and security organs – via notification to the Chairperson of the African Union – with the information necessary to assess whether those bodies should intervene in the case. Thus, Article 34A(1) could be read as providing a conscious desire to distinguish between investigation and prosecution, both of which form part of the judicial process (interests of justice) and a political process (interests of peace) – as in the case of the OTP's interests of justice policy.[102] That is – distinguishing between the investigation and prosecution processes which form part of the judicial process (interests of justice) and a political process (interests of peace) – as we will see in the ICC's OTP Position Paper. This is particularly crucial with respect to the expanded criminal jurisdiction since criminal prosecutions, as described above, have the potential to impact ongoing peace processes. By receiving notification of the initiation of a case under article 34A, the Assembly, Parliament, and Peace and Security Council, among other bodies, would be able to assess whether to submit a request for intervention under article 49.

Unlike the ICC, however, there is no provision in the Malabo Protocol that permits the AU to automatically defer a criminal investigation or prosecution. Instead, the AU would have to submit a request for intervention under Article 49, and the decision as to whether to permit such intervention would rest with the African Court.

[102] OTP Policy paper, at 1 states that: 'that there is a difference between the concepts of the interests of justice and the interests of peace and that the latter falls within the *mandate of institutions other than the Office of the Prosecutor* (emphasis mine).

Article 49 permits interventions only where the requesting party has an 'interest of a legal nature.' That phrase is identical to that in the intervention provision of the Statute of the International Court of Justice,[103] and it is therefore logical to examine how that court has interpreted that phrase in assessing how the African Court might interpret article 49. To date, the ICJ has never held that promoting peace constitutes an interest of a legal nature. Indeed, out of fifteen requests for intervention, the ICJ has permitted only two, both of which were related to territorial disputes.[104] The ICJ has routinely declined requests for intervention based on more humanitarian interests, such as the interest in combating apartheid.[105] It has also rejected the similar request to decline jurisdiction due to an ongoing peace process.[106] In light of this consistent jurisprudence, it is unlikely that the African Court would come to a different conclusion. A State that opposes such deferral could likewise seek to intervene under Article 49 with the reasons against deferral.

Affected States already have the ability to express their opinions on a potential deferral under the intervention provision in article 49. The key peace and security organs of the African Union may request a deferral through the intervention provision in article 49. Nonetheless, as a means of clarification, the Rules of the Court could be written so as to explicitly confirm that where the AU submits a request for intervention seeking a deferral, the Court will (1) seek the opinion of the affected State(s) and (2) consider those opinions before rendering a judgment on the request.

Ultimately, the right of intervention is not guaranteed, but rather is left to the discretion of the Court.[107] In exercising its discretion on whether to permit an AU organ to intervene in a criminal case, the African Court would have to determine whether a request to intervene in order to propose a deferral of the criminal case or some other subordination of the criminal proceedings to the

[103] Statute of the International Court of Justice, art. 62(1).

[104] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, Judgment of 4 May 2011, Dissenting Opinion of Judge Al-Khasawneh, § 6, available online at www.icj-cij.org/files/case-related/124/124-20110504-JUD-02-01-EN.pdf.

[105] South West Africa Cases, Judgment (Second Phase), at 34 (finding that 'humanitarian considerations' were insufficient to constitute a legal interest in the absence of an obligation provided by a relevant text, such as a treaty).

[106] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, at §§ 52–3 (noting that there were 'differing views' as to 'what influence the Court's opinion might have on these negotiations' and therefore deemed the facts not 'compelling' enough to decline the exercise of jurisdiction).

[107] Merger Protocol, art. 49.

peace process constitutes 'an interest of a legal nature which may be affected by the decision in the case.'[108] This issue is not straightforward and there is no definitive caselaw on this issue. Nonetheless, there is substantial support for such a position.

It is well established that legal interests are not limited to borders and contracts but also extend to matters of peace, security, and human rights. The International Court of Justice, for example, has held that 'all States can be held to have a legal interest' in ensuring observance of the prohibition on acts of aggression, genocide, and other 'obligations of a State towards the international community as a whole.'[109] Such obligations extend to the protection of human rights,[110] which include the right to 'national and international peace and security' under both regional African treaties and international declarations.[111]

Consistent with this understanding, judges of the International Court of Justice have explicitly recognized that a 'legal interest' exists in 'preserv[ing]

[108] Merger Protocol, art. 49. The language of the intervention provision is nearly identical to that contained in the Statute of the International Court of Justice. United Nations, Statute of the International Court of Justice, art. 62 (18 April 1946) (providing that a State may submit a request to the Court to be permitted to intervene where the State has 'an interest of a legal nature which may be affected by the decision in the case'), available online at www.icj-cij.org/en/statute.

[109] *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Judgment of 5 February 1970, §§ 33–4, available online at www.icj-cij.org/files/case-related/50/050-19700205-JUD-01-00-EN.pdf; see also *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment of 20 July 2012, § 68, available online at www.icj-cij.org/files/case-related/144/144-20120720-JUD-01-00-EN.pdf. Although the ICJ referred to States, it is beyond dispute that an international organization may enforce a legal interest, even more so when specifically authorized to do so under a relevant treaty or protocol. See, e.g., *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,, Advisory Opinion of 9 July 2004, §§ 15–17, available online at www.legal-tools.org/doc/e5231b/pdf/.

[110] International Law Institute, *The Protection of Human Rights and the Principle of Non-Intervention in Internal Affairs of States* (13 September 1989) (declaring that 'every State has a legal interest in the protection of human rights'), available online at http://hrlibrary.umn.edu/instree/1989b.htm.

[111] Organization of African Unity, African Charter on Human and Peoples' Rights, art. 23(1) (June 1, 1981), available online at https://au.int/sites/default/files/treaties/7770-treaty-0011_-_african_charter_on_human_and_peoples_rights_e.pdf; General Assembly Res. 39/11, Declaration on the Right of Peoples to Peace (12 November 1984), available online at www.ohchr.org/EN/ProfessionalInterest/Pages/RightOfPeoplesToPeace.aspx; *Human Rights Council Declaration on the Right to Peace*, UN Doc. A/HRC/32/L.18, 24 June 2016, available online at http://unipd-centrodirittiumani.it/public/docs/Declaration_RightToPeace_24062016.pdf (adopted on 1 July 2016).

the internal stability of [a] country'[112] and 'humanitarian causes.'[113] A progressive African Court could, consistent with this jurisprudence, hold that issues of peace and security are 'interests of a legal nature' that would permit the Court to defer consideration of a case for a period of time. As noted, the final decision would be left to the Court's discretion.

There is no automatic ability of the AU or its organs to defer a criminal matter under the Malabo Protocol. Moreover, because any request for a deferral would have to be made through a request for intervention, the parties to the criminal matter, as well as the State where the crimes occurred, would have an opportunity to comment upon the request and present any supporting or countervailing considerations. By leaving the discretion for a deferral with the Court, the Malabo Protocol takes a different approach than the Rome Statute of the ICC which, under the United Nations Security Council, has the authority to require the ICC to defer an investigation or prosecution for up to a year.[114] The Malabo Protocol therefore ensures a less politicized process than that which has bedeviled the ICC.

Similarly, the AU's referral authority to the African Court under the Malabo Protocol is more constrained than that of the UN Security Council vis-à-vis the ICC. Unlike the UN Security Council, which may refer a case to the ICC related to any country, even if it is not a party to the Rome Statute,[115] the African Union may only refer cases related to matters in States that have

[112] *Case Concerning Certain Criminal Proceedings in France (Republic of the Congo* v. *France)*, , Order of 17 June 2003, (dissenting opinion of Judge de Cara), available online at www.icj-cij.org/files/case-related/129/129-20030617-ORD-01-02-EN.pdf. The majority did not appear to contest that internal security may constitute a legal interest, which it described as a 'right,' and instead concluded that there was no risk of irreparable prejudice to that right. *See Case Concerning Certain Criminal Proceedings in France (Republic of the Congo* v. *France)*, Order of 17 June 2003, §§ 27–9, available online at www.icj-cij.org/files/case-related/129/129-20030617-ORD-01-00-EN.pdf.

[113] See, e.g., *South West Africa Cases (Ethiopia v. South Africa; Liberia* v. *South Africa)*, Judgment (Preliminary Objections) of 21 December 1962, 425 (separate opinion of Judge Jessup), available online at www.icj-cij.org/files/case-related/46/046-19621221-JUD-01-03-EN.pdf; *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Judgment (Second Phase) of 18 July 1966, 252–53 (dissenting opinion of Judge Tanaka), available online at www.legal-tools.org/doc/3ed45e/pdf/. In the 1966 decision, the majority did not dispute that a State may have a legal interest in such issues, but rather held that the legal interest must be clearly vested in the particular petitioner in order to permit a claim. *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Judgment (Second Phase) of 18 July 1966, § 44, available online at www.icj-cij.org/files/case-related/46/046-19660718-JUD-01-00-EN.pdf.

[114] Rome Statute of the International Criminal Court, art. 16 (17 July 1998), available online at www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf

[115] Rome Statute of the ICC, art. 13(b); ibid. art. 12(2) (exempting UNSC referrals from the requirement that the relevant State be a party to the Statute).

ratified the Protocol.[116] There is thus no danger that the AU could request that the African Court overreach its authority by prosecuting a case related to a state that has not ratified the Protocol, as the ICC has done with Sudan – shown in the next section. Nevertheless, in order to explicitly confirm the possibility of deferrals for reasons of peace and security, the Rules of the Court could be written so as to explicitly confirm that a request for intervention in order to defer a case in favor of ongoing peace processes. For example, the rules could include a definition of 'interest of a legal nature' that specifies that matters of peace and security are included.

4. PRIORITIZING PEACE: SEQUENCING AS KEY TO JUSTICE RECONCEIVED IN THE AFRICAN REGION

Recognizing that international criminal law prohibits amnesties for war crimes and crimes against humanity, those who approach the international legal terrain through this lens often argue that in several situations where peace agreements initially included amnesties for warring parties, domestic, regional, and international courts have annulled those amnesties and permitted prosecutions to proceed. For example, they suggest that in October 1992, the Inter-American Commission on Human Rights found that Argentina's 'Full Stop Law' and other laws granting amnesty for human rights violations committed during Argentina's 'dirty war' deprived victims of their right to justice under the *American Convention on Human Rights*.[117]

In March 2001, The Inter-American Court of Human Rights invalidated Peru's Law No. 26479, which granted amnesty to perpetrators of human rights violations during its period of armed conflict from 1980 to 1995.[118] Here the argument made was that the Court held that 'all amnesty provisions ... are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearances, all of them prohibited because they violate non-derogable rights

[116] Merger Protocol, art. 29(2) (providing that '[t]he Court shall also have no jurisdiction to deal with a dispute involving a Member State that has not ratified the Protocol').

[117] Inter-American Commission on Human Rights, *Report No. 28.92: Argentina*, 2 October 1992, available online at: www.cidh.oas.org/annualrep/92eng/Argentina10.147.htm.

[118] Inter-American Court of Human Rights, *Case of Barrios Altos v. Peru*, Judgment of 14 March 2011, available online at: www.corteidh.or.cr/docs/casos/articulos/seriec_75_ing.pdf [*Barrios Altos*]; see also Amnesty International, 'Peru: Amnesty laws consolidate impunity for human rights violations' online: www.amnesty.org/download/Documents/168000/amr460031996en.pdf.

recognized by international human rights law.'[119] These regional precedents led to the judicial invalidation of Argentinian amnesty laws in domestic courts, and eventual legislative annulment.[120]

Some also argue that the issuance of an international indictment sends a message of condemnation that delegitimizes the accused warring party, and triggers States' duties of arrest which isolate the individual and lead to retreat.[121] Human Rights Watch points to the situations of both the Former Yugoslavia and Liberia as successful examples of marginalization and isolation through issuance of arrest warrants:

> In Bosnia and Herzegonina the indictment of Radovan Karadzic by the ICTY marginalized him and prevented his participation in the peace talks leading to the success of the Dayton negotiations to end the Bosnian war. Similarly, the unsealing of the arrest warrant for Liberian President Charles Taylor at the opening of talks to end the Liberian civil war was ultimately viewed as helpful in moving negotiations forward. By delegitimizing Taylor both domestically and internationally, the indictment helped make clear that he would have to leave office, an issue that had been a potential sticking point in negotiations. He left Liberia's capital, Monrovia, a few months later.[122]

Similarly, some of those advocating this position in African contexts have suggested that although Article IX of the 1999 Lomé Peace Agreement between the government of Sierra Leone and the Revolutionary United Front granted 'absolute and free pardon and reprieve to all combatants and

[119] *Barrios Altos*, supra note 119 at § 41.

[120] See Lorena Balardini, 'Argentina: Regional Protagonist of Transitional Justice' in Elin Skaar Jemima Garcia-Godos and Cath Collins, eds., *Transitional Justice in Latin America: The Uneven Road from Impunity Towards Accountability* (Routledge: 2016) Chapter 3, 50 at 57–60 [Balardini].

[121] Bantekas, supra note 10 at 92; See also Human Rights Watch, *Settling Justice Short: Why Accountability Matters for Peace* (7 July 2009): 'Indictments of abusive leaders and the resulting stigmatization can lead to marginalizing a suspected war criminal and may ultimately facilitate peace and stability.' Available online at: www.hrw.org/report/2009/07/07/selling-justice-short/why-accountability-matters-peace [Human Rights Watch]

[122] Ibid.; The Former Yugoslavia was also cited by the Panel of the Wise at 11 as an example where indictments and prosecutions may help secure peace by removing spoilers from the peace process; On the other hand, Prorok, supra note at 220 argues that the 'threat of prosecution by the international tribunal in The Hague made it practically impossible for NATO to reach an early deal with Milosevic, thereby lengthening the war and suffering in the Balkans in the summer of 1999.' In terms of Liberia, others have argued that Charles Taylors' surrender and arrest was only possible because he had lost power and authority over his government to rebel forces, forcing him into exile (see below).

collaborators in respect of anything done by them in pursuit of their objectives,"[123] it came with an express reservation by the UN that it did not accept immunity for war crimes and crimes against humanity. As such, the Peace Agreement was not an impediment to the establishment of the Special Court for Sierra Leone and trying rebel leaders.[124]

While some view the annulment or invalidation of various amnesties as a positive approach to achieving peace, there is also a more regionally relevant approach to the management of violence on the African continent that is underway that points to a fresh and new set of possibilities that focuses on the preservation of human life first through the cessation of hostilities.

A. *Prioritizing Peace*

Seeking justice 'at all costs' while conflict situations are ongoing can significantly undermine peace processes.[125] Indicted leaders may be incentivized to continue or incentivize conflict to avoid capture, extradition, and trial.[126] By contrast, offering amnesties may persuade combatants to enter into negotiations and lay down their arms. As noted earlier, A prominent example is the situation in Uganda, where the ICC Prosecutor had issued arrest warrants against Joseph Kony, leader of the Lord's Resistance Army (LRA), as well as other high-ranking LRA commanders, as the government of Uganda was attempting to negotiate a peace agreement with the LRA. The threat of capture and arrest, and the ICC's refusals to drop the indictments, kept Kony and other LRA members from coming to the negotiation table and ultimately signing the peace agreement.[127]

[123] *Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone* (12 July 1999) UN Doc S/1999/777 available online at: https://peacemaker.un.org/sites/peacemaker.un.org/files/SL_990707_LomePeaceAgreement.pdf.

[124] See Bantekas, supra note 10 at 105; See also Special Court for Sierra Leone, *Prosecutor* v. *Allieu Kondewa*, Decision on Lack of Jurisdiction/Abuse of Process: Amnesty Provided by the Lomé Accord (25 May 2004).

[125] See, e.g. Human Rights Watch, supra note 122: 'At the same time, some diplomats tasked with negotiating peace agreements have argued that the prospect of prosecution by the ICC has made achieving their objectives more difficult. Those negotiating peace have tended to view the possibility of prosecution as a dangerous and unfortunate obstacle to their work. Some fear that merely raising the specter of prosecution will bring an end to fragile peace talks. Facing understandable pressure to resolve an armed conflict, negotiators and others often feel pressured to push justice to the side.'; Prorok, supra note at 214.

[126] Ibid. at 214; L. Gissel, 'Justice Tides: How and When Levels of ICC Involvement Affect Peace Processes', 9 *International Journal of Transitional Justice* (2015) 428 at 429 [Gissel].

[127] Ibid. at 220.

Further, indicted heads of states are also incentivized to retain power as, '[s]overeignty norms ... provide some protection to sitting state leaders: while venturing outside sovereign borders puts state leaders at risk, remaining entrenched at home leaves them relatively secure against ICC prosecution. ... Further, domestic actors often lack the ability to remove a sitting leader who enjoys the protection of the state's security apparatus.'[128]

The most cited example is the Sudan's Omar Al-Bashir, who 'cancelled plans to step down from power in 2009, reversing course after the ICC issued an arrest warrant[.]'[129] The ICC arrest warrant has been criticized by experts on Sudan, who, arguing that justice should wait until perpetrators of atrocity are no longer in positions of authority and capable of retaliation, have stated, '[a]ttempts to deploy UNAMID [the AU/UN peacekeeping mission in Sudan] in Darfur are at a critical point. At this sensitive time, to lay charges against senior government officials, and to criminalise the entire government, will derail attempts to pull Sudan from the brink.'[130]

In this case, on 31 March 2005, the UNSC adopted Resolution 1593 in which it referred the conflict in Darfur to the ICC.[131] This marked the first time that the UNSC had invoked its power under Article 13(b) of the Rome Statute to refer a particular situation to the ICC prosecutor for investigation and possible prosecution.[132] The referral was predicated on the UNSC's determination that the situation in Sudan constituted a threat to international peace and security under Article 39 of the UN Charter, and that the prosecution of the perpetrators of the human rights violations in Darfur would help to restore peace and stability in the region.[133]

On 27 April 2007, the ICC issued arrest warrants against Janjaweed militia leader Ali Kushayb and Sudan's Minister of Humanitarian Affairs, Ahmed Harun.[134] On 14 July 2008, the ICC Prosecutor requested an arrest warrant against Sudanese President, Omar al-Bashir, which was issued on 4 March 2009.[135] The government of Sudan objected to the exercise of this jurisdiction in relation to Sudan, arguing that both the UNSC and ICC violated the

[128] Ibid. at 221.
[129] Ibid. at 85.
[130] As cited in Human Rights Watch, supra note 122.
[131] Akande, du Plessis and Jalloh, supra note 69, at 5.
[132] Ibid.
[133] Ibid.
[134] Decision on the Prosecution Application Under Article 58(7) of the Statute, *Harun* (ICC-02/05–01/07–1), Pre-Trial Chamber I, 27 April 2007.
[135] Warrant of Arrest for Omar Hassan Ahmad Al Bashir, *Al Bashir* 9ICC-02/05–01/09–1), Pre-Trial Chamber I, 4 March 2009.

country's sovereignty.[136] As an immediate reaction to the arrest warrant against Bashir, the Sudanese government expelled more than a dozen humanitarian aid organizations, leaving more than one million people without access to food, water, and healthcare services.[137] In addition to the Sudanese government, the African Union (AU), the Arab League, and the Organisation for Islamic Conference also objected to the arrest warrant on the grounds that such an action by the ICC was destabilizing for peace talks which were to be revived in Doha, Qatar.[138] Several African and Arab members of the UNSC, supported by the permanent members, China and Russia, proposed a resolution to renew the United Nations–African Union Mission in Darfur (UNAMID), the joint AU-UN peacekeeping mission formally approved by United Nations Security Council Resolution 1769 on July 31, 2007, to bring stability to the war-torn Darfur region of Sudan while peace talks on a final settlement continued[139]

In response to the ICC's arrest warrant against Bashir, Sudan began aggressively mobilizing AU member states in support of its position, seeking to weaken the support for the ICC in Africa. The AU called upon the UNSC to invoke Article 16 of the Rome Statute to defer the processes initiated against Bashir on the grounds that a prosecution of the president could impede the prospects for peace in the region.[140] The UNSC showed minimal response to the AU request, considering it only briefly and failing to act on it.[141] In response, in its July 2009 summit in Sirte, Libya, the AU directed all of its member states to withhold their cooperation from the ICC in respect of the arrest and surrender of Bashir.[142] This message has been reiterated at

[136] Akande, du Plessis and Jalloh, supra note 69, at 5.
[137] Akhavan, supra note 14, at 648.
[138] S. Baldo, 'Sudan: Impact of the Rome Statute and the International Criminal Court', International Centre for Transitional Justice, May 2010, available online at: www.ictj.org/publication/sudan-impact-rome-statute-and-international-criminal-court.
[139] M. Phoebe, '10 Years of the International Criminal Court: The Court, Africa, the United Nations Security Council (UNSC) and Article 16 of the Rome Statute', (2012), available online at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2169819.
[140] Akande, du Plessis and Jalloh, supra note 92, at 5. See also Decision of the Meeting of African States Parties to the Rome Statute of the International Criminal Court, Doc Assembly/AU/13 (XIII), Addis Ababa, 1–3 July 2009, 8; Communiqué of the 207th Meeting of the Peace and Security Council at the Level of the Heads of State and Government, Doc PSC/AHG/COMM.1(CCVII), 29 October 2009, 5.
[141] Akhavan, supra note 14, at 648.
Akande, du Plessis and Jalloh, supra note 92, at 6.
[142] Ibid.

subsequent summits and in the most recent event held in June 2015, South Africa declined/failed to turn over Bashir to the ICC.[143]

To contain the broad backlash against the ICC in Africa, the AU established a High-Level Panel for Darfur (AUPD) in March 2009, headed by Thabo Mbeki, with a mandate to recommend approaches for reconciling the demands of peace, justice, and reconciliation.[144] The report, released in October 2009, recommended balancing these demands by establishing a hybrid court composed of Sudanese and non-Sudanese judges and legal experts; the introduction of legislation to remove immunities for state actors suspected of crimes in Darfur; and a 'Trust, Justice and Reconciliation Commission'.[145] The report did not challenge the ICC's independent jurisdiction in the Darfur situation. Increasing tensions between the AU and the UNSC and ICC prompted the AU to present a proposal at the November 2009 session of the ICC Assembly of States Parties (ASP) that called for Article 16 to be amended to allow for the UN General Assembly to act should the UNSC fail to decide on a deferral request within six months.[146] The AU called upon the UNSC to invoke Article 16 of the Rome Statute to defer the processes initiated against him on the grounds that a prosecution of the president could impede the prospects for peace in the region.[147] The UNSC showed minimal response to the AU request, considering it only briefly and failing to act on it.[148] In response, in its July 2009 summit in Sirte, Libya, the AU directed all of its member states to withhold their cooperation from the ICC in respect of the arrest and surrender of Bashir.[149] This message has been

[143] See M. Taddele Maru, 'Why South Africa let Bashir Get Away', *Al Jazeera*, 15 June 2015, available online at: www.aljazeera.com/indepth/opinion/2015/06/south-africa-bashir-150615102211840.html

[144] S. Baldo, 'Sudan: Impact of the Rome Statute and the International Criminal Court', *International Centre for Transitional Justice*, May 2010, available online at: www.ictj.org/publication/sudan-impact-rome-statute-and-international-criminal-court.

[145] C. Ero, 'Understanding Africa's Position on the International Criminal Court' (Oxford Transitional Justice Research Working Paper Series), 10 March 2010, available online at: http://otjr.crim.ox.ac.uk/materials/papers/122/Justice_in_Africa.pdf.

[146] Akande, du Plessis and Jalloh, supra note 92, at 6.

[147] Akande, du Plessis and Jalloh, supra note 69, at 5.See also Decision of the Meeting of African States Parties to the Rome Statute of the International Criminal Court, Doc Assembly/AU/13 (XIII), Addis Ababa, 1–3 July 2009, 8; Communiqué of the 207th Meeting of the Peace and Security Council at the Level of the Heads of State and Government, Doc PSC/AHG/COMM.1(CCVII), 29 October 2009, 5.

[148] Akhavan, supra note 5, at 648.
Akande, du Plessis and Jalloh, supra note 69, at 6.

[149] Ibid.

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The attempt to apply Article 16 of the ICC in the case of Sudan has been highly controversial. Proponents of an Article 16 deferral cite a number of advantages. First, the deferral of investigation and prosecution may prevent an aggressive reaction from Sudan's ruling party, which could further jeopardize peace and security in Darfur. Second, it could allow more time to assess the merits and drawbacks of prosecuting Bashir. Third, it may place pressure on Sudan's ruling party to cooperate with the UN and its peacekeeping force to respect human rights and to protect civilians. Non-cooperation with such objectives could be sanctioned by a refusal to renew the Article 16 deferral. Finally, the use of Article 16 could be used by the international community as leverage in negotiations towards a peace agreement.[153]

On the other hand, opponents of issuing a deferral under Article 16 argue that deferring the investigation or prosecution of Bashir would deny justice to victims in Darfur and make the UN Security Council appear indecisive, as it was the organ that made the initial referral.[154] Some scholars have also been skeptical as to whether or not any peace negotiations are even taking place that would warrant such a deferral.[155] Various other scholars are more optimistic and insist that the ICC strategy to issue the arrest warrant against al-Bashir has been successful to a certain extent because the looming threat of ICC arrest warrants has created an incentive to at least feign a willingness to end the war.

[150] See M. Taddele Maru, 'Why South Africa let Bashir Get Away', *Al Jazeera*, 15 June 2015, available online at: www.aljazeera.com/indepth/opinion/2015/06/south-africa-bashir-150615102211840.html

[151] Akande, du Plessis and Jalloh, supra note 69, at 6.

[152] For a review of all ASP working group reports, see: www.icc-cpi.int/en_menus/asp/WGA/Pages/default.aspx.

[153] International Refugee Rights Initiative, supra note 68, at 32.

[154] Ibid.

[155] See R. Goldstone, 'Catching a War Criminal in the Act', *New York Times*, 15 July 2008, available online at: www.nytimes.com/2008/07/15/opinion/15goldstone.html?_r=0.

They note that in November 2008, Bashir announced a ceasefire with the Darfur rebels and that this was prompted by the pressure of the looming arrest warrant.[156]

A working group of the ASP has since been established to consider this and other proposed amendments to the Rome Statute. As per the most recent report, the proposed amendment is still under review.[157] In May 2011, the Doha Document for Peace in Darfur (DDPD) was finalized at the All Darfur Stakeholders Conference.[158] On 14 July, the Government of Sudan and the Liberation and Justice Movement signed a protocol agreement committing themselves to the Document, which is now the framework for the comprehensive peace process in Darfur. The DDPD was the culmination of two and half years of negotiations, dialogue and consultations with the major parties to the Darfur conflict, all relevant stakeholders and international partners. UNAMID lent technical expertise to the process and continues to support the dissemination of the Document as well as to urge non-signatory movements to sign up to the DDPD.[159] As recently as June 2015, the UNSC has expressed concern regarding the continuous serious delays in the overall implementation of the accord and the lack of permanent ceasefire.[160]

What the Sudan example shows us is that rushing to adjudication too quickly impedes democratic consolidation and that the move to trials may perpetuate more instability.[161] This argument holds that in addition to securing peace, other issues may be more crucial to a country's survival post-conflict, such as economic reconstruction, transition to a market economy, provision of healthcare, infrastructure, and employment – all leading to the strengthening of stable democracies.[162] Following a path of legal punishment can serve to maintain rather than reconcile differences between groups in society.'[163]

B. *Accountability is Not Possible Without Stability*

Argentina and Chile have been the most prominently-used examples of successful peace–justice sequencing. The Panel of the Wise has pointed to Argentina as an example revealing

[156] Akhavan, supra note 5, at 650.
[157] For a review of all ASP working group reports, see: www.icc-cpi.int/en_menus/asp/WGA/Pages/default.aspx.
[158] See http://unamid.unmissions.org/Default.aspx?tabid=11060.
[159] Ibid.
[160] See www.un.org/apps/news/story.asp?NewsID=51285#.VcKwCJNViko.
[161] Ibid.; See also Olsen et al., supra note 24.
[162] Olsen et al., supra note 24 at 987.
[163] Ibid at 986.

> that while political realities complicated the search for accountability, multiple truth-seeking initiatives continually exposed perpetrators, and a vigilant array of victims' groups and civil society organizations kept the demand for justice alive. In addition, Argentina's victims' groups used international and regional instruments at critical moments to pressure their government to act.[164]

In Argentina, the military dictatorship in place since 1976 collapsed in 1982 when Argentina's military defeat in the Falklands War with the United Kingdom led to the calling of elections.[165] The outgoing military regime implemented a blanket self-amnesty in September 1983, which was overturned by Argentina's Supreme Court three months later, allowing the trials of members of the armed forces for serious human rights violations committed during the dictatorship.[166] The overturning of the amnesty, however, provoked backlash among the military, 'leading the government to change course and design measures to contain, and eventually halt, trials.'[167] These included the 'Full Stop Law' of 1986, which established a 60-day deadline after which Argentine courts would no longer admit new criminal complaints against military perpetrators. According to Balardini, the Full Stop Law:

> produced results opposite to its intentions, sparking 'frenetic activity' in the courts . . . As hundreds of claims were presented nationwide, the number of cases in court tripled during the allowed period. Tensions between the government and the military increased as a result. After military revolts that threatened democracy, [Argentinian President] Alfonsin submitted to Congress the Due Obedience Law . . . Approved in 1987, it limited the criminal liability of subordinates based on the presumption that they were following orders. The immediate effect of these two laws was the withdrawal of charges against 431 existing defendants, bringing most ongoing investigations to a definitive halt.[168]

These measures held for approximately the next decade, where a series of 'unprecedented political and economic cris[es] . . . shifted the focus of public and policy attention to social problems such as violent public order policing, poverty, and unemployment.'[169] However, slowly, with the help of human rights activists bringing challenges to the courts resulting in jurisprudence

[164] Panel of the Wise, supra note 18 at 12–13.
[165] Balardini, supra note 121 at 51.
[166] Ibid. at 57.
[167] Ibid.
[168] Ibid. at 58.
[169] Ibid. at 58.

from the Inter-American system, the international duty to prosecute was upheld and amnesties voided by the courts, and ultimately annulled by the Argentine legislature in 2003.[170] As a result, 'the combination of political and legal strategizing pursued by [human rights organizations], both nationally and internationally, plus clear political will in the various branches of state, led eventually to a full reopening of trials against perpetrators.'[171] Previous truth commission findings also served as evidence to bolster the later prosecutions.

Chile's transitional justice process has been described as 'painstaking' and lacking state commitment.[172] However, Collins and Hau describe that '[t]he excessive caution of its early transitional justice trajectory gradually gave way to what some now consider to be a success story of incrementalism.'[173] Transition from General Augusto Pinochet's 17 years of brutal military dictatorship ended following a democratic election in 1989. Like in Argentina, the military regime implemented a self-imposed, wide-ranging amnesty before ceding power. However, unlike Argentina, and fearful of potential backlash from the military, still commanded by Pinochet, Chile's new government opted to pursue a 'low-key transitional justice process focused on truth and reparations, which did not encroach unduly on entrenched military and right-wing interests.'[174]

As of mid-2015, the amnesty law was still in place. However, through advocacy and litigation, human rights organizations and victims have managed to limit its application through 'creative circumvention'[175] using judicial means, opening up domestic criminal justice procedures to victims of atrocities committed during the military dictatorship. According to Randeny and Lassee, 'Pinochet's arrest on a Spanish arrest warrant, the Inter-American Court's jurisprudence on amnesty laws, as well as public pressure on the basis of truth commissions' reports finally created the conditions necessary to initiate trials.'[176] In particular, as described above, jurisprudence from the Inter-American system invalidated amnesties for war crimes and crimes against humanity. In relation to Chile, the Inter-American Court of Human Rights re-

[170] Ibid. at 59–60.
[171] Ibid. at 60.
[172] C. Collins and B. Hau, 'Chile: Incremental Truth, Late Justice' in E, Skaar, J. Garcia-Godos and C. Collins, eds., *Transitional Justice in Latin America: The Uneven Road from Impunity towards Accountability* (Routledge: 2016) Chapter 6 126 at 143 [Collins and Hau].
[173] Ibid. at 126.
[174] Ibid. at 143.
[175] Ibid. at 327.
[176] Randeny and Lassee, supra note 36 at 10.

affirmed in 2006 that 'States cannot neglect their duty to investigate, identify, and punish those persons responsible for crimes against humanity by enforcing amnesty laws or any other similar domestic provisions. Consequently, crimes against humanity are crimes which cannot be susceptible of amnesty.'[177]

Uruguay provides another example of successful sequencing, although the path to justice has occurred far slower and in a context where judicial and political will has been lacking. Following a negotiated peace in 1985, victims and their relatives of the civil-military regime from 1973 to 1985 immediately presented claims to the courts regarding human rights violations. In response the Uruguayan government passed the 'Expiry Law' which terminated all judicial proceedings involving military forces and transferring investigations for human rights abuses to the executive branch of government. The Expiry Law was repeatedly challenged in Uruguayan Courts and held to be invalid in 2011 by the Inter-American Court of Human Rights. That same year, the government's legislature annulled the amnesty law, opening the door to new criminal action. However, Lessa and Skaar have pointed out that achieving justice has nevertheless been an 'uphill battle', with the Uruguayan Supreme Court reluctant to recognize the former regime's crimes as crimes against humanity.[178] Further, the executive has limited access to archives and other types of documentation, impeding truth-finding efforts. Despite these obstacles, Lessa and Skaar point out that 'the culture of fear that dominated Uruguayan society for so long is arguably no longer present. The fact that the military no longer constitutes a threat to democracy makes the political context very different from that of 1985, allowing more space in which to choose a pro-human rights stance.'[179] As such, the find that '[o]n balance … we can say that Uruguay's progress along the scale from impunity towards accountability has been significant, especially during the past decade, a period that has seen the most positive developments.'[180]

Mozambique is another example of successful peace–justice sequencing where, although 'there has been no justice for horrendous crimes committed during a lengthy civil war, … it has remained stable since the peace

[177] Inter-American Court of Human Rights, *Case of Almonacid-Arellano et al.* v. *Chile*, Judgment of 26 September 2006 (Preliminary Objections, Merits, Reparations and Costs) at para 114 online: www.corteidh.or.cr/docs/casos/articulos/seriec_154_ing.pdf.

[178] F. Lessa and E. Skaar, 'Uruguay: Halfway Towards Accountability' in E. Skaar, J. Garcia-Godos and C. Collins, eds., *Transitional Justice in Latin America: The Uneven Road from Impunity towards Accountability* (Routledge: 2016) Chapter 4, 77 [Lessa and Skaar].

[179] Ibid. at 94.

[180] Ibid. at 96.

agreement was signed in 1992."[181] The Panel of the Wise has observed that despite the amnesties, 'informal mechanisms to deal with issues of reconciliation have flourished in Mozambique. Civil society organizations have engaged in peacebuilding activities that have reintegrated former combatants and trained rural communities in dispute resolution and various methods of reconciliation and healing."[182] However, conflict resumed in Mozambique between 2013 and 2014.[183] Igreja argues that the 'amnesty law in Mozambique fell short of creating a political environment conducive to a process of democratic participation that could consolidate a new political space where former war foes would repress ... memories of political violence and work together, expressing mutual tolerance and respect and striving for reconciliation."[184] In addition to providing vows of reconciliation, inclusion, and democracy as part of the 2014 peace accord, Igreja argues that 'a nationwide programme is needed to determine degrees of responsibility for serious human rights violations and crimes and, more specifically, regarding the composition and role of security and defence forces in the country."[185]

Scholars have also pointed to Namibia as an example where 'amnesty has directly led to the consolidation of peace and healing of society in the wake of mass crimes."[186] However, Höhn has pointed out that a decade after Namibia's transition, the Namibian National Society for Human Rights filed a submission in 2006 requesting an investigation by the International Criminal Court into grave human rights violations committed during Namibia's independence struggle from 1966 to 1990 by a number of alleged perpetrators, including former President Sam Nujoma.[187] This effort by civil society emphasizes that achievement of reconciliation also requires justice and accountability.

Others may question the placing of burden on rights by holding survivors accountable for pursuing justice. However these examples also raise the question of how long becomes too long to wait for justice. In some situations, when the door to prosecutions opens decades after a conflict, those victimized

[181] Human Rights Watch, supra note 122; See also Olsen et al., supra note 24 at 986.
[182] Panel of the Wise, supra note 18 at 32.
[183] A. Jarstad et al., 'Peace Agreements in the 1990s – What are the Outcomes 20 Years Later?' (2015) *Umea Working Papers in Peace and Conflict Studies*, No. 8 at 6–10 online: www.diva-portal.org/smash/get/diva2:887947/FULLTEXT02 [Jarstad et al.].
[184] V. Igreja, 'Amnesty Law, Political Struggles for Legitimacy and Violence in Mozambique', (2015) 9 *International Journal of Transitional Justice* 239 at 257 [Igreja].
[185] Ibid. at 258.
[186] Olsen et al., supra note 24 at 986; See also Jarstad et al., supra note 91 at 6–10.
[187] S. Höhn, 'International Justice and Reconciliation in Namibia: the ICC Submission and Public Memory', 109 *African Affairs* (2010) 471.

by violence may not live enough to see witness its results. Although there is no one approach fits all in sequencing histories, the common thread in all of these examples is the persistent efforts of human rights and victims' organizations, and civil society in pressing for justice using various judicial and advocacy means. For some the success of these actors may signify the consolidation of democratic institutions and the rule of law, and a successful demonstration of sequencing. These are key consideration for the future application of the African Court.