

REVOLUTION, PEACE, AND JUSTICE IN SUDAN

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ABSTRACT

After decades of internal civil conflict, a peaceful popular revolution toppled longtime dictator Omar al-Bashir in April 2019. The popular revolution paved the way for the transitional government of Sudan to negotiate the October 2020 Juba Peace Agreement, a comprehensive peace agreement with a coalition of regional armed movements. The 2019 revolution and the 2020 peace process created the opportunity for Sudan to transition to a peaceful multi-ethnic participatory democracy with shared constitutional powers, economic prosperity, and respect for human rights throughout all of Sudan. The popular revolution and peace process also laid the groundwork for the establishment of transitional justice and accountability mechanisms for the human rights atrocities committed by the Bashir regime and other parties to Sudan's decades-long violent internal conflicts. Despite the October 2021 military coup of Sudan's transitional government near the one-year anniversary of the signing of the Juba Peace Agreement, a

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restoration of the democratic transition remains possible. The groundwork laid by the Juba Peace Agreement provides Sudan with a peaceful way forward. This Article serves as a case study of the world's most recently concluded peace process. The Article begins by assessing the peace process and the Juba Peace Agreement using the theoretical peace versus justice framework. In subsequent Sections, this Article examines how themes of peace and justice have unfolded in past Sudanese peace processes and situates the Juba peace process within that history. Through this case study, the Article makes clear that the 2019 popular revolution paved the way for the Juba peace process to address issues of peace and transitional justice in a more fulsome way than would have been possible with a Bashir led government. By bringing the parties to Sudan's ongoing violent conflicts to agreement on peace, justice, and a political path forward, the Juba Peace Agreement lays a clear roadmap to a peaceful and democratic Sudan. With sustained domestic support and international engagement, the Juba Peace Agreement's significant promise can withstand the current volatility of Sudan's political transition.

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I. INTRODUCTION

In April 2019, a popular revolution galvanized the toppling of Sudan's dictator Omar al-Bashir.¹ The revolution opened the door for regional armed groups to negotiate a long term, comprehensive peace agreement with the newly installed transitional government.² The year-long negotiation culminated in the multi-track Juba agreement signed on October 3, 2020.³ The Juba Agreement was not the first agreement to be signed between armed opposition groups and the Sudanese national government.⁴ However, as this Article explains, the toppling of Bashir and the creation of a new transitional government that included opposition civilian leaders⁵ paved the way for the completion of a peace agreement addressing accountability for international crimes which had long been a thorny issue in Sudan's peace negotiations, particularly following Bashir's indictment by the ICC in 2009.⁶ With Bashir gone and the establishment of a new transition government that included civilian representatives from his opposition, the peace negotiations proceeded with greater alignment of interests on both sides of the table. The Juba negotiation was not without its challenges; the newly formed transitional government contained military officials who had been part of Bashir's regime and controlled military forces that had committed grave human rights violations.⁷ Within the

¹ See *infra* Part II.

² Juba Agreement for Peace in Sudan Between the Transitional Government of Sudan and the Parties to Peace Process, Oct. 3, 2020 [hereinafter Juba Peace Agreement], <https://constitutionnet.org/sites/default/files/2021-03/Juba%20Agreement%20for%20Peace%20in%20Sudan%20-%20Official%20ENGLISH.PDF> [https://perma.cc/X23K-83VN].

³ *Id.*

⁴ See *infra* Part IV. See generally GENE CAROLAN, AUTONOMY, SECESSION, AND THE TIES THAT BIND: LESSONS FROM THE PEACE AGREEMENTS OF THE SUDAN (2018) (for historical overview of peace agreements signed between armed groups and Sudanese central government).

⁵ Dame Rosalind Marsden, *Can Sudan Achieve Piece and Democratic Transition?*, CHATHAM HOUSE (Aug. 9, 2019), <https://www.chathamhouse.org/2019/08/can-sudan-achieve-peace-and-democratic-transition> [https://perma.cc/K8YX-4AKM].

⁶ See generally INT'L CRISIS GRP., SUDAN: JUSTICE, PEACE AND THE ICC (2009), https://media.africaportal.org/documents/Sudan_-_Justice_peace_and_the_ICC.pdf [https://perma.cc/Y52Z-ERVE].

⁷ Samuel Ramani, *Sudan's Imperiled Political Transition*, CARNEGIE MIDDLE E. CTR. (Mar. 17, 2021), <https://carnegie-mec.org/2021/03/17/sudan-s-imperiled-political-transition-pub-84077> [https://perma.cc/8TJG-NFBD]. The ability of

negotiation, accountability remained a central priority for many Sudanese victims of the Bashir regime, particularly those from the conflict regions of Darfur and the Two Areas of the Blue Nile and South Kordofan.⁸ Despite this difficult history, the parties were able to reach agreement on certain transitional justice and accountability measures.⁹

Scholars have long debated whether and to what extent justice and accountability measures should be addressed in peace negotiations seeking to end an active conflict.¹⁰ The Sudanese peace process offers an excellent case study for exploring the longstanding issues that animate the peace versus justice dilemma. This Article will commence in the following parts. Part II of the Article provides background on the longstanding conflicts in Sudan and the circumstances that led to the Spring 2019 revolution that toppled Omar al-Bashir. Part III of the Article provides a survey of the theoretical frameworks that evolved out of the peace versus justice dilemma. Part IV applies the peace versus justice conceptual framework to prior peace negotiations in Sudan. Part V explores how concepts of peace and justice unfolded within the context of the Juba negotiations and the Juba peace agreement. Part VI concludes by forecasting how peace and justice may unfold in Sudan's political transition in light of the Juba Peace Agreement.

Bashir-era military officials to retain power in the transitional government threatened to undermine the peaceful democratic transition, as seen by the military coup attempt against Prime Minister Hamdook on October 24, 2021. Declan Walsh, Abdi Latif Dahir & Simon Marks, *Sudan's Military Seizes Power, Casting Democratic Transition Into Chaos*, N.Y. TIMES (last updated Oct. 29, 2021), <https://www.nytimes.com/2021/10/25/world/africa/sudan-military-coup.html> [<https://perma.cc/T4AY-Y4N9>]. At the time of publication of this Article, the duration of the coup and its impact on the democratic transition remain uncertain. Protesters have returned to the streets against the military officials who staged the coup. Killian Clarke and Mai Hassan, *This Is How to Stop the Coup in Sudan*, N.Y. TIMES (Oct. 29, 2021), <https://www.nytimes.com/2021/10/29/opinion/sudan-coup-military.html> [<https://perma.cc/9L5T-URRC>].

⁸ This was the author's observation from his conversations with opposition parties negotiating the Juba Peace Agreement from Darfur and the Two Areas. Surdarsan Raghavan, *In violence between Sudan and South Sudan, 'echoes of Darfur'*, WASH. POST (Mar. 10, 2012), https://www.washingtonpost.com/world/violence-between-two-sudans-has-echoes-of-darfur/2012/03/09/gIQALukS3R_story.html [<https://perma.cc/HA8U-65MG>].

⁹ See *infra* Part V.

¹⁰ See *infra* Part III.

II. OMAR AL-BASHIR'S REGIME AND THE SPRING 2019 REVOLUTION

Sudan is an immensely diverse, multi-ethnic, multi-religious state which, prior to its 2011 partition into Sudan and South Sudan, was the tenth largest country on the planet, constituting two percent of the world's land mass—approximately the size of all of continental Western Europe.¹¹ Historic Sudan comprises 597 tribes and subtribes who speak 133 languages and even more dialects.¹² In addition to these numerous tribal and ethnic identities, many of Sudanese self-identify on racial grounds as African or Arab, and practice Islam, Christianity, and various traditional African religions.¹³ Division along tribal, racial, and religious grounds, along with resource competition, has been an ongoing source of conflict in Sudan.¹⁴ Since gaining its independence from Britain and Egypt in 1956, Sudan has struggled with political instability, moving between authoritarianism and brief periods of democracy at the national level. Sudan has consistently faced civil conflict between the capital in Khartoum and the South, as well as between the capital and marginalized regions including Darfur, the Blue Nile, the Nuba Mountains, and east Sudan.¹⁵ All of Sudan's internal divisions and conflicts were exacerbated by the policies of Omar al-Bashir after he seized control of the country.

a. Omar al-Bashir's Regime

Omar al-Bashir's thirty year dictatorship began in 1989 when Bashir led a coup against Sudan's democratically-elected Prime Minister Sadiq al-Mahdi.¹⁶ Brigadier General al-Bashir and a group of midlevel Army officers removed, arrested, and imprisoned Prime

¹¹ ANDREW S. NATSIOS, *SUDAN, SOUTH SUDAN, AND DARFUR: WHAT EVERYONE NEEDS TO KNOW* 8 (2012).

¹² *Id.* at 10.

¹³ *Id.* at 11-12.

¹⁴ *Id.* at 12-13.

¹⁵ See LUTZ OETTE & MOHAMED ABDELSALAM BABIKER, *CONSTITUTION-MAKING AND HUMAN RIGHTS IN THE SUDANS* 2 (2019); see also Brian A. Kritz & Jacqueline Wilson, *No Transitional Justice Without Transition: Darfuri – A Case Study*, 19 MICH. ST. J. INT'L L. 475, 476-77 (2011).

¹⁶ See NATSIOS, *supra* note 11, at 80; see also Mila Versteeg, Timothy Horley, Anne Meng, Mauricio Guim, and Marilyn Guirguis, *The Law and Politics of Presidential Term Limit Evasion*, 120 COLUM. L. REV. 173, 221 (2020).

Minister al-Mahdi, one hundred senior military officers, and twenty political figures.¹⁷ Bashir was backed by a Sudanese minority Islamist political party, the National Islamic Front (NIF), and its spiritual leader, Hassan al-Turabi.¹⁸ Bashir instituted a dictatorial Islamist state predicated on the political philosophies of Turabi.¹⁹ Bashir and Turabi transformed Sudan into an Islamist state governed by sharia law by filling the military and state institutions with loyal Islamists, creating a new court system based on sharia law, requiring the banking system to conform to Islamic principles, and banning respected secular institutions, such as the Sudanese Bar Association.²⁰ These changes, and the civil conflicts discussed herein, led nearly two million secular professionals and young people to flee Sudan.²¹

While transforming Sudan into an Islamic state domestically, Bashir also transformed Sudan into a pariah state globally.²² Bashir's foreign policy supported international terrorist groups and his domestic policy fomented grave human rights violations and genocide. Turabi's political and religious philosophy called for a world Islamic uprising²³ and in furtherance of this grand strategy, Turabi funneled weapons to Islamist revolutionaries in Egypt, Libya, and Tunisia.²⁴ The Bashir regime also opened Sudan's territory for any citizen of an Arab nation to enter and reside without a visa.²⁵ This policy led to a number of extremists moving to Sudan,

¹⁷ See NATSIOS, *supra* note 11, at 80; see also Alan Cowell, *Military Coup In Sudan Ousts Civilian Regime*, N. Y. TIMES (July 1, 1989), <https://www.nytimes.com/1989/07/01/world/military-coup-in-sudan-ousts-civilian-regime.html> [<https://perma.cc/BKY3-DR2D>].

¹⁸ NATSIOS, *supra* note 11, at 80, 80-83.

¹⁹ NATSIOS, *supra* note 11, at 80, 87-90.

²⁰ See NATSIOS, *supra* note 11, at 87-90; see also Declan Walsh, *The Fall of Omar Hassan al-Bashir, the 'Spider' at the Heart of Sudan's Web*, N. Y. TIMES (Apr. 11, 2019), <https://www.nytimes.com/2019/04/11/world/africa/omar-bashir-sudan.html> [<https://perma.cc/F7MD-DSJ4>].

²¹ See NATSIOS, *supra* note 11, at 90; see also *South Sudan: civilians fleeing violence nears 2 million with no likelihood of return soon*, UN NEWS (Sept. 24, 2014), <https://news.un.org/en/story/2014/09/478442> [<https://perma.cc/6E7X-FRSE>].

²² Herman J. Cohen, *The Roots of Sudan's Upheaval*, COUNCIL ON FOREIGN RELS. (May 9, 2019, 4:31 PM), <https://www.cfr.org/blog/roots-sudans-upheaval> [<https://perma.cc/ZB38-87E8>].

²³ NATSIOS, *supra* note 11, at 7.

²⁴ Cohen, *supra* note 22.

²⁵ Cohen, *supra* note 22.

including Osama Bin Laden, the head of Al Qaeda.²⁶ In 1993, a year after Bin Laden moved to Sudan, Al Qaeda committed its first attack against the World Trade Center in New York City, killing six people with a truck bomb.²⁷ The Clinton Administration designated Sudan as a State Sponsor of Terrorism, and the country became subject to sanctions, diplomatic withdrawals, and UN condemnation.²⁸ Under pressure, Sudan eventually expelled Osama Bin Laden to Afghanistan, but even after Bin Laden was expelled, Sudan was implicated in Al Qaeda's 1998 bombings of the US Embassies in Tanzania and Kenya and Al Qaeda's 2000 bombing of the USS Cole naval ship off the coast of Yemen.²⁹ The Bashir regime's connection to Al Qaeda's attacks furthered its international isolation in the early twenty-first century as did its oppression of its own people, particularly in Darfur.

b. Darfur Rebellion

Bashir's Arabization and Islamization campaign manifested in the systemic oppression of non-Arab and non-Muslim Sudanese throughout the country. Various non-Arab groups in Darfur rose up in three rebellions against the Bashir regime. The first Darfuri rebellion was the short Arab-Fur conflict of 1991, and the second Darfuri rebellion was the Arab-Masalit conflict, which lasted from 1995-99.³⁰ The third Darfuri rebellion of 2003-2010 was the largest civil conflict in Darfur in more than a century and it was led by a coalition of the largest and most powerful African tribes in Darfur – the Fur, the Masalit, and the Zaghawa.³¹ Some have argued that the Bashir regime increased its attacks in the oil-rich Darfur region to increase its access to oil, as the oil-rich South moved towards greater

²⁶ See Cohen, *supra* note 22; see also Hamza Hendawi, *Sudan under al-Bashir: Long history of turmoil, conflicts*, ASSOCIATED PRESS (Jan. 3, 2019), <https://apnews.com/article/8c637e57658243aca3ee36318a6b5e20> [<https://perma.cc/C3Q6-9EBP>].

²⁷ Cohen, *supra* note 22; Sarah Pruitt, *7 Facts About the 1993 World Trade Center Bombing*, HISTORY (Aug. 24, 2021), <https://www.history.com/news/world-trade-center-bombing-1993-facts> [<https://perma.cc/586Z-77CD>].

²⁸ Cohen, *supra* note 22.

²⁹ NATSIOS, *supra* note 11, at 102-03, 113-14.

³⁰ NATSIOS, *supra* note 11, at 128-31.

³¹ NATSIOS, *supra* note 11, at 135.

independence following the North-South peace negotiations of the early 2000s.³²

The third rebellion was fomented by the publication of *The Black Book: Imbalance of Power and Wealth in Sudan* ("The Black Book"),³³ a heavily researched and detailed book about the ethnic and geographic origin of the Sudanese elite who had ruled Sudan since independence.³⁴ *The Black Book* revealed that most of the country outside of the Sudanese elites' stronghold in Khartoum and the northeast had been marginalized.³⁵ *The Black Book* was produced by the Justice and Equality Movement (JEM), a Darfur rebel group run by the Zaghawa, an African tribe that later allied with the Fur and Masalit in rebellion against Khartoum.³⁶ In May 2000, JEM arranged to have copies of *The Black Book* distributed outside mosques, in cities throughout Sudan as people left Friday prayers.³⁷ *The Black Book* spread quickly throughout Sudan, and within Darfur, it inflamed the existing grievances of African tribes, setting off the Third Rebellion against the Bashir regime.³⁸

The Black Book revealed that the Three Tribes of the northern Nile River Valley – the Shaiqiyya, Ja'aliyyin, and Danagla – which made up only 5.4 percent of the Sudanese population, completely dominated Sudanese institutions by holding seventy percent or more of its senior positions, concentrating the nation's resources and oil revenue in Khartoum and the so-called Arab Triangle.³⁹ The Arab Triangle is a geographic region in northeastern Sudan that is the stronghold of the Three Tribes and includes the capital, Khartoum.⁴⁰ Members of the Three Tribes self-identify with Arab culture and identity, and this identity undergirded the Bashir regime's desire to turn Sudan into an Islamic state dominated by Arab-identified people through its forced Arabization and

³² See Michael J. Kelly, *The Debate over Genocide in Darfur, Sudan*, 18 U.C. DAVIS J. INT'L L & POL'Y 205, 208-9 (2011).

³³ THE BLACK BOOK: IMBALANCE OF POWER AND WEALTH IN SUDAN (Abdullahi Osman El-Tom trans., 2004), https://www.sudanjem.com/sudan-alt/english/books/blackbook_part1/book_part1.asp.htm [<https://perma.cc/U7WY-6YPU>].

³⁴ NATSIOS, *supra* note 11, at 132.

³⁵ NATSIOS, *supra* note 11, at 132; *see also* Kritz & Wilson, *supra* note 15, at 478.

³⁶ NATSIOS, *supra* note 11, at 132.

³⁷ NATSIOS, *supra* note 11, at 132-33.

³⁸ NATSIOS, *supra* note 11, at 135.

³⁹ NATSIOS, *supra* note 11, at 132.

⁴⁰ NATSIOS, *supra* note 11, at 9-10.

Islamization campaigns.⁴¹ This strategy of forced Arabization and Islamization alienated the fifty-five percent of historic Sudanese that identified as African and the third of the country that was non-Muslim.⁴² Prior to the 2011 partition of Sudan, Arab-identified people were the minority of the population, representing forty-five percent of the country. After the partition, discussed herein, the percent of the country that was Arab became fifty-five percent.⁴³ And it was an even smaller minority of the self-identified Arab population—the Three Tribes—that truly controlled the levers of power in Sudan.⁴⁴

The detailed revelations of *The Black Book* galvanized the Darfuri Fur, Masalit, and Zhargawa to form a military alliance against Bashir driven by their shared experiences of marginalization, poverty, underdevelopment, and human rights victimization by Arab supremacists.⁴⁵ In 2001, Fur and Zhagawa leaders signed a pledge to resist the Arab supremacy movement sweeping across Darfur. In February 2002, they initiated their first joint military campaign against Bashir's Sudanese Armed Forces (SAF).⁴⁶ The Masalit joined the alliance soon thereafter and in response, Bashir mobilized new units of the Janjawiid militia, an Arab militia group drawn from violent Arab supremacist groups such as the Arab Gathering and the Islamic Legion.⁴⁷ The Janjawiid entered each village in Dar Masalit of Western Darfur and summarily executed nearly 2000 local Masalit leaders and sheiks in front of their tribes.⁴⁸ Janjawiid attacks against Fur villages increased, with the Janjawiid destroying hundreds of Fur villages, raping women and killing young men.⁴⁹

The following year, "in February 2003, the Darfur rebel coalition formally announced its intention to rebel."⁵⁰ Between February and

⁴¹ NATSIOS, *supra* note 11, at 11-12.

⁴² NATSIOS, *supra* note 11, at 12.

⁴³ NATSIOS, *supra* note 11, at 12.

⁴⁴ THE BLACK BOOK: IMBALANCE OF POWER AND WEALTH IN SUDAN, *supra* note 33 (see discussion following Table 10 noting that the Shaiqiyya, Ja'aliyyin, and Danagla were a small minority that dominated political control for the rest of the country).

⁴⁵ NATSIOS, *supra* note 11, at 135.

⁴⁶ NATSIOS, *supra* note 11, at 137.

⁴⁷ NATSIOS, *supra* note 11, at 125, 137; see also Kritz & Wilson, *supra* note 15, at 479.

⁴⁸ NATSIOS, *supra* note 11, at 137.

⁴⁹ NATSIOS, *supra* note 11, at 137.

⁵⁰ NATSIOS, *supra* note 11, at 138.

October 2003, the rebels inflicted the most damage on the SAF since Sudan's independence; the rebels won thirty-four out of thirty-eight battles with the SAF.⁵¹ These defeats led Bashir to impose a brutal counterinsurgency campaign against the Fur, Masalit and Zaghawa alliance.⁵² To bolster the counterinsurgency campaign, Bashir offered a dar—or homeland—to his newly appointed Janjawiid commander Sheikh Moussa Hillal and his Um Jalal clan in exchange for their recruitment of new Janjawiid troops.⁵³ Dar are culturally significant and tied to social capital, “for generations, Darfuri tribes were assigned their own specific “dar” or land for their farmers and herders.”⁵⁴ Many of the smaller Arab tribes in the North were nomadic and had not been assigned a dar.⁵⁵ Population increase, animal herd expansion, climatic changes, and a decrease in arable land caused some of these tribes to believe that they were at risk of extinction.⁵⁶ Therefore, Bashir's offer of a dar to Hillal and his clan was a powerful incentive for their recruitment of new Janjawiid, who engaged in oppressive campaigns against the tribal coalition in Darfur, in part, to eliminate them from land that they wanted for their promised dar.⁵⁷

The Fur, Masalit, and Zaghawa coalition attacks against SAF bases, police stations, and government buildings were increasingly successful and, in retaliation, Bashir decided not only to pursue the rebels, but also to attack their defenseless civilian villages in retaliation.⁵⁸ Bashir's campaign against the Darfur rebellion targeted the coalition's villages mercilessly and committed systemic, grave human rights violations.⁵⁹ A repetitive pattern for the attacks included SAF air force carpet bombings of civilian villages, followed by Janjawiid troops attacking the villages from trucks and on horseback.⁶⁰ The Janjawiid would enter the bombed villages, kill any males that could potentially be recruited for the rebellion, bury

⁵¹ NATSIOS, *supra* note 11, at 139.

⁵² NATSIOS, *supra* note 11, at 139.

⁵³ NATSIOS, *supra* note 11, at 139-40.

⁵⁴ NATSIOS, *supra* note 11, at 125.

⁵⁵ NATSIOS, *supra* note 11, at 125.

⁵⁶ NATSIOS, *supra* note 11, at 125-26.

⁵⁷ See NATSIOS, *supra* note 11, at 139-40 (stating that that the dar could only be given to Hillal at the expense of another tribe and that Hillal's clan would be expected to recruit Janjawiid troop in return for the dar).

⁵⁸ NATSIOS, *supra* note 11, at 140.

⁵⁹ NATSIOS, *supra* note 11, at 148-9

⁶⁰ NATSIOS, *supra* note 11, at 148.

them in mass graves, and then “rape village women to humiliate their fathers and husbands . . . forced to watch helplessly at gunpoint.”⁶¹ The Janjawiid troops would then loot the communities and burn crops before leaving the villages.⁶² Bashir’s campaign against the coalition rebels constituted an ethnic cleansing campaign, as 1.8 million Fur, Masalit, and Zaghawa and other sympathetic tribe members were forced from their land into sixty-five Internally Displaced Person (IDP) camps located throughout Darfur and 240,000 Sudanese were forced into refugee camps in Chad.⁶³

Estimates of the number of deaths in Darfur committed during Bashir’s campaign have greatly varied. The Center for Research on the Epidemiology of Disasters at the Université Catholique de Louvain La Neuve, Belgium (“Louvain Study”) estimated that there were 298,000 deaths in Darfur during the entire conflict from 2003-10.⁶⁴ The Louvain Study concluded that approximately eighty percent of the deaths were from disease and malnutrition caused by the forced displacement, and that twenty percent, or 60,000 deaths, were due to the violent conflict.⁶⁵ Other international advocacy groups placed the numbers at much higher levels—Eric Reeves, a Smith College professor and advocate, estimated that “544,000 people died—304,000 from violence and 240,000 from the disease, dehydration, and hunger caused by [the] forced displacement.”⁶⁶ U.S. Secretary of State Colin Powell commissioned a report by the International Coalition for Justice on the scope of the atrocities in Darfur.⁶⁷ This coalition of US judges, prosecutors, and detectives conducted over 1,000 interviews with Darfuri refugees in Chad. Based on the report’s findings, Secretary Powell reported to Congress on September 9, 2004, and later to the United Nations, that

⁶¹ NATSIOS, *supra* note 11, at 148.

⁶² NATSIOS, *supra* note 11, at 148.

⁶³ See NATSIOS, *supra* note 11, at 148-49 (describing how the government’s strategy was an ethnic cleansing that purged and displaced certain groups).

⁶⁴ See NATSIOS, *supra* note 11, at 153 (describing the study and reporting it had a mid-range average of 298,000 deaths).

⁶⁵ NATSIOS, *supra* note 11, at 153.

⁶⁶ See NATSIOS, *supra* note 11, at 151 (noting that Reeves’ estimates were drawn from “extrapolating from the number of original family members reported by Darfuri refugees in Chad, a method not accepted by international public health experts or demographers who are technical experts in the discipline of mortality rates.”).

⁶⁷ NATSIOS, *supra* note 11, at 150.

genocide was occurring in Sudan.⁶⁸ The definition of genocide, as contained in the U.N. Convention on the Prevention and Punishment of the Crime of Genocide, is the commission of certain acts “with intent to destroy, in whole or in part, a national, ethnical, racial or religious group.”⁶⁹ The acts include killing, causing serious bodily or mental harm, preventing births, forcibly transferring children, or deliberately inflicting conditions intended to bring about the destruction of the group.⁷⁰

The mass human rights atrocities in Sudan led the United Nations Security Council to request an International Criminal Court (ICC) investigation of the situation in Darfur in 2005.⁷¹ Despite concerns expressed by some human rights advocates that an indictment would thwart peace negotiations,⁷² in July 2008, ICC Chief Prosecutor Luis Moreno-Ocampo ordered the arrest of Bashir and two members of his regime for the commission of crimes against humanity in Darfur.⁷³ In 2009, “the ICC affirmed the order, and in July 2010 . . . added an indictment for genocide.”⁷⁴

c. The North-South Civil Wars and Secession

The Third Darfur Rebellion, which led to Bashir’s indictment by the ICC for crimes against humanity and genocide, was neither the first nor the longest-standing conflict between the Bashir regime and Sudanese citizens outside the so-called Arab Triangle. This distinction was held by the citizens of southern Sudan who had fought two long-standing civil wars with Khartoum.⁷⁵ The seeds of the North-South civil wars began before Sudan obtained its

⁶⁸ See NATSIOS, *supra* note 11, at 157 (describing Secretary Powell as reporting genocide was occurring in Darfur).

⁶⁹ Convention on the Prevention and Punishment of the Crime of Genocide art. II, Dec. 9, 1948, 78 U.N.T.S. 277.

⁷⁰ *Id.*

⁷¹ S.C. Res. 1593, ¶ 1 (Mar. 31, 2005).

⁷² See, e.g., Julie Flint and Alex de Waal, ‘This prosecution will endanger the people we wish to defend in Sudan’, GUARDIAN (July 12, 2008); <https://www.theguardian.com/world/2008/jul/13/sudan.humanrights> [<https://perma.cc/24KP-94AJ>].

⁷³ NATSIOS, *supra* note 11, at 160.

⁷⁴ NATSIOS, *supra* note 11, at 160.

⁷⁵ NATSIOS, *supra* note 11, at 12-13.

independence from Britain and Egypt in 1956.⁷⁶ In 1821, an Ottoman Turk-Egyptian army invaded and took military control of the territory that comprised the historic Fur sultanate, Funj sultanate, Azande Kingdom, and Shilluk kingdom, which makes up the modern states of Sudan and South Sudan.⁷⁷ The Turco-Egyptian Administration imposed a heavy annual toll on the African tribes of the south.⁷⁸ The Turco-Egyptian Administration kidnapped up to 30,000 non-Muslim Africans from the South into slavery on an annual basis to populate their enslaved army.⁷⁹ During the nineteenth century, this slave trade virtually depopulated regions of the South.⁸⁰ This legacy influenced Southern African tribes' fear of continued oppression following independence.⁸¹

Following World War II, in 1950, Egypt's King Farouk announced to his parliament that he was abrogating "the 1899 Condominium Agreement with Great Britain and the 1936 Anglo-Egyptian Treaty, which had established a joint British-Egyptian claim on Sudanese territory."⁸² King Farouk announced that Sudan would be annexed to Egypt under his monarchy and he approved a constitution that purported to unify the two countries, although he had no communication with either northern or southern leaders in Sudan.⁸³ Two years later, in 1952, King Farouk was deposed by Abdel Nasser.⁸⁴ The new Egyptian secular socialist regime abandoned Egyptian claims to Sudan and supported Sudan's independence from Great Britain.⁸⁵

At a 1947 conference in Juba, representatives from the north of Sudan and a group of representatives from the South, who did not represent popular southern opinion, agreed to a Khartoum

⁷⁶ NATSIOS, *supra* note 11, at 12-13.

⁷⁷ See NATSIOS, *supra* note 11, at 16 (describing the geographical territory occupied by the four political powers and the arrival of the Egyptian army).

⁷⁸ NATSIOS, *supra* note 11, at 18.

⁷⁹ NATSIOS, *supra* note 11, at 18.

⁸⁰ See NATSIOS, *supra* note 11, at 18 (describing the amount of people taken captive and how the scale of the practice exceeded what had occurred in the region under the Funj Kingdom).

⁸¹ NATSIOS, *supra* note 11, at 18.

⁸² NATSIOS, *supra* note 11, at 36-37.

⁸³ NATSIOS, *supra* note 11, at 37.

⁸⁴ See generally NATSIOS, *supra* note 11, at 37 (describing how a colonel named Nasser and General Muhammad Naguib unseat Farouk)

⁸⁵ NATSIOS, *supra* note 11, at 39.

supported plan to create a National Assembly for all of Sudan.⁸⁶ In 1953, elections were held throughout Sudan and a National Assembly was elected to prepare for decolonization.⁸⁷ This new coalition “voted against [a] union with Egypt following independence” from Britain.⁸⁸ Sudan’s Southern leaders organized a second Juba conference in 1954 that agreed with the National Assembly’s vote for independence from Egypt, but only if the southern region would be given autonomy within a federal state, or was guaranteed self-determination, including through an independent southern state if necessary.⁸⁹

The denial of southern leaders’ demands for autonomy and self-determination following independence from Britain and Egypt in 1956 led to the two North-South civil wars – the first from 1956-1972 and the second from 1983-2005.⁹⁰ The half century of North-South conflicts led to the loss of 4,000,000 lives before the conclusion of the Comprehensive Peace Agreement of 2005 between Khartoum and the South.⁹¹

When Bashir came to power in 1989, the second North-South Civil conflict had been underway for six years.⁹² It started in 1983 when Khartoum violated the 1972 Addis-Ababa Peace Agreement that had ended the first North-South conflict.⁹³ The Addis-Ababa Agreement created a federal state in southern Sudan with its own regional parliament and Council of Ministers.⁹⁴ The Agreement specified English as the official language of instruction in schools in the new southern state.⁹⁵ The catalyst for the second civil war occurred in January 1983, when Khartoum attempted to re-deploy southern army units to the North, which, under the Addis-Ababa Agreement, were to remain in the Southern region to defend it.⁹⁶

⁸⁶ See NATSIOS, *supra* note 11, at 38-39 (describing who was present at the conference and its purposes).

⁸⁷ NATSIOS, *supra* note 11, at 39.

⁸⁸ NATSIOS, *supra* note 11, at 39.

⁸⁹ NATSIOS, *supra* note 11, at 40.

⁹⁰ See NATSIOS, *supra* note 11, at 12-13 (describing the reasons behind the civil wars)

⁹¹ See NATSIOS, *supra* note 11, at 40 (describing the toll the war would exact before the South gained its independence).

⁹² NATSIOS, *supra* note 11, at 60-1 and 80 (discussing the start of the Second Civil War in 1983 and Bashir’s taking of power in 1989).

⁹³ See discussion *infra* Part IV.

⁹⁴ NATSIOS, *supra* note 11, at 50.

⁹⁵ NATSIOS, *supra* note 11, at 50.

⁹⁶ NATSIOS, *supra* note 11, at 65-66.

The southern army units militarily resisted re-deployment, leading to a military conflict with the SAF and the start of the second civil war.⁹⁷ In all, "3,000 southern troops deserted the SAF and joined the civil war . . ."⁹⁸ In July 1983, John Garang, one of the leaders of the southern armed forces, consolidated the southern troops as the unified Sudanese People's Liberation Army (SPLA) and created the Sudanese People's Liberation Movement (SPLM), both under his leadership.⁹⁹

Over the course of the year, Sudanese President Numayri took additional measures that abrogated the Addis-Ababa Agreement and escalated the civil war. In June 1983, Sudanese President Numayri issued Republican Order Number One, which dissolved the Southern Regional Assembly and divided the Southern region into three separate provinces with three separate capitals and three weaker provincial assemblies that lacked fiscal authority.¹⁰⁰ Numayri's order also rescinded the South's power to elect its own Governors and granted himself the authority to appoint Governors.¹⁰¹ He also eliminated separate southern army units and the proportional representation of southerners in the Sudanese Armed Forces for which the Addis Ababa Agreement provided.¹⁰² Further, the order "substituted Arabic for English as the official language."¹⁰³ Following Order Number One, Khartoum imposed the September Laws, which imposed Sharia law throughout all of Sudan.¹⁰⁴ The government began to impose harsh penalties such as floggings, cross-amputations, and public executions by stoning.¹⁰⁵

All these actions by Khartoum fueled the second revolution. After John Garang announced himself the commander-in-chief of the SPLA and its civilian counterpart, the Southern Manifesto was published, which detailed the weaknesses of the Addis Ababa Agreement and the federal Southern government that was created out of it.¹⁰⁶ By the end of 1985, John Garang, with 10,000 troops

⁹⁷ NATSIOS, *supra* note 11, at 65-66.

⁹⁸ NATSIOS, *supra* note 11, at 66.

⁹⁹ NATSIOS, *supra* note 11, at 66.

¹⁰⁰ NATSIOS, *supra* note 11, at 60.

¹⁰¹ NATSIOS, *supra* note 11, at 60.

¹⁰² NATSIOS, *supra* note 11, at 60.

¹⁰³ NATSIOS, *supra* note 11, at 60.

¹⁰⁴ NATSIOS, *supra* note 11, at 60-61.

¹⁰⁵ See NATSIOS, *supra* note 11, at 61 (describing news reports of the punishments).

¹⁰⁶ NATSIOS, *supra* note 11, at 66.

under his command in Sudan, and 20,000 troops in training in nearby Ethiopia, had taken control of most of the south.¹⁰⁷ In response to protests against Numayri brought on by the collapsing economy, the SAF toppled him and announced a plan for national elections within a year.¹⁰⁸ Al-Mahdi's party won the election and Sadiq al-Mahdi became Prime Minister.¹⁰⁹ He imposed a four point plan that continued Khartoum's historic policies of Arabization and Islamization in the South.¹¹⁰ Ultimately, al-Mahdi was deposed in 1989 by Bashir, who continued the civil war with the South.¹¹¹

Bashir drastically exacerbated the Second Civil War. The Second Civil War between Sudan and South Sudan involved countless atrocities, including combatants killed over battles for oil, religious massacres, and mass torture.¹¹² In addition, government forces and allied militias are estimated to have used 17,000 children as combatants in the conflict and the opposition armed groups are estimated to have used 2,500 to 5,000 child soldiers.¹¹³ Bashir's government instructed certain northern militia groups to mass slaughter southern villages in ethnic cleansings.¹¹⁴ These northern militia groups also raped and abducted thousands of women and

¹⁰⁷ See generally NATSIOS, *supra* note 11, at 66 (describing the number of troops within the SPLA).

¹⁰⁸ NATSIOS, *supra* note 11, at 71.

¹⁰⁹ See NATSIOS, *supra* note 11, at 71-72 (describing how the Umma Party, led by Sadiq al-Mahdi, won the most seats in the National Assembly and took office).

¹¹⁰ See NATSIOS, *supra* note 11, at 72 (describing the policies and how they sought to encourage Arabization and Islamization among the Southern population).

¹¹¹ NATSIOS, *supra* note 11, at 80.

¹¹² See World Peace Found., *Sudan: 1985 – 2005, MASS ATROCITY ENDINGS*, (Aug. 7, 2015), <https://sites.tufts.edu/atrocityendings/2015/08/07/sudan-2nd-civil-war-darfur/> [<https://perma.cc/M5CU-GU9J>] (examining the numerous acts of violence that occurred in Sudan in the 1990s such as the Government's jihad and massacres on oilfields).

¹¹³ CHILD SOLDIERS INT'L, *CHILD SOLDIERS GLOBAL REPORT 2004 – SUDAN* (2004), <https://www.refworld.org/docid/4988062928.html> [<https://perma.cc/A8EV-7P7P>].

¹¹⁴ *Facts & Stats, Sudan: The Quick and the Terrible, January 2005*, PBS FRONTLINE/WORLD, (Jan. 2005), <https://www.pbs.org/frontlineworld/stories/sudan/facts.html> [<https://perma.cc/G8VC-VCAZ>].

children from southern villages for servitude.¹¹⁵ Within the south, civilians also experienced intra-ethnic violence.¹¹⁶

Over its twenty-two-year period, the Second Civil War placed about 2.6 million people at risk for starvation.¹¹⁷ Bashir's government, militias, and smaller faction groups precipitated famine in South Sudan and other areas by deliberately blocking food and medical relief supplies.¹¹⁸ As a result, a rough estimate of one to two million civilians died due to starvation and disease in the war.¹¹⁹ Further, the conflict displaced more than 4.5 million civilians as refugees, most of them from the south.¹²⁰

In addition to escalating the war with the south, Bashir's government established a penal code that instituted amputations, torture, mass arrests, and other stringent punishments for anyone who opposed his extreme Islamist views or created outside political parties.¹²¹

By the late 1990s and early 2000s, neighboring countries were pushing for peace within Sudan, particularly Kenya, Ethiopia, Eritrea, and Uganda under the confederation of the Intergovernmental Authority on Development.¹²² Oil companies halted business relations with Sudan due to their inability to conduct business in a war free environment. The United States also pressured Sudan to change its policies and to pursue peace by

¹¹⁵ World Peace Found., *supra* note 112.

¹¹⁶ See Jok Madut Jok & Sharon Elaine Hutchinson, *Sudan's Prolonged Second Civil War and the Militarization of Nuer and Dinka Ethnic Identities*, 42 AFR. STUD. REV. 125, 127, 137-39 (1999) (describing the intra-ethnic violence that occurred between groups in South Sudan and the origins of these conflicts).

¹¹⁷ Leben Nelson Moro, *Oil, War and Forced Migration in Sudan*, 2 ST. ANTHONY'S INT'L REV. 75, 81 (2006).

¹¹⁸ *Id.*

¹¹⁹ See World Peace Found., *supra* note 112 ("[T]he conflict was marked by violence against civilians, which caused the deaths of a rough estimates of 1 - 2 million civilians, many of them a result of starvation and disease.").

¹²⁰ CHILD SOLDIERS INT'L, *supra* note 109.

¹²¹ Greg Larson, *A brief history of modern Sudan and South Sudan*, WATER FOR SOUTH SUDAN (2020), <https://www.waterforsouthsudan.org/brief-history-of-south-sudan> [<https://perma.cc/QAL4-VVYJ>] (stating, "the new government fiercely enforce[d] Islamic code throughout Sudan, banning . . . political parties."). See Salman, *infra* note 248, at 371-72 (stating the government amended the 1973 constitution and introduced harsh penalties like amputating the hands of people convicted of petty theft) and at 376 (discussing the regime's mass arrests, torture and banning of political parties.).

¹²² Larson, *supra* note 121.

imposing sanctions that prohibited trade with businesses in Sudan and investment in Sudan.¹²³

The second civil war formally came to an end with the conclusion of the Comprehensive Agreement of 2005 between Khartoum and the SPLM.¹²⁴ The Comprehensive Peace Agreement included provisions allowing for secession, which South Sudan exercised in 2011, becoming an independent state.¹²⁵

d. 2019 Popular Revolution

Despite South Sudan's secession, Sudan continued to experience significant conflict and disarray under Bashir. Ultimately Bashir's repression and policies led to a popular revolution that toppled him in 2019.¹²⁶ Much like the Arab Spring revolutions that erupted throughout the Middle East and North Africa in 2011, Sudanese citizens took to the streets in protest "because of long-standing economic and political grievances and anger over state corruption and abuse."¹²⁷ Professional associations, unions, and opposition parties organized protests and strikes in the southeastern cities of Damazin and Sennar on December 13, 2018, over increasing food costs and fuel, medicine and cash shortages.¹²⁸ Bashir had tanked the economy by gross mismanagement and corruption, spending seventy percent of the national budget on security forces used to oppress his political opposition.¹²⁹ The loss of oil revenue due to South Sudan's secession and continuing U.S. sanctions also

¹²³ *Facts & Stats, Sudan: The Quick and the Terrible, January 2005, supra* note 114.

¹²⁴ NATSIOS, *supra* note 11, at 180 ("The CPA...was a political agreement that ended an increasingly unpopular war.").

¹²⁵ NATSIOS, *supra* note 11, at 171.

¹²⁶ INT'L CRISIS GRP., SAFEGUARDING SUDAN'S REVOLUTION 6 (2019), https://d2071andvip0wj.cloudfront.net/281-safeguarding-sudans-revolution_0.pdf [<https://perma.cc/SS92-2CKC>].

¹²⁷ Darin E.W. Johnson, *Beyond Constituent Assemblies and Referenda: Assessing the Legitimacy of the Arab Spring Constitutions in Egypt and Tunisia*, 50 WAKE FOREST L. REV. 1007, 1010 (2015).

¹²⁸ INT'L CRISIS GRP., *supra* note 126, at 3.

¹²⁹ See INT'L CRISIS GRP., *supra* note 126, at 3 ("Bashir had maintained his power by repressing political opposition, fighting costly counter-insurgencies in peripheral areas and underwriting his factious security sector with patronage-driven expenditures that ate up, by some estimates, seventy per cent of the national budget.").

negatively impacted the economy.¹³⁰ The protests spread to other cities and by December 19, protesters were calling for regime change.¹³¹

Bashir had previously used his security forces to put down middle-class youth-led protests in Khartoum, but these protests arising outside Khartoum had a broader base of support and were organized by neighborhood resistance committees that had learned from prior protests how to resist Bashir's armed response.¹³² On January 1, 2019, the Sudan Professionals Association joined with twenty-one other groups to form the Forces for Freedom and Change opposition group, which called for a national transition government to replace Bashir.¹³³ Bashir responded by declaring a state of emergency and installing military officers as governors in Sudan's eighteen states.¹³⁴ Bashir formed a security committee of loyalists to attempt to manage the protests.¹³⁵ By April, state funds were depleted from covering police and security official overtime in response to four months of protests.¹³⁶ National inflation shot up to seventy percent, further impacting the Sudanese citizenry.¹³⁷ Protesters sensed Bashir's vulnerability and called for widespread street protests.¹³⁸ On April 6, protesters organized sit-ins at police headquarters in Khartoum and at military installations in a number of other cities.¹³⁹ After protesters camped outside the military installations, on April 10, Bashir's security committee decided to topple Bashir.¹⁴⁰ Following the coup, the military leadership sought to assert political control of Sudan, but following the military's massacre of 120 protesters, the international community backed the protesters demand for a transition to civilian rule.¹⁴¹ The military

¹³⁰ See INT'L CRISIS GRP., *supra* note 126, at 3 (stating that protests spread to another city, Atbara, by this time and protesters were demanding regime change).

¹³¹ INT'L CRISIS GRP., *supra* note 126, at 3.

¹³² INT'L CRISIS GRP., *supra* note 126, at 3.

¹³³ See INT'L CRISIS GRP., *supra* note 126, at 4 (describing the formation of the SPA and its goals).

¹³⁴ See INT'L CRISIS GRP., *supra* note 126, at 4 (describing the government's response to the protests).

¹³⁵ INT'L CRISIS GRP., *supra* note 126, at 5.

¹³⁶ INT'L CRISIS GRP., *supra* note 126, at 5.

¹³⁷ INT'L CRISIS GRP., *supra* note 126, at 5.

¹³⁸ INT'L CRISIS GRP., *supra* note 126, at 5.

¹³⁹ INT'L CRISIS GRP., *supra* note 126, at 5.

¹⁴⁰ INT'L CRISIS GRP., *supra* note 126, at 6.

¹⁴¹ INT'L CRISIS GRP., *supra* note 126, at 7-9.

leadership caved to this domestic and international pressure, and negotiated a power-sharing arrangement with the civilian coalition to form a joint transitional government and which outlined a thirty-nine-month roadmap to democratic elections, which was reflected in the August 17 Constitutional Declaration.¹⁴² This transitional government, comprised members of the Forces For Freedom and Change civilian protest movement, as well as military members of Bashir's former regime.¹⁴³

III. THE PEACE VERSUS JUSTICE DEBATE

From the 1972 Addis Ababa Agreement to the 2020 Juba Agreement, peace agreements have played a central role in mediating the longstanding regional, racial, and religious conflicts in Sudan.¹⁴⁴ Peace scholars have long debated the question of peace versus justice.¹⁴⁵ The debate centers around the issue of whether parties to a peace process, some of whom may have been engaged in the commission of international crimes, would agree to negotiate peace if there is the potential that they themselves would subsequently be subjected to justice through criminal accountability.¹⁴⁶

Historically, amnesty played a central role in many twentieth century peace agreements and was often seen as a necessary trade-off for peace. For example, Turkish forces, who many considered responsible for the massacre of eight hundred thousand to one million Armenians¹⁴⁷ during World War I, were given amnesty in the 1923 Treaty of Lausanne.¹⁴⁸ In another instance of impunity, French and Algerians soldiers who massacred thousands of civilians during the Algerian War were given amnesty under the Evian

¹⁴² INT'L CRISIS GRP., *supra* note 126, at 8-9.

¹⁴³ Marsden, *supra* note 5.

¹⁴⁴ See discussion *infra* Section IV.

¹⁴⁵ See generally Richard J. Goldstone, *Peace versus Justice*, 6 NEV. L.J. 421 (2005-2006).

¹⁴⁶ *Id.*

¹⁴⁷ Geoffrey Robertson, *Was There An Armenian Genocide?*, 4 UNIV. OF ST. THOMAS J. OF L. AND PUB. POLICY 83, 100 (2010) (describing the number of Armenians massacred).

¹⁴⁸ Lausanne Peace Treaty, ch. VIII, July 24, 1923, https://www.mfa.gov.tr/viii_-declaration-of-amnesty.en.mfa [<https://perma.cc/9LZX-H46F>].

Agreement of 1962.¹⁴⁹ During the 1980s, in Argentina, Chile, El Salvador, Guatemala, and Uruguay, former regime officials who had engaged in widespread atrocity crimes against thousands of their citizens, including torture and killing by death squads, were given amnesty as part of the political transition to new governments.¹⁵⁰ These blanket amnesties contributed to an initial peace but in many instances, it was not a durable peace. Often amnesty resulted in perpetrators returning to positions of power and re-committing atrocities, or the amnesties fed lingering societal resentments that led to a lack of social cohesion and recurrence of the conflict. For example, a century after the Armenian genocide, many in the Armenian community are still seeking a form of acknowledgement or reparations related to the massacre by Turkish forces during WWI.¹⁵¹ Regarding recurrence, many of the Algerian combatants receiving amnesty during the Algerian War were involved in committing similar atrocities in the Algerian Civil War.¹⁵²

A move away from blanket amnesty in exchange for peace began to occur in the late twentieth century, as hybrid international criminal tribunals in Rwanda and Yugoslavia were established,¹⁵³ and the Rome Statute of the International Criminal Court was completed.¹⁵⁴ These new institutions reflected growing consensus within the international legal community that accountability following conflict is an integral part of long-term peace in post conflict environments.¹⁵⁵ The peace versus justice dilemma evolved into a general consensus that transitional justice arrangements should provide for both peace and justice.¹⁵⁶ Despite this general consensus, peace versus justice tradeoffs continue to abound.

¹⁴⁹ Paul Williams, *Lawyering Peace: Infusing Accountability into the Peace Negotiations Process*, 52 CASE W. RES. J. INT'L L. 491, 494 (2020).

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.* at 499-502 (discussing the creation of the Rwanda and Yugoslavia Tribunals and the ICC).

¹⁵⁴ Juan Menendez, Keynote Address at the McCulloch Ctr. For Glob. Initiatives, *Justice and Imagination: Building Peace in Post-Conflict Societies Conference, Justice or Peace? Can We Have Both?* 4 (Feb. 1-Mar. 1, 2014) (discussing the emergence and importance of the Peace with Justice framework), <https://www.mtholyoke.edu/sites/default/files/global/docs/Keynote.pdf> [<https://perma.cc/K6FR-9TJ9>].

¹⁵⁵ Williams, *supra* note 149, at 498.

¹⁵⁶ Williams, *supra* note 149, at 498.

Different frameworks that transitional justice scholars and practitioners have developed to explore the ongoing peace versus justice debate include “Peace First,” “Justice First,” and “Peace with Justice.” This section explores each in turn.

a. Peace First Approach

The first theoretical framework in the Peace versus Justice dilemma is referred to as the Peace First approach. The Peace First approach prioritizes peace over accountability and other interests, and is singularly focused on achieving an end to a conflict through a negotiated peace to save lives as quickly as possible.¹⁵⁷ Under this view, scholars have noted that

[t]he singular role of [peace] negotiators is to seek an agreement that brings the most immediate end to the violence. All other goals and concerns that may impede immediate peace should be pushed aside. In this way, the approach is single-minded and pragmatic: peace is the priority and any obstacle to peace should be avoided or eliminated.¹⁵⁸

Advocates of the Peace First approach generally assert that accountability should not be pursued immediately if doing so would prolong the immediate conflict.¹⁵⁹ Within a peace process, negotiating parties who have committed atrocities are often seen as advocates for a Peace First approach, as they hope to avoid accountability for their crimes.¹⁶⁰ A Peace First approach is also associated with mediators who may believe their “role is to end the conflict, not to assume the role of a prosecutor and assign responsibility or call for justice.”¹⁶¹ As such, Peace First approach mediators may end up accommodating the interest of atrocity perpetrators in evading responsibility by initially deemphasizing

¹⁵⁷ Paul R. Williams, Lisa K. Dicker, and C. Danae Paterson, *The Peace vs. Justice Puzzle and the Syrian Crisis*, 24 ILSA J. INT’L & COMPAR. L. 417, 421 (2018).

¹⁵⁸ See *id.* (describing the theories underpinning the Peace First approach and how one the most salient priorities under this approach is ending the violence).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

accountability. A Peace First approach can be reflected in agreements exclusively focused on ending violent conflict such as Ceasefires and Cessation of Hostilities agreements. This approach might also require peacekeeping and international engagement to enforce the peace. Amnesty agreements can also be seen as reflecting a Peace First approach. Advocates of a Peace First approach would say that its benefits include saving lives as quickly as possible and ending the destructive harm that violence brings. An example of a Peace First approach would be the Arab Spring conflict in Yemen that arose in 2011.¹⁶² The Government security forces responded to a Yemeni student uprising with violence that led 250 deaths, 1,000 injuries, and 100,000 displacements in ten months.¹⁶³ The Gulf Cooperation Council (GCC) stepped in and negotiated an end to hostilities and a peace agreement that gave Yemeni President Saleh immunity from prosecution for any crimes that he committed during his thirty five year tenure, as long as he stepped down and transferred power to his Vice President.¹⁶⁴ The GCC-mediated resolution involving Saleh reflects the overall benefits and drawbacks to a Peace First approach—although Saleh's departure and amnesty agreement may have ended the early phase of the conflict in Yemen, the agreement ultimately allowed Saleh to retain his freedom and political influence. He later returned to Yemen to work with the armed Houthi secessionist movement that devolved the country into a protracted civil war.¹⁶⁵

b. Justice First Approach

The second theoretical framework is known as a Justice First approach. In a peace process, a Justice First approach prioritizes justice through accountability measures such as prosecution.¹⁶⁶ A

¹⁶² See Darin E.W. Johnson, *Conflict Constitution-Making in Libya and Yemen*, 39 U. PA. J. INT'L L. 293, 321-22 (2017) [hereinafter *Conflict Constitution-Making*] (discussing how Yemen President Saleh was provided amnesty for some human rights violations to leave office with the goal of quelling the Arab Spring conflict).

¹⁶³ *Id.* at 321.

¹⁶⁴ *Id.*

¹⁶⁵ Shuaib Almosawa and Ben Hubbard, *Yemen's Ex-President Killed as Mayhem Convulses Capital*, N.Y. TIMES (Dec. 4, 2017) <https://www.nytimes.com/2017/12/04/world/middleeast/saleh-yemen-houthis.html> [https://perma.cc/C7RA-3EFP].

¹⁶⁶ Williams, *supra* note 149, at 430.

Justice First approach might tolerate a prolonged peace process so long as prosecution for atrocity crimes is part of any negotiated settlement.¹⁶⁷ As noted by peace process scholars: “[a]lthough insisting upon accountability mechanisms may prolong the conflict, the eventual peace that is created is more likely to be sustainable.”¹⁶⁸ Parties to a conflict whose members have been the primary victims of atrocity crimes and individual victims of atrocity crimes are often seen as proponents of a Justice First approach.¹⁶⁹ External entities such as states that have ratified the ICC Statute and international institutions, such as the ICC, are seen as advocates of a Justice First approach.¹⁷⁰ Further, international non-government organizations (NGOs) that are dedicated to pursuing justice for international crimes through prosecutions are advocates of a Justice First approach.¹⁷¹

In order to incorporate a Justice First approach, peace scholars have noted that

the peace process [must be] inclusive of the interests of all key stakeholders, not just the armed combatants. While the armed actors are less likely to seek the inclusion of an accountability mechanism, civil society, victims, marginalized populations, and other groups who were harmed during the conflict and did not, themselves, commit atrocities are likely to seek justice.¹⁷²

The benefits to a Justice First approach are that it avoids the assignment of collective guilt to an entire population by holding specific perpetrators accountable, delegitimizes oppressive institutions and war criminals, and facilitates victim catharsis.¹⁷³ In its ideal manifestation, a Justice First approach contributes to non-recurrence, promotes deterrence, and supports an accurate historical record.¹⁷⁴

¹⁶⁷ Williams, *supra* note 149, at 430.

¹⁶⁸ Williams, *supra* note 149, at 430-31.

¹⁶⁹ Williams, *supra* note 149, at 431.

¹⁷⁰ Williams, *supra* note 149, at 431.

¹⁷¹ See Williams, *supra* note 149, at 431 (describing how many NGOs seek to promote justice for crimes and many prepare for future justice mechanisms).

¹⁷² Williams, *supra* note 149, at 431.

¹⁷³ Williams, *supra* note 149, at 431.

¹⁷⁴ Williams, *supra* note 149, at 431.

The mechanisms that are used in a Just First approach are the ICC, ad hoc international criminal tribunals, hybrid tribunals, specialized domestic courts, universal jurisdiction, and the prohibition of any form of amnesty that violates international law.¹⁷⁵ For example, the ICC has prioritized justice by initiating investigations of its own volition or at the request of states while parties are in the midst of negotiating peace.¹⁷⁶ In one example, while the Ugandan government was engaged in peace negotiations with the Lord's Resistance Army ("LRA"), the ICC issued arrest warrants against LRA leader Joseph Kony after the matter was referred to it by the Ugandan government.¹⁷⁷ Accordingly, the draft comprehensive agreement that resulted from the peace negotiations heavily emphasized justice and called for a special Ugandan court to prosecute LRA leaders.¹⁷⁸ Kony refused to sign the agreement, but the draft agreement language led Uganda to establish an international crimes division within its court system to complement the ICC.¹⁷⁹ While the ICC indictment led to Kony's refusal to sign the peace agreement,¹⁸⁰ the prioritization of justice by the ICC and the Ugandan government resulted in the ICC's recent conviction of one of Kony's closest LRA allies.¹⁸¹

As seen with Kony's refusal to sign the Ugandan-LRA peace deal, some observers have argued that a Justice First approach can undermine peace processes. In the Sudan context, some peacemakers, including former U.S. Envoy to Sudan Andrew Natsios, argued that the ICC's 2008 issuance of an arrest warrant for Bashir's international crimes in Darfur would undermine the peace process with Darfur and the regime's implementation of the 2005 North-South peace accord.¹⁸² However, following Bashir's toppling

¹⁷⁵ Williams, *supra* note 149, at 434.

¹⁷⁶ Williams, *supra* note 149, at 442.

¹⁷⁷ Williams, *supra* note 149, at 442.

¹⁷⁸ Williams, *supra* note 149, at 442.

¹⁷⁹ Williams, *supra* note 149, at 442.

¹⁸⁰ Skye Wheeler, *Ugandan rebel Kony still refuses to sign peace deal*, REUTERS (Nov. 30, 2008, 1:24 PM), <https://www.reuters.com/article/idUSWAL063121> [<https://perma.cc/2DET-XTXS>].

¹⁸¹ Lisa Bryant, *ICC Sentences Former Lord's Resistance Army Commander to 25 Years in Jail*, VOA (May 6, 2021, 10:09 AM), https://www.voanews.com/a/africa_icc-sentences-former-lords-resistance-army-commander-25-years-jail/6205504.html [<https://perma.cc/4BYL-CKEP>].

¹⁸² Opheera McDoom, *ANALYSIS – Justice clashes with peace on Darfur Bashir warrant*, REUTERS (July 14, 2008, 7:09 AM),

by the 2019 revolution, observers have argued that Bashir's prosecution by the ICC will further the cause of peace¹⁸³ and the Sudanese transition government has publicly stated that it will turn Bashir over to the ICC.¹⁸⁴

c. Peace with Justice

Peace with Justice is an emerging framework that argues that peace and justice are mutually enforcing rather than mutually exclusive and that both objectives can and should be pursued concurrently.¹⁸⁵

The Peace First approach acknowledges that the pursuit of justice can impact the pursuit of peace.¹⁸⁶ The Justice First approach prioritizes justice from the perspective that sustainable peace is impossible without accountability.¹⁸⁷ The Peace with Justice approach advances the idea that peace and justice are not mutually exclusive and should be pursued together in measured intentional ways.¹⁸⁸ The question becomes not which goal to pursue first, but rather how to pursue both. The primary tenets of the Peace with Justice approach can be summarized as:

- 1) peace and justice are inextricably connected to both reinforce and complement one another;
- 2) the promotion of both, regardless of how complex and difficult, should be pursued;
- 3) there is a grave need for peace, but it should be found in conjunction with recognition of the demand for

<https://www.reuters.com/article/idUSMCD424646> [https://perma.cc/C6ZU-Y3KE].

¹⁸³ See e.g., Ali Anzola, *Al-Bashir's trial at the ICC will be a victory for the popular revolution*, MIDDLE E. MONITOR (Feb. 20, 2020, 5:00 PM), <https://www.middleeastmonitor.com/20200220-al-bashirs-trial-at-the-icc-will-be-a-victory-for-the-popular-revolution/> [https://perma.cc/CUA6-FL6E].

¹⁸⁴ *Sudan says will 'hand over' al-Bashir to ICC for war crimes trial*, AL JAZEERA NEWS (Aug. 12, 2021), <https://www.aljazeera.com/news/2021/8/12/sudan-omar-al-bashir-icc-war-crimes-darfur> [https://perma.cc/B7GP-QJGF].

¹⁸⁵ Menendez, *supra* note 154 (discussing the emergence and importance of the Peace with Justice framework).

¹⁸⁶ Williams, *supra* note 149, at 443.

¹⁸⁷ Williams, *supra* note 149, at 443.

¹⁸⁸ Williams, *supra* note 149, at 443.

justice; and 4) when mishandled, peace and justice may clash, but peace should never justify impunity.¹⁸⁹

Peace with Justice advocates observe that by combining peace with justice during a peace process, the form of justice pursued naturally shifts from retributive to restorative, because participants in a post-conflict peace process may see restorative justice as an effective tool for reconciliation.¹⁹⁰

Restorative justice principles focus on reconciling the wrongdoer with the victim through participatory processes that acknowledge wrong-doing and seek reparation and healing.¹⁹¹ These principles have informed transitional justice mechanisms such as truth and reconciliation processes.¹⁹² Additional non-prosecutorial restorative justice measures in transitional contexts include localized traditional justice measures, memorialization, reparations, and institutional reform.¹⁹³

The long-term peace envisioned by Peace with Justice relies upon the strategic sequencing and phasing of various transitional justice mechanisms that embody restorative justice values.¹⁹⁴ Strategic sequencing anticipates that parties will seek justice following the completion of a peace agreement, so justice and peace are not prioritized over one another in separate processes, but rather carefully planned together as part of a long term process.¹⁹⁵ Some critics argue that the long term nature of sequenced justice processes will not satisfy victims of international crimes.¹⁹⁶ Of course, justice processes under any framework necessarily are long term in nature.

The transitional justice process in Sierra Leone can be described as reflecting a Peace with Justice approach. The Sierra Leonean peace process was interwoven with retributive and restorative justice mechanisms. Initially, the 1999 Lome Peace Agreement provided amnesty for parties who committed certain crimes under Sierra Leonean law and in 2000 a Truth and Reconciliation

¹⁸⁹ Williams, *supra* note 149, at 443.

¹⁹⁰ Williams, *supra* note 149, at 444.

¹⁹¹ Carrie Menkel-Meadow, *Restorative Justice: What Is It and Does It Work?* 3 *Ann. Rev. L & Soc. Sci.* 10.1, 10.4 (2007).

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ Williams, *supra* note 149, at 445.

¹⁹⁵ Williams, *supra* note 149, at 445.

¹⁹⁶ Williams, *supra* note 149, at 445.

Commission was created.¹⁹⁷ However, two years later, the United Nations Security Council accepted the Sierra Leonean government's request to establish the hybrid Special Court for Sierra Leone to prosecute international and domestic crimes committed during the conflict.¹⁹⁸ Despite the fact that the inclusion of certain amnesty provisions may have been necessary to get the parties to sign the peace agreement, the sequencing of justice through the Sierra Leonean government's subsequent request for a hybrid UN international court ensured a form of accountability. The United Nations determined that the Special Court was not bound by the amnesty provisions in the Lome Agreement relative to international crimes, which enabled the Special Court to prosecute several high level perpetrators of the conflict, including Liberian President Charles Taylor.¹⁹⁹

As seen in the Sierra Leone context, Peace with Justice may involve coordination across multiple parties and institutions, at the domestic and international level.

d. Goal: Durable Peace with Justice

Within the peace and justice dialogue, there is general consensus today that both peace and justice are required for long-term stability arising out of conflict and minimizing either aim threatens that stability. Justice and accountability mechanisms cannot achieve their objectives of deterrence and non-recurrence if peace is not established. A weak peace without justice is likely to result in a recurrence of the conflict. Peace negotiators need to "carve out space for accountability and justice in order to achieve a durable peace."²⁰⁰

The importance of justice for a durable peace can be seen in the present day response to the Latin American transitions of power during the twentieth century that emphasized peace without justice through blanket amnesty for government perpetrators.²⁰¹ Over the last two decades, victims challenged these amnesty laws in domestic

¹⁹⁷ Williams, *supra* note 149, at 453.

¹⁹⁸ Williams, *supra* note 149, at 453; *see also* U.N. Security Council Res. 1315 (Aug. 14, 2002) (establishing the Special Court for Sierra Leone).

¹⁹⁹ Williams, *supra* note 149, at 454.

²⁰⁰ Williams, *supra* note 149, at 511.

²⁰¹ Santiago A. Canton, *Amnesty Laws*, in *VICTIMS UNSILENCED: THE INTER-AMERICAN HUMAN RIGHTS SYSTEM AND TRANSITIONAL JUSTICE IN LATIN AMERICA* 167, 167-68 (Catherine A. Sunshine ed., Gretta K. Siebentritt trans., 2007).

and regional courts.²⁰² Domestic pressure and persistent calls for accountability culminated in 2005, when the Argentine Supreme Court of Justice formally declared blanket amnesties unconstitutional and void.²⁰³ Following in the footsteps of Argentina, and in compliance with international law, Uruguay, Peru, and El Salvador have all formally or informally annulled their amnesty laws and are now bringing former regime perpetrators of human rights atrocities to justice.²⁰⁴ After several decades, the survivors of these atrocity regimes continue to demand justice as a core element of long term peace.

IV. THE EVOLUTION OF PEACE VERSUS JUSTICE IN SUDAN

The seeds of Sudan's peace versus justice dilemma have been present since at least its independence in 1956. The manner in which Sudan achieved independence—without autonomy for the ethnically and religiously distinct South—embedded the seeds of conflict in the future state, and the Three Tribes' attempted Islamization and Arabization throughout the country ensured that justice would remain a demand of marginalized Sudanese in Darfur, the South, and elsewhere in response to decades of state oppression.²⁰⁵

a. Darfur Peace Process

As discussed in Part II, the Bashir regime engaged in a sustained violent conflict against the people of the Darfur region. The conflict intensified and the increasing numbers of internally displaced and refugees caused neighboring countries and international actors, such as Chad, the United Nations (UN), and the African Union (AU) to attempt to bring peace between Sudan's government and rebel groups.²⁰⁶ On May 5, 2006, the Darfur Peace Agreement (DPA) also

²⁰² See generally *id.*

²⁰³ *Id.* at 181.

²⁰⁴ *Id.* at 168-82.

²⁰⁵ See discussion of these conflicts *supra* Part II.

²⁰⁶ Julian Thomas Hottinger, *The Darfur Peace Agreement: Expectations Unfulfilled*, 18 ACCORD, no. 18, 2006, at 46, 47-48 (2006), <https://rc-services->

known as the Abuja Agreement was signed by the government of Sudan and one faction of rebel groups in Darfur known as the Sudan Liberation Army (SLA), while other factions of the SLA refused to sign.²⁰⁷ The failure to bring all parties together prevented the peace agreement from operating as it was intended and the violence continued. After four years of continued conflict and peace negotiations, the government of Sudan and Liberation and Justice Movement (LJM) signed what is known as the Doha Document for Peace in Darfur (DDPD) or the Doha Agreement.²⁰⁸

i. 2006 Darfur Peace Agreement

The initial peace negotiation in late 2003 was conducted by neighboring Chad in a form of ceasefire, which ultimately failed.²⁰⁹ Sudan objected to the involvement of the US, European Union (EU), and the UN in the negotiations but permitted the AU under the limitation that the talks focus on humanitarian rather than political issues.²¹⁰ Meanwhile, ceasefire agreements like the N'Djamena Humanitarian Ceasefire Agreement were signed between Sudan and the rebel groups; the AU formed the African Union Mission in Sudan (AMIS); and AMIS dispatched thousands of African peacekeeping troops to Darfur.²¹¹ By 2005, due to tribal confrontation, internal politics, and differing views on the peace negotiation, rebel groups had begun to split into factions.²¹² After six rounds of peace talks in Abuja, Nigeria, the DPA, otherwise

assets.s3.eu-west-1.amazonaws.com/s3fs-public/18_Sudan_2006_ENG_F.pdf [https://perma.cc/A3GW-YWZF].

²⁰⁷ *Id.* at 48.

²⁰⁸ INT'L CRISIS GRP., SUDAN'S SPREADING CONFLICT (III): THE LIMITS OF DARFUR'S PEACE PROCESS 3 (2014), <https://www.refworld.org/pdfid/52e7c8954.pdf> [https://perma.cc/DAQ6-YC3Q].

²⁰⁹ Abdullahi Shuaibu, *Darfur Peace Agreements: Challenges and Opportunities, VOICES OF DARFUR*, July 2012, at 8, 8, https://unamid.unmissions.org/sites/default/files/old_dnn/VoD_En_July_2012_web.pdf [https://perma.cc/N7NA-3CM5].

²¹⁰ *Too Little, Too Late: Sudanese and International Response 2004*, HUM. RTS. WATCH, <https://www.hrw.org/reports/2004/sudan0504/8.htm> [https://perma.cc/W7M9-MYDB].

²¹¹ HUMAN RTS. WATCH, IMPERATIVES FOR IMMEDIATE CHANGE: THE AFRICAN UNION MISSION IN SUDAN 52 (Figure 2) (Jan. 2016). <https://www.hrw.org/sites/default/files/reports/sudan0106webwcover.pdf> [https://perma.cc/BS9E-SQ2K].

²¹² Shuaibu, *supra* note 209, at 8.

known as the Abuja Agreement, was signed on May 5, 2006, by Sudan and only one faction of SLM/A, SLA-MM led by Minni Minnawi.²¹³

The agreement was divided into six chapters outlining: Power Sharing; Wealth Sharing; Comprehensive Ceasefire and Final Security Arrangements; Darfur-Darfur Dialogue and Consultation; General Provisions; and Implementation Modalities and Timelines.²¹⁴ Due to Sudan's condition that the negotiation only address humanitarian issues, the agreement was limited to a general peace mechanism rather than justice.²¹⁵ In this instance, the agreement reflected a Peace First approach.

ii. *2011 Doha Document for Peace in Darfur*

Due to the failure to unify the rebels and the continuation of violence in Darfur, additional peace negotiations were necessary. In July 2007, the AU and the UN established a hybrid operation known as the United Nations – African Union Hybrid Operation in Darfur (UNAMID).²¹⁶ In October 2007, in an attempt to achieve goals that were missed in the DPA and despite boycotting by SLA factions and JEM, the UN and AU organized the Sirte Conference to negotiate peace among the central government, rebels, and other civil society groups.²¹⁷ In 2008, Qatar confirmed that it would host the peace negotiation in Doha.²¹⁸ These meetings lasted until May 2011. A coalition of small armed movements called the Liberation and Justice Movement (LJM) participated in the talks, providing splinter rebel groups with a united voice.²¹⁹ SLA-AW, led by Abdelwahid

²¹³ Shuaibu, *supra* note 209, at 8.

²¹⁴ Darfur Peace Agreement, May 5, 2006, U.N. Peacemaker, https://peacemaker.un.org/sites/peacemaker.un.org/files/SD_050505_DarfurPeaceAgreement.pdf [<https://perma.cc/M48H-D6F3>].

²¹⁵ Darfur Peace Agreement, Sudan-Sudan, May 5, 2006, <https://www.un.org/zh/focus/southernsudan/pdf/dpa.pdf> [<https://perma.cc/3N8S-Q7XQ>].

²¹⁶ Nafisa Eltahir and Khalid Abdelaziz, *Darfur Displaced Fearful As UN Peacekeepers Hand Over to Local Forces*, REUTERS (Jan. 13, 2021; 6:22 AM), <https://www.reuters.com/article/us-sudan-politics-darfur-idUSKBN29I1WH> [<https://perma.cc/7P2P-YVV5>].

²¹⁷ Shuaibu, *supra* note 209, at 8.

²¹⁸ Shuaibu, *supra* note 209, at 8.

²¹⁹ Shuaibu, *supra* note 209, at 8.

Mohammed Ahmed Nur, refused to participate.²²⁰ JEM followed suit and withdrew from the talks.²²¹ The DDPD was finalized in May 2011 and was signed between the government and LJM, to the exclusion of other rebel groups.²²²

The DDPD was signed by the central government and LJM at the All Darfur Stakeholders Conference on July 14, 2011.²²³ Similar to the DPA, the DDPD outlined power sharing, wealth sharing, permanent ceasefire, internal dialogue, and consultation and implementation mechanisms.²²⁴ However, unlike the DPA, the DDPD was comprehensive and included justice mechanisms through chapters on Human Rights and Fundamental Freedoms, Compensation and Return of IDPs and Refugees, and Justice and Reconciliation.²²⁵ Additionally, the DDPD was supported by UNAMID, the African Union, and the Arab League, and endorsed by the Security Council under Chapter VII of the UN Charter.²²⁶

The wealth sharing provision of the peace agreement created the Darfur Reconstruction and Development Fund (DRDF), the Fiscal and Financial Allocation Monitoring Commission (FFAMC), and the Compensation Commission.²²⁷ The DRDF was designed to ensure that the new Government of National Unity (GNU) would contribute significant money to Darfur.²²⁸ The DDPD stated that Darfur would share in Sudan's wealth and would benefit from a nation-wide strategy for poverty alleviation. Specifically, the DDPD designated that the Government of Sudan would transfer two billion dollars to Darfur through the Darfur Reconstruction and Development Fund (DRDF).²²⁹ The amount allocated to DRDF

²²⁰ Shuaibu, *supra* note 209, at 8.

²²¹ Shuaibu, *supra* note 209, at 8.

²²² Shuaibu, *supra* note 209, at 8.

²²³ Doha Document for Peace in Darfur, U.N.-Afr. Union Hybrid Mission in Darfur, U.N. Doc. A/65/914, S/2011/449 (Jul. 14, 2011), https://unamid.unmissions.org/sites/default/files/ddpd_english.pdf [<https://perma.cc/JDV5-CF69>].

²²⁴ Doha Document for Peace in Darfur, *supra* note 223.

²²⁵ Doha Document for Peace in Darfur, *supra* note 223, at chs. I, IV-V.

²²⁶ Press Release, Security Council, Adopting Resolution 2113 (2013), Renews Mandate of African Union-United Nations Hybrid Operation in Darfur until 31 August 2014, U.N. Press Release SC/11083 (July 30, 2013), <https://www.un.org/press/en/2013/sc11083.doc.htm> [<https://perma.cc/96X9-7KH8>].

²²⁷ Hottinger, *supra* note 206, at 48.

²²⁸ Hottinger, *supra* note 206, at 48.

²²⁹ Doha Document for Peace in Darfur, *supra* note 223, ¶ 142.

would be adjusted based on reconstruction and developmental needs in Darfur.²³⁰

The FFAMC was assigned to oversee financial transfers from Khartoum to Darfur's three states.²³¹ The Compensation Commission was established to compensate all victims who suffered loss or damage, including loss of life, physical injury, mental harm, housing, and emotional suffering, "with membership nominated by the parties, to define mechanisms for reviewing and enforcing the Commissions' decisions."²³² Additionally, the Sudanese government agreed to provide thirty million dollars to victims of the conflict.²³³ Lastly, the agreement included plans to establish a commission that would consult with the UN in assisting displaced persons and refugees in returning home to Sudan.²³⁴

The security provision called for a ceasefire with consequences for violation and withdrawal of armed groups from respective areas and for demilitarized zones to be created around camps for IDPs.²³⁵ The rebels were not required to disarm until the Sudanese Armed Forces withdrew and the GNU disarmed and had the Janjaweed under control.²³⁶ It was agreed that in groups of 100-150, 4,000 former combatants be integrated into the Sudanese Armed Forces, 1,000 be integrated into security institutions such as police forces, and 3,000 would join education and training programs. Similarly, the DDPD called for the disarmament, demobilization and integration of former combatants into SAF and Police Forces.²³⁷

Unlike the DPA, the DDPD included justice provisions. The DDPD established the Truth, Justice and Reconciliation Commission (TJRC).²³⁸ The TJRC would have two committees (Justice Committee and Truth and Reconciliation Committee) who would be responsible for receiving, examining, and assessing claims of victims and assessing the root of the conflict in order to provide recommendations for comprehensive and lasting peace in Darfur.²³⁹ Those who committed violations of human rights and international

²³⁰ Hottinger, *supra* note 206, at 48.

²³¹ Doha Document for Peace in Darfur, *supra* note 223, ¶ 154.

²³² Hottinger, *supra* note 206, at 48.

²³³ Hottinger, *supra* note 206, at 48.

²³⁴ Hottinger, *supra* note 206, at 48.

²³⁵ Hottinger, *supra* note 206, at 48.

²³⁶ Hottinger, *supra* note 206, at 48.

²³⁷ Doha Document for Peace in Darfur, *supra* note 223, art. 72.

²³⁸ Doha Document for Peace in Darfur, *supra* note 223, ¶ 311.

²³⁹ Doha Document for Peace in Darfur, *supra* note 223, ¶ 311.

humanitarian law would be held accountable by a Special Court for Darfur to prosecute human rights violations.²⁴⁰ Amnesty was given to certain civil and military members and to prisoners of war.²⁴¹ In contrast, because of the Government of Sudan's requirement that the DPA peace negotiations only concern humanitarian issues, the DPA failed to include any justice mechanisms.

In the years that followed the peace agreement, the security situation in Darfur remained unstable due to the delayed implementation of the DDPD.²⁴² Particularly, under the power sharing provision, only half of the federal level posts granted to LJM were satisfied and the vote on Darfur's administrative status was not conducted.²⁴³ In terms of the wealth sharing provision, due to the economic crisis in Sudan, only \$135 million had been made available, but not deposited in the DRDF bank account, by late 2013.²⁴⁴ Under the security provisions, the integration of LJM forces into government forces stalled due to disagreements over the numbers, and the disarming of government militias was not implemented.²⁴⁵

The DDPD reflected a comprehensive peace agreement with peace and justice provisions, and it was backed by several international organizations and foreign states with the ability to fund and support the enforcement of peace and the administration of justice. In many ways, the DDPD reflects the sequencing of a Peace with Justice process and promised to set the foundation for a durable peace. Unfortunately, the Bashir regime failed to fully implement the DDPD, and that failure fueled the grievances that gave rise to the April 2019 revolution that toppled Bashir.

b. North-South Peace Process

As discussed in Part II, conflict between what is now Sudan and South Sudan stems back to the early 1800s upon the arrival of the

²⁴⁰ Doha Document for Peace in Darfur, *supra* note 223, art. 59.

²⁴¹ Mollie Zapata, *Darfur: The Doha Peace Process, December 2010-present*, ENOUGH (Jan. 10, 2012), <https://enoughproject.org/blog/darfur-doha-peace-process-december-2010-present> [<https://perma.cc/C3DS-AEBV>]; Doha Document for Peace in Darfur, *supra* note 224, art. 60.

²⁴² INT'L CRISIS GRP., *supra* note 208, at 10-13.

²⁴³ INT'L CRISIS GRP., *supra* note 208, at 6.

²⁴⁴ INT'L CRISIS GRP., *supra* note 208, at 8.

²⁴⁵ INT'L CRISIS GRP., *supra* note 208, at 10-11.

Turko-Egyptians and the British subsequently after.²⁴⁶ Even after Sudanese independence in 1956, Egypt and Britain's legacy catalyzed further cultural, religious, and economic differences between the northern and southern regions that led to several civil wars. The first civil war began a year before the country gained independence in 1956. Upon independence, the northerners pressed for one Sudan fully immersed in Arab-Islamic culture and opposed the southern federation and the practice of Christianity and other indigenous religions.²⁴⁷ Southern groups reiterated their cries for self-determination, leading to a mutiny, which officially began the war.²⁴⁸

i. Addis Ababa Agreement of 1972

After seventeen years of fighting and even a military takeover, the Addis Ababa Agreement ended the first civil war in 1972.²⁴⁹ The agreement between Sudan's new government under President Numayri and the Southern Sudan Liberation Movement granted regional autonomy to the southern region.²⁵⁰ Citizens of the southern region were given the power to elect a People's Regional Council, which had full authority to legislate on all local matters.²⁵¹ National matters, such as foreign trade and national defense, were excluded from this regional authority.²⁵² Following the agreement, President Numayri appointed leaders from the South, such as members of the Southern Sudan Liberation Movement within his government and established the Sudanese Socialist Union.²⁵³ A number of political parties in the northern region were unhappy with President Numayri and the Addis Ababa Agreement because

²⁴⁶ Sam C. Sarkesian, *The Southern Sudan: A Reassessment*, 16 AFR. STUD. REV. 1, 2 (1973).

²⁴⁷ *Id.* at 11-13.

²⁴⁸ See Salman M.A. Salman, *South Sudan Road to Independence: Broken Promises and Lost Opportunities*, 26 GLOB. BUS. & DEV. L.J. 343, 352 (2013).

²⁴⁹ *Id.* at 364-65.

²⁵⁰ U.N. Peacemaker, *The Addis Ababa Agreement on the Problem of South Sudan*, art. 4. (1972) [hereinafter the Addis Ababa Agreement], https://peacemaker.un.org/sites/peacemaker.un.org/files/SD_720312_Addis%20Ababa%20Agreement%20on%20the%20Problem%20of%20South%20Sudan.pdf [<https://perma.cc/6MV3-FF83>].

²⁵¹ The Addis Ababa Agreement, *supra* note 250, art. 8.

²⁵² The Addis Ababa Agreement, *supra* note 250, art. 7.

²⁵³ Salman, *supra* note 248, at 366.

it did not advocate for one unified Arab-Islamic country.²⁵⁴ A number of Northerners also resented the southern region's ability to elect local government officials within the People's Regional Council while the northern region was under the repressive military dictatorship of Numayri.²⁵⁵ Towards the end of the 1970s and early 1980s, Southerners, too, disapproved of President Numayri's actions, including President Numayri requiring the southern region to split into three regions and creating an unwanted canal to transport oil from the south to the north.²⁵⁶

President Numayri's desire to control oil resources heightened competition between political elites in the national government and also increased division with the southern region.²⁵⁷ Lingering agitations from the first civil war illustrated by controversies over the North-South border also increased tensions between the national political elites and southerners.²⁵⁸ Moreover, in September 1983, President Numayri breached the 1972 Addis Ababa Agreement by enforcing Sharia law throughout the entire country, including the southern region.²⁵⁹ In response, John Garang and other southern leaders created both the Sudan People's Liberation Army and the Sudan People's Liberation Movement.²⁶⁰

The Second Sudanese Civil War began in 1983 with a series of military conflicts between the Southern People's Liberation Movement and the central Sudanese government.²⁶¹ Even after President Numayri was overthrown in 1985 by a popular uprising,²⁶² the North-South conflict continued as the Southern People's Liberation army fought against the civilian-led transitional government and the government formed under Prime Minister al-Mahdi following elections in 1986.²⁶³ Prime Minister al-Mahdi, under the influence of the National Islamic Front, continued to support the so-called "September Laws" that sought to make Sudan an Islamic State and impose sharia law throughout the country.²⁶⁴

²⁵⁴ Salman, *supra* note 248, at 366.

²⁵⁵ Salman, *supra* note 248, at 366.

²⁵⁶ Salman, *supra* note 248, at 367-68.

²⁵⁷ Moro, *supra* note 117, at 86.

²⁵⁸ Moro, *supra* note 117, at 77.

²⁵⁹ Salman, *supra* note 248, at 371.

²⁶⁰ See discussion *supra* Part II.

²⁶¹ Salman, *supra* note 248, at 371.

²⁶² Salman, *supra* note 248, at 372.

²⁶³ Salman, *supra* note 248, at 372-75.

²⁶⁴ Salman, *supra* note 248, at 373-75.

Peace discussions renewed for a brief period beginning in 1986; leaders from both sides of the conflict met in Ethiopia to discuss peace in Sudan at the Koka Dam meeting and released the Koka Dam Declaration which called for the lifting of the September laws, the State of Emergency, and all other restrictive laws, and the convening of a national peace conference with all the parties in June 1986.²⁶⁵ Despite the government's failure to implement the provisions of the Koka Dam Declaration, John Durang, and the head of the DUP Party met in Addis Ababa in 1988 and announced the Sudanese Peace Initiative, a plan to host a constitutional conference to discuss the situation in Sudan, and for a ceasefire and suspension of the September Laws in the lead up to the conference.²⁶⁶ Al-Mahdi was toppled by a military coup in June 1989 which led to the dictatorship of Omar al-Bashir; the regimes of both al-Mahdi and al-Bashir effectively thwarted any opportunity for progress on peace under the Koka Dam Declaration of Sudanese Peace Initiatives.²⁶⁷

Bashir's regime didn't merely thwart the opportunity for peace, it escalated the Second civil war with the south by declaring Jihad against southerners and turning the conflict into a "holy war."²⁶⁸ The regime sought to spread Islam through the Southern region of the country and further into Africa, and the regime's fighters who died in the conflict were called martyrs and exalted.²⁶⁹ By 2002, Bashir and the National Congress Party (formerly the National Islamic Front) agreed to enter into serious peace negotiations with the Southern People's Liberation Army.²⁷⁰ The lack of oil revenue and the heavy pressure from the international community led both parties to sign the Machakos Peace Agreement in Machakos, Kenya in July 2002.²⁷¹

²⁶⁵ Salman, *supra* note 248, at 373-74.

²⁶⁶ Salman, *supra* note 248, at 375.

²⁶⁷ Salman, *supra* note 248, at 376.

²⁶⁸ Salman, *supra* note 248, at 376.

²⁶⁹ Salman, *supra* note 248, at 376-77.

²⁷⁰ Salman, *supra* note 248, at 378.

²⁷¹ See Salman, *supra* note 248, at 378 (examining the factors pushing the government towards reaching a peaceful resolution of the conflict).

ii. *Machakos Protocol of the Comprehensive Peace Agreement of 2005*

The Machakos Protocol addressed the root causes of the civil war in Sudan and provided Sudan a six-year interim period to create comprehensive reforms in the system of governance.²⁷² Specifically, the Machakos Protocol is the flagship document of the six chapeau agreement titled the Comprehensive Peace Agreement.²⁷³ In 2005, the Comprehensive Peace Agreement officially terminated the twenty-two year civil war in Sudan.²⁷⁴ The Comprehensive Peace Agreement required that by “January 2011, a referendum on independence be held, allowing the people of southern Sudan to choose between . . . power-sharing . . . [under one central government] or opting for full independence through secession from the north . . . ,” the option which southerners had wanted at the outset of Sudan’s independence from Britain in 1956.²⁷⁵ After a six-month transition period, on July 9, 2011, South Sudan became an independent State.²⁷⁶

Pressure from the international community, including the United States, Nigeria, and neighboring countries within the Intergovernmental Authority on Development, facilitated peace processes to end the second civil war.²⁷⁷ Kenya hosted the entire peace process from June 18 to July 20, 2002, for the Machakos Protocol, but also for the entire span of the Comprehensive Peace Agreement.²⁷⁸ Mr. Daniel arap Moi, the former President of Kenya, appointed General Lazaro Sumbeiywo as a full-time mediator

²⁷² See Emeric Rogier, *The (Un-) Comprehensive Peace Agreement, in NO MORE HILLS AHEAD? THE SUDAN’S TORTUOUS ASCENT TO HEIGHTS OF PEACE* 105, 105 (2005). See also Marina Ottaway & Amr Hamzawy, *The Comprehensive Peace Agreement, CARNEGIE ENDOWMENT FOR INT’L PEACE* (2011), <https://carnegieendowment.org/2011/01/04/comprehensive-peace-agreement-pub-42223> [<https://perma.cc/7J8E-FWRY>] (discussing the structure of the peace agreement).

²⁷³ Salman, *supra* note 248, at 391.

²⁷⁴ See Ottaway & Hamzawy, *supra* note 272, at 1 (stating that Comprehensive Peace Agreement was signed on January 9, 2005, and that it marked the end of the two decades of civil conflict).

²⁷⁵ Ottaway & Hamzawy, *supra* note 272, at 2. See discussion *supra* Part II regarding southerners’ desire for independence in 1956.

²⁷⁶ Ottaway & Hamzawy, *supra* note 272, at 344.

²⁷⁷ See Salman, *supra* note 248, at 412 (describing how multiple nations like the United States and Nigeria facilitated negotiations to bring about peace).

²⁷⁸ Salman, *supra* note 248, at 378.

between the Sudanese central government and the Southern People's Liberation Movement and Army.²⁷⁹ The United States, Norway, and the United Kingdom also assisted with mediation under the guise of the troika.²⁸⁰

The Machakos Protocol is the first part of the six-part Comprehensive Peace Agreement.²⁸¹ In the Machakos Protocol, both parties agreed on a broad framework for the transitional process and the structures of government, State and religion, and the right to self-determination for the people of South Sudan.²⁸²

The first section of the Machakos Protocol outlines South Sudan's right of self-determination.²⁸³ The Machakos Protocol outlines that Sudan honors freedom of religion and belief and that no one should be discriminated on such grounds generally nor within public office.²⁸⁴ Further, the Protocol discusses that personal and family matters such as marriage, divorce, and inheritance shall not be governed by the specific party's personal or religious laws.²⁸⁵

Next, the Machakos Protocol details the structures of government. The National Constitution of Sudan is established as the Supreme Law of the land within this agreement.²⁸⁶ Nonetheless, the agreement highlights that Sudan will establish a National Constitutional Review Commission to draft a Legal and Constitutional Framework to incorporate the Machakos Protocol and to govern Sudan during the Interim Period.²⁸⁷ The agreement establishes alternative options for instances where national legislation is enacted that conflicts with the religion of another.²⁸⁸

The Machakos Protocol ends with the introduction of the Assessment and Evaluation Commission.²⁸⁹ The Machakos Protocol establishes this commission to improve institutions and

²⁷⁹ Salman, *supra* note 248, at 412.

²⁸⁰ Salman, *supra* note 248, at 412.

²⁸¹ Ottoway & Hamzawy, *supra* note 272, at 1.

²⁸² U.N. Peacemaker, Machakos Protocol, Recitals, July 20, 2002, https://peacemaker.un.org/sites/peacemaker.un.org/files/SD_020710_MachakosProtocol.pdf [<https://perma.cc/HPY9-A9YN>].

²⁸³ *Id.* at §1.3.

²⁸⁴ *Id.* at §§6.2-6.3.

²⁸⁵ *Id.* at §6.4.

²⁸⁶ *Id.* at §3.1.1.

²⁸⁷ *Id.* at §3.1.2.

²⁸⁸ *Id.* at §3.2.4.

²⁸⁹ *Id.* at §2.4.

arrangements created under the agreement and to address pending issues of power sharing, wealth sharing, and human rights.²⁹⁰

The Machakos Protocol is an interim agreement between the Southern People's Liberation Movement/Army (SPLM/A) and the Sudanese government.²⁹¹ The Machakos Protocol called for a six-and-a-half-year interim period where the local, state, and federal government would rule over the country as a whole until the southern region decided whether or not to depart from Sudan through referendum.²⁹² The Protocol also initiated a conversation on the future of State and religion.²⁹³ On July 20, 2002, the two parties signed the Machakos Protocol under the supervision of General Lazaro Sumbeiywo as a full-time mediator.²⁹⁴ The parties also received mediation assistance from international parties, such as Kenya, Ethiopia, Eritrea, and Uganda under the confederation of the Intergovernmental Authority on Development, along with assistance from the aforementioned troika (United States, Norway, and the United Kingdom).²⁹⁵

The Machakos Protocol does not directly address accountability or justice mechanisms within the agreement. Further, the agreement does not address any amnesty provisions or any form of transitional justice. Political drivers may have contributed to the failure to address justice provisions in the agreement. Scholars have suggested that the Sudanese government hesitated in making a grand compromise to get a better deal by negotiating in a piecemeal manner.²⁹⁶ Furthermore, SPLM/A's concerns regarding the administration of presidential elections influenced the content of the Machakos Protocol and the timing of the peace process in Sudan.²⁹⁷ Specifically, the principle and timing of elections was a contentious issue throughout and following the peace negotiations.²⁹⁸ Despite these tensions and the failure of the CPA to address issues of justice,

²⁹⁰ *Id.*

²⁹¹ *Id.* at Recitals.

²⁹² Nicole Rumeau & Howard Wolpe, *Sudan: Last Steps in the Peace Process*, WILSON CTR. (Sept. 3, 2003), <https://www.wilsoncenter.org/event/sudan-last-steps-the-peace-process> [<https://perma.cc/LZH4-5NBA>].

²⁹³ Oysten H. Rolandsen, *A Quick Fix? A Retrospective Analysis of the Sudan Comprehensive Peace Agreement*, 38 REV. OF AFR. POL. ECON. 554, 555 (2011).

²⁹⁴ Salman, *supra* note 248, at 412.

²⁹⁵ Salman, *supra* note 248, at 385, 388, and 412.

²⁹⁶ Rolandsen, *supra* note 293, at 557.

²⁹⁷ Rogier, *supra* note 272, at 109.

²⁹⁸ Rogier, *supra* note 272, at 109.

the CPA has been described by the former US Special Envoy to Sudan as “perhaps the most transformational document in modern Sudanese history.”²⁹⁹

The Machakos Protocol and the Comprehensive Peace Agreement, of which it is a component part, reflect a Peace First approach, where provisions about accountability and transitional justice were not included so the parties could focus exclusively on provisions necessary to end the violent conflict. In terms of the text of the agreement, those requirements did not explicitly include accountability. The fact that Bashir had already had an ICC arrest warrant issued for his conduct in Darfur may have influenced this result. Bashir had no incentive to broach accountability and the SPLM may have felt that Bashir would eventually face justice. The outcome reflects the benefits and drawbacks of a Peace First approach. The CPA was widely understood to have been essential to ending the Second North-South Civil War; however, the failure to hold perpetrators of international crimes accountable meant that the Bashir regime was able to continue committing war crimes against others within Sudan.

V. PEACE AND JUSTICE IN THE JUBA PEACE AGREEMENT

The Comprehensive Peace Agreement of 2005 ultimately led to South Sudan’s secession, granting the South Sudanese the self-determination and autonomy that they had long sought.³⁰⁰ Nevertheless, following the 2011 bifurcation of the two nations, Bashir continued to oppress the remaining citizenry within Sudan and he faced significant opposition to his regime.³⁰¹ The internal tension within Sudan ultimately led to Bashir’s toppling in April 2019, following months of country-wide protests led by the Forces for Freedom and Change (FFC) coalition.³⁰² The military junta that deposed Bashir also targeted the protesters who helped to topple Bashir, killing several of them on June 3, 2020.³⁰³ As a result of this massacre, the international community pressured the military

²⁹⁹ NATSIOS, *supra* note 11, at 170.

³⁰⁰ See discussion *supra* Parts II and IV.

³⁰¹ See *supra* Part II.

³⁰² INT’L CRISIS GRP., *supra* note 208, at 7-9.

³⁰³ INT’L CRISIS GRP., *supra* note 208, at 7-9.

transitional government to negotiate with the civilian protesters and to form a jointly-led transition government.³⁰⁴

a. 2019 Constitutional Declaration

The Transitional Military Council that toppled Bashir and the Forces for Freedom and Change signed a transitional constitutional declaration in August 2019 that established the civilian led transitional government (“CLTG”), laid out its authorities, and provided a timeline for the political transition.³⁰⁵ The peace process was a key element of the political transition.³⁰⁶ Transitional justice was also a priority reflected in the declaration. Article 38(5)(f) of the Constitutional Declaration provides for the establishment of a Transitional Justice Commission as part of the legal reform process in Sudan.³⁰⁷ The Constitutional Declaration further provided that Sudan shall begin implementing transitional justice and accountability measures for crimes against humanity and war crimes during the transitional period.³⁰⁸

The transformation of the Sudanese government’s composition created space for the negotiation of peace with parties who had been harmed by Bashir’s abuses on both sides of the negotiating table.³⁰⁹ The significance of this realignment for the pursuit of peace and justice in tandem was apparent in the prioritization of transitional justice in the Constitutional Declaration that created the new transitional governance authority and set the terms for the political transition. The prioritization of justice as part of the transition continued when armed groups entered into negotiation with the new CLTG.

³⁰⁴ INT’L CRISIS GRP., *supra* note 208, at 7-9.

³⁰⁵ Draft Constitutional Charter for the 2019 Transitional Period, Aug. 4, 2019, <https://constitutionnet.org/sites/default/files/2019-08/Sudan%20Constitutional%20Declaration%20%28English%29.pdf> [<https://perma.cc/8PZ3-6MYN>].

³⁰⁶ *See, e.g., id.* at art 6(2) (“During the first six months of the transitional period, the priority is to work seriously to establish peace . . .”).

³⁰⁷ *Id.* at art. 38(5)(f).

³⁰⁸ *Id.* at art. 67(g).

³⁰⁹ *See* INT’L IDEA, THE JUBA AGREEMENT FOR PEACE IN SUDAN: SUMMARY AND ANALYSIS 7 (2020), <https://www.idea.int/sites/default/files/publications/the-juba-agreement-for-peace-in-sudan-en.pdf> [<https://perma.cc/2LPM-TLA6>] (noting that former opposition members were now in government and that made reaching agreement easier).

b. Juba Declaration

The CLTG met with a coalition of armed rebels in October 2019 in Juba, South Sudan to initiate the peace process.³¹⁰ The rebel groups had previously formed an umbrella political organization known as the Sudan Revolutionary Forces (“SRF”) to collectively represent the views of the geographically and ethnically distinct armed movements, each of whom shared disdain for Bashir’s regime.³¹¹ The SRF comprised groups from throughout Sudan, with significant representation from the conflict areas of Darfur, as well as the Two Areas of the Blue Nile and South Kordofan (“The Two Areas”).³¹² The October 2019 Juba talks were their first opportunity to negotiate with a post-Bashir regime.

The SRF and CLTG signed a joint Cessation of Hostilities and a Joint Political Declaration (“Juba Declaration”) that laid out their intentions to negotiate a peace agreement that would comprehensively address their concerns within a three-month period.³¹³ The Juba Declaration reflected that the Juba peace process was designed to unfold as a sequenced Peace with Justice endeavor. In this case, the first step of the sequence emphasized peace, as the Cessation of Hostilities was the key outcome of the Juba Declaration and the only measure to take immediate effect.³¹⁴ The Government of Sudan’s transition to a civilian-led government, comprised of FFC members who had been part of the opposition,³¹⁵ created confidence in the members of the SRF that they could achieve an appealing political outcome.³¹⁶ This confidence created the opportunity for the parties to expressly address justice and accountability as an intended outcome of the Juba peace process. The Juba Declaration provided that the parties agreed to work towards “a comprehensive and sustainable peace that discusses the root causes of the Sudanese

³¹⁰ Denis Dumo, *Sudan, major rebel group sign deal to integrate rebels into army*, REUTERS (Aug. 18, 2020, 6:54 AM), <https://www.reuters.com/article/us-sudan-politics/sudan-major-rebel-group-sign-deal-to-integrate-rebels-into-army-idUSKCN25E1B9> [<https://perma.cc/42V7-HLTG>].

³¹¹ INT’L CRISIS GRP., *supra* note 208, at 19.

³¹² INT’L CRISIS GRP., *supra* note 208, at 19.

³¹³ Sudan Revolutionary Forces and Transitional Government Joint Cessation of Hostilities and Joint Political Declaration (Oct. 21, 2019) [hereinafter Juba Declaration].

³¹⁴ *Id.*

³¹⁵ Marsden, *supra* note 5.

³¹⁶ See INT’L IDEA, *supra* note 309, at 7.

crisis, citizenship, justice, reconciliation, development and democracy, marginalization, alleviation of suffering, reparations, land issues, and the return of displaced persons as a priority.”³¹⁷ The parties also understood the importance of a durable Peace with Justice declaring that “the realization of the objectives of the Sudanese revolution of December 2018 necessitates the cessation of conflict and war and achieving peace, justice, and a transition to democracy.”³¹⁸

c. Juba Agreement for Peace in Sudan

While the Juba Declaration envisioned that the Juba peace process would conclude within three months, the process ended up taking a full year and a final comprehensive peace agreement was concluded in October 2020.³¹⁹ The Juba Agreement for Peace in Sudan, also known as the Juba Peace Agreement (JPA), was a multi-track agreement with regional track agreements negotiated by regional constituent groups of the SRF with the CLTG.³²⁰ The comprehensive agreement comprised six separate track agreements signed by the Sudanese government and individual rebel groups – The Darfur Peace Agreement, the Blue Nile and Kordofan Peace Agreement, the Eastern Path Peace Agreement, the Northern Path Peace Agreement, the Central Path Peace Agreement, the Third Front Security Agreement, and a National Issues Agreement (along with “final” agreement status provisions) signed by all of the parties.³²¹ Two rebel groups, SPLM North Al Hillu and the Sudan Liberation Movement, did not sign the agreement.³²² SPLM North Al Hillu attended the negotiations in Juba and expressed interest in negotiating their own track agreement, but insisted on a commitment from the Sudanese government that Sudan would become a secular state before negotiations could begin and they failed to receive that precondition.³²³ The Sudan Liberation

³¹⁷ Juba Declaration, *supra* note 313, ¶ 1.

³¹⁸ Juba Declaration, *supra* note 313, ¶ 4.

³¹⁹ Juba Peace Agreement, *supra* note 2.

³²⁰ See generally INT’L IDEA, *supra* note 309 (analyzing the nuances of the Juba Agreement for Peace in Sudan); Juba Peace Agreement, *supra* note 2.

³²¹ Juba Peace Agreement, *supra* note 319.

³²² INT’L IDEA, *supra* note 309, at 12.

³²³ INT’L IDEA, *supra* note 309, at 12.

Movement did not attend the Juba peace process because it did not recognize the CLTG as a legitimate government due to the membership of former regime military officials in the body.³²⁴ Nonetheless, the final provisions of the Juba Peace Agreement contained provisions which would allow non-signatories to later join the agreement with the approval of the original signatories.³²⁵

In terms of peace and justice, the multi-track peace agreement explicitly addressed issues of transitional justice and accountability as called for in the Juba Declaration and it established a permanent ceasefire with signatory armed groups upon conclusion of the agreement.³²⁶ A sequenced Peace with Justice approach was reflected in the negotiation's outcome documents. The final Juba Peace Agreement provides for various transitional justice obligations and mechanisms on the national and regional level, and in particular within the context of the Darfur Track Peace Agreement.³²⁷ The following subsections describe the specific transitional justice provisions contained within the JPA.

i. National Issues Agreement

Article 19(1) of the National Issues Agreement states that the Parties shall form a Transitional Justice Commission within thirty days of the date of signing the JPA, provided that the transitional justice mechanism encompasses all of Sudan, and particularly the conflict areas.³²⁸ In accordance with the National Issues Agreement Implementation Matrix, the Government of Sudan must issue a decision or decree to establish the Commission.³²⁹ In addition to the Transitional Justice Commission, the National Issues Agreement calls for general legal reform and grants a general amnesty "for passed rulings and standing warrants against political leadership

³²⁴ INT'L IDEA, *supra* note 309, at 12.

³²⁵ Juba Peace Agreement, *supra* note 2, tit. 8, art. 8.

³²⁶ Provisions for a permanent ceasefire with the relevant signatories were included in the Darfur Agreement (tit. 2, art. 12), the Blue Nile and Kordofan Agreement (tit. 3, ch. 2, art. 26), and the Third Front—Tamazuj Agreement (tit. 7, art. 15.1). Juba Peace Agreement, *supra* note 2.

³²⁷ Juba Peace Agreement, *supra* note 2

³²⁸ Juba Peace Agreement, *supra* note 2, tit. 1, art. 19(1).

³²⁹ Juba Peace Agreement, *supra* note 2, tit. 9.

and members of armed movements in relation to their membership therein.”³³⁰

On November 12, 2020, seemingly in implementation of this provision, the Sovereign Council granted a general amnesty for anyone who participated in armed or military operations during the war, including the political leadership and members of the armed movements and members of the Sudanese regular forces—the amnesty does not apply to those who are wanted by the ICC, those who committed war crimes, crimes against humanity, or genocide since 2002, and those involved in litigation for a private right.³³¹

ii. *Darfur Track Agreement*

The Darfur Track Peace Agreement contains the most comprehensive provisions on transitional justice of the various track agreements. Specifically, the Darfur Track Agreement establishes obligations regarding the ICC and calls for the creation of transitional justice mechanisms such as the Darfur Special Court, the Truth and Reconciliation Committee, and the Compensation and Reparations Fund.³³² The Agreement also calls for memorialization and the use of traditional justice mechanisms.³³³ The Darfur Track Agreement also addresses transitional justice as it relates to displaced persons and land issues.³³⁴

The Darfur Track Agreement recognizes that the pursuit of justice, accountability, and reconciliation precludes the possibility of any amnesty or immunity for perpetrators of genocide, crimes against humanity, or war crimes and creates an obligation to ensure that all perpetrators of violations of human rights and international humanitarian law are held accountable pursuant to the jurisdiction

³³⁰ Juba Peace Agreement, *supra* note 2, tit. 1, art. 17.

³³¹ Ali Agab and Olivia Bueno, *Sudan's Recent Amnesty Resolution Undermines the Prospects for Accountability and Peace*, INT'L JUST. MONITOR (Nov. 25, 2020), <https://www.ijmonitor.org/2020/11/sudans-recent-amnesty-resolution-undermines-the-prospects-for-accountability-and-peace/> [<https://perma.cc/5BHH-GWAG>] (noting that the wording of the amnesty may have only excluded those *already* charged by the ICC with committing international crimes).

³³² Juba Peace Agreement, *supra* note 2, tit. 2, ch. 3.

³³³ Juba Peace Agreement, *supra* note 2, tit. 2, ch. 3.

³³⁴ Juba Peace Agreement, *supra* note 2, tit. 2, ch. 3.

of domestic courts, the ICC, or the Darfur Special Court.³³⁵ The Agreement further recognizes the right of victims to have unhindered access to effective justice and redress mechanisms as well as the special status and role of women, children, and youth and their issues, in the prevention and resolution of conflicts and in transitional justice processes.³³⁶ Furthermore, the Agreement stresses the importance of local and indigenous methods of truth-telling, justice, reconciliation, and healing in complementing formal processes of justice and reconciliation.³³⁷

The Agreement provides for the Parties' full and unlimited cooperation with the International Criminal Court (ICC) concerning persons for whom arrest warrants have been issued, which includes facilitating the appearance of those wanted before the ICC and committing to UN Security Council Resolution 1593.³³⁸ The Agreement additionally provides that the Parties shall ensure that ICC prosecutors and investigators have easy access to victims, witnesses, and investigation sites, as well as free movement throughout Sudan at all times.³³⁹ In addition, the Parties agreed to not interfere with the investigations and trials conducted by the ICC and to ensure the protection and safety of all prosecutors, victims, and witnesses.³⁴⁰

The Darfur Track Peace Agreement provides for the establishment of the Darfur Special Court to prosecute genocide, crimes against humanity, war crimes, and gross violations of international human rights and humanitarian law since 2002 in Darfur.³⁴¹ The Agreement specifies that the Court shall be established within ninety days of signing and shall continue operations for ten years from the date of its establishment.³⁴² The Court shall be composed of Sudanese judges appointed by the head of the judiciary as well as an independent prosecutor appointed by the Attorney General upon the approval of the Parties to the Agreement.³⁴³ The Parties further agreed that a team of experts and specialists from the African Union shall monitor the Court's

³³⁵ Juba Peace Agreement, *supra* note 2, tit. 2, ch. 3.

³³⁶ Juba Peace Agreement, *supra* note 2, tit. 2, ch. 3.

³³⁷ Juba Peace Agreement, *supra* note 2, tit. 2, ch. 3.

³³⁸ Juba Peace Agreement, *supra* note 2, tit. 2, ch. 3, para. 24.

³³⁹ Juba Peace Agreement, *supra* note 2, tit. 2, ch. 3, para. 24.

³⁴⁰ Juba Peace Agreement, *supra* note 2, tit. 2, ch. 3, para. 24.

³⁴¹ Juba Peace Agreement, *supra* note 2, tit. 2, ch. 3, para. 25.

³⁴² Juba Peace Agreement, *supra* note 2, tit. 2, ch. 3, para. 25.

³⁴³ Juba Peace Agreement, *supra* note 2, tit. 2, ch. 3, para. 25.

procedures.³⁴⁴ The Darfur Special Court will apply Sudanese criminal law and international criminal law in relation to war crimes, crimes against humanity, and genocide.³⁴⁵

Additionally, the Agreement provides for the establishment of the Truth and Reconciliation Committee (TRC), which shall have the mandate to identify and assess the root causes of conflicts in Darfur, investigate broad violations, crimes, and human rights abuses, hold hearings, receive testimonies and statements from victims, witnesses, local communities, interest groups, or persons directly or indirectly involved in events, store evidence, create a comprehensive record of all crimes and forms of violations, and report its findings with recommendations to the regional government of Darfur, among other tasks.³⁴⁶ The TRC was set to be established within sixty days of signing the Agreement and be composed of independent members selected jointly by the Parties who have extensive experience in human rights, transitional justice and/or truth and reconciliation.³⁴⁷

The Agreement empowers traditional justice mechanisms in Darfur to penalize individuals who committed offenses related to the conflict or to the perpetuation of intra-tribal and inter-tribal conflicts.³⁴⁸ The jurisdiction of traditional justice mechanisms will include all offenses related to the conflicts that fall outside the jurisdiction of the ICC, the Darfur Special Court, the national judiciary of Sudan, and the TRC.³⁴⁹ Traditional justice mechanisms must refer all cases outside of their jurisdiction to other competent justice mechanisms.³⁵⁰ The Agreement provides that traditional justice mechanisms must exercise traditional competencies, employ both customary substantive laws and customary procedural rules, and respect the due process rights of the accused.³⁵¹

The Parties moreover agreed to establish memorials honoring the victims of the conflicts in Darfur.³⁵² Memorialization may take many forms, including but not limited to annual public ceremonies,

³⁴⁴ Juba Peace Agreement, *supra* note 2, tit. 2, ch. 3, para. 25.

³⁴⁵ Juba Peace Agreement, *supra* note 2, tit. 2, ch. 3, para. 25.

³⁴⁶ Juba Peace Agreement, *supra* note 2, tit. 2, ch. 3, para. 22.

³⁴⁷ Juba Peace Agreement, *supra* note 2, tit. 2, ch. 3, para. 22.

³⁴⁸ Juba Peace Agreement, *supra* note 2, tit. 2, ch. 3, para. 23.

³⁴⁹ Juba Peace Agreement, *supra* note 2, tit. 2, ch. 3, para. 23.

³⁵⁰ Juba Peace Agreement, *supra* note 2, tit. 2, ch. 3, para. 23.

³⁵¹ Juba Peace Agreement, *supra* note 2, tit. 2, ch. 3, para. 23.

³⁵² Juba Peace Agreement, *supra* note 2, tit. 2, ch. 3, para. 27.

museums, documentation centers, or monuments.³⁵³ Additionally, the memorials for victims shall be designed to promote reconciliation.³⁵⁴ The Parties agreed to engage in popular consultations and dialogue with all levels of society in Darfur to identify collective goals for the memorialization project.³⁵⁵

The Darfur Track Peace Agreement also provides for the establishment of the Compensation and Reparations Fund to receive and address compensation and reparation decisions issued by the relevant mechanisms.³⁵⁶ The Parties agreed that the Fund shall make its own regulations, rules, procedures, and decision-making methods.³⁵⁷ The Agreement further provides that women must comprise at least forty percent of the functional structure of the Fund.³⁵⁸ Under the Darfur Track Agreement, reparations can include, among other things, the right to seek compensation for lost property, lost livelihood, death in the family, personal injury, and other trauma or damages, whether psychological or physical, resulting from the conflict in Darfur.³⁵⁹

iii. Two Areas Track Agreement

The Two Areas Track Agreement (Blue Nile and South Kordofan) ("Two Areas") provides for relatively limited transitional justice obligations and mechanisms.³⁶⁰ The Parties to the Agreement agree to the establishment of the national Transitional Justice Mechanism as well as a regional branch of the Commission in the Two Areas.³⁶¹ The Agreement additionally provides a fund concerned with the affairs of martyrs and wounded persons in the Two Areas.³⁶² As part of the Agreement, the Parties also agreed to

³⁵³ Juba Peace Agreement, *supra* note 2, tit. 2, ch. 3, para. 27.

³⁵⁴ Juba Peace Agreement, *supra* note 2, tit. 2, ch. 3, para. 27.

³⁵⁵ Juba Peace Agreement, *supra* note 2, tit. 2, ch. 3, para. 27.

³⁵⁶ Juba Peace Agreement, *supra* note 2, tit. 2, ch. 4.

³⁵⁷ Juba Peace Agreement, *supra* note 2, tit. 2, ch. 4.

³⁵⁸ Juba Peace Agreement, *supra* note 2, tit. 2, ch. 4.

³⁵⁹ Juba Peace Agreement, *supra* note 2, tit. 2, ch. 4.

³⁶⁰ Juba Peace Agreement, *supra* note 319, at tit. 3.

³⁶¹ Juba Peace Agreement, *supra* note 319, at tit. 3.

³⁶² Juba Peace Agreement, *supra* note 319, at tit. 3.

the establishment of a national ministry for peace and human rights and a national commission for religious freedom.³⁶³

The only party among the SRF coalition that did not sign the group is SPLM/Al Hillu.³⁶⁴ They objected to the negotiation itself, because get they wanted a commitment from the CLTG that Sudan would become a secular state.³⁶⁵ Negotiations to incorporate Al Hillu, which controls a significant portion of territory within the Two Areas, remains ongoing.³⁶⁶ Their engagement and incorporation within the JPA would be a major advancement in addressing issues of justice within the Two Areas. In the author's view, the fact that SPLM North Al Hillu did not negotiate a track agreement was a likely reason that the Two Areas Track Agreement language on transitional justice was so sparse in contrast to the detailed language of the Darfur Track Agreement. The signatories of the Two Areas Track Agreement likely felt that they did not have the ability to make binding commitments for the vast territory in the Two Areas that they do not control.

d. Juba Peace Agreement: A Peace with Justice Approach

Because the Juba Agreement is a multi-track peace agreement, consisting of various regional agreements, the provisions on justice greatly vary. Darfur and the Two Areas, two regions with armed movements, and whose people had been subjected to mass atrocities by the Bashir regime, ultimately had very different justice provisions in their track agreements. As noted above, the Two Areas justice provisions were fairly limited, likely due to the absence of SPLM-N Al Hillu in the negotiations. Darfur's justice mechanisms were the most comprehensive and in the author's view, reflected the fact that Darfur negotiators were well-prepared and came into the negotiations with clear positions across the range of transitional justice issues. This preparation and clear vision of justice enabled the parties to reach clear agreements on the comprehensive nature of transitional justice in Darfur. As noted previously, the Darfur

³⁶³ Juba Peace Agreement, *supra* note 319, at tit. 3.

³⁶⁴ INT'L IDEA, *supra* note 309, at 12.

³⁶⁵ INT'L IDEA, *supra* note 309, at 12.

³⁶⁶ *Sudan gov't and SPLM-N sign agreement to pave way for peace talks*, AL JAZEERA (March 28, 2021), <https://www.aljazeera.com/news/2021/3/28/sudan-and-main-rebel-group-sign-agreement-to-restart-peace-talks> [https://perma.cc/W2LT-UE2D].

region negotiators were also aided by the fact there were friendly parties in the FFC from Darfur who were part of the CLTG, and as such they were often negotiating with like-minded associates. This did not obviate the fact that the CLTG has amongst its membership military officials who had also been part of the Bashir regime and who had arguably committed atrocities themselves. The amnesty agreement announced by the Sovereign Council was likely a prophylactic for any fear that these officials might have regarding any personal criminal liability.³⁶⁷ Despite the personal interests of some of the participants, the parties were able to come to an agreement on a comprehensive transitional justice framework in Darfur and a general framework for transitional justice at the national level.

The Darfur agreement justice framework contained multiple and sequenced mechanisms which reflected a Peace with Justice approach. The potential for Bashir and his close allies to face international criminal accountability from the ICC was a strong reinforcing tool for the incorporation of justice into the agreement.³⁶⁸ The Darfur Track Agreement made clear, the parties must cooperate and actively support ICC investigations and indictments.³⁶⁹ The existence of the ICC warrants for Bashir and other regime officials may have acted as an influential external mechanism, convincing even those former military regime elements within the CLTG to cooperate with the incorporation of justice into the peace process.³⁷⁰

VI. CONCLUSION

While the Juba Peace Agreement includes provisions that reflect a framework for Peace with Justice in Sudan, to achieve the goal of a durable Peace with Justice, the accountability and transitional justice measures will need to be implemented in a holistic manner in the context of Sudan's political transition process, which includes national and regional elections, the constitution-making process, and long-term peace building—which in turn includes institution

³⁶⁷ Discussed *supra* this Part.

³⁶⁸ See discussion *supra* Part II on Bashir's ICC warrants.

³⁶⁹ Juba Peace Agreement, *supra* note 319, tit. 2, ch. 3.

³⁷⁰ Although as noted, the CLTG effectively gave its officials, who had not yet been indicted by the ICC, amnesty for prior acts.

building, institutional reform, and democratic norm building throughout the state.

International institutions will also shape Sudan's transition. The International Criminal Court's indictment of Bashir loomed in the backdrop of the peace negotiations. Sudanese authorities have met with the ICC Prosecutor about ensuring that Bashir faces accountability either at the ICC, a hybrid court, or in a Special Court for Crimes in Darfur provided for in the Juba Peace Agreement.³⁷¹ States will also play a critical role in supporting Sudan's peaceful path forward, including supporting the peace process and a post-Bashir state committed to democracy, transparency, and accountability. The United States' lifting of terrorism sanctions following the conclusion of the Juba Peace Agreement is an important step in shoring up the national economy and signaling support for the peace process and political transition.

Post-authoritarian political transitions are challenging and can face significant setbacks.³⁷² Despite the setback to Sudan's political transition caused by the October 2021 military coup,³⁷³ there is still room to hope for the emergence of a peaceful, diverse democracy in Sudan that respects human rights and justice. The participants in the Juba peace process were able to leverage political space gained in the wake of Bashir's removal and the creation of the CLTG to prioritize transitional justice within their peace process and political transition. This prioritization of Peace with Justice was consistent from the establishment of the CLTG's transitional mandate in the August 2019 Constitutional Declaration through the completion of

³⁷¹ Sudan to hand former leader, Omar al-Bashir, other officials over to the ICC, AFR. NEWS (last updated Nov. 8, 2021, 13:17), <https://www.africanews.com/2021/08/11/sudan-to-hand-former-leader-omar-al-bashir-other-officials-to-icc/> [<https://perma.cc/3YUW-VABR>].

³⁷² I have written extensively about the setbacks that can occur during post-authoritarian political transitions. See Darin E.W. Johnson, *Beyond Constituent Assemblies and Referenda: Assessing the Legitimacy of the Arab Spring Constitutions in Egypt and Tunisia*, 50 WAKE FOREST L. REV. 1007, 1013-27 (discussing tensions between secular and Islamist groups during Egypt's Arab Spring transition and the military coup of the first democratically elected Egyptian President). See generally *Conflict Constitution-Making*, *supra* note 162, at 293 (discussing how the political transitions in Libya and Yemen following the Arab Spring devolved into civil war).

³⁷³ Shortly before this Article went to print, former regime officials had committed a military coup against the civilian led government. Jen Kirby, *The coup in Sudan, explained*, VOX (Oct. 29, 2021, 2:20 PM), <https://www.vox.com/2021/10/29/22751437/sudan-coup-protests-al-burhan-hamdok> [<https://perma.cc/MFY2-JFFP>].

the Juba Peace Agreement in October 2020. Because of that commitment, the Juba Peace Agreement's roadmap to a durable peace remains. The 2019 popular revolution in Sudan helped create this unique opportunity for peaceful advancement. The author's most fervent hope is that the Sudanese people, with the support of the international community, will be able to quickly return to the peaceful transition with justice that they so deeply deserve.