International Studies Quarterly (2024) **68**, sqae011

Terrorists versus Rebels: The Strategic Use of Implicit Amnesty in the Peace Process in Mali

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Why do governments block efforts to hold perpetrators of human rights violations accountable, including against actors linked to proscribed groups? This article explores the Malian government's decisions to support or suspend accountability efforts against prominent individuals during the peace negotiations between 2012 and 2017, including those with links to jihadist groups. By tracing the micro-processes determining how and why certain individuals faced justice for crimes and not others, the article shows how Malian authorities used implicit amnesty measures as a tool of strategic legitimation for certain rebel leaders. This helped constitute certain actors as part of the legitimate opposition and gloss over both their alleged responsibility for human rights abuses and their involvement in jihadist groups excluded from the talks. This article presents a framework that demonstrates how elite bargaining around accountability follows four political rationales and shows how a government's selective approach to justice can enable actors to use peace processes as a means of impunity and political rehabilitation. This reveals the political significance of implicit amnesty measures, which achieve similar aims as formal amnesties yet without crossing the red line of providing formal amnesty for international crimes and serious human rights violations.

¿Por qué los Gobiernos tienden a bloquear aquellos esfuerzos realizados con el fin de hacer rendir cuentas a los perpetradores de violaciones en materia de derechos humanos, incluso cuando estos esfuerzos van en contra de agentes vinculados a grupos proscritos? Este artículo explora las decisiones que llevó a cabo el Gobierno de Mali de apoyar o suspender los esfuerzos para hacer rendir cuentas a ciertas personas prominentes durante las negociaciones de paz entre 2012 y 2017, incluyendo a aquellas personas que tenían vínculos con grupos yihadistas. El artículo muestra, mediante la investigación de los microprocesos que determinan cómo y por qué ciertas personas tuvieron que enfrentarse a la justicia por unos crímenes, pero no por otros, cómo las autoridades malienses utilizaron medidas de amnistía implícitas como una herramienta de legitimación estratégica de ciertos líderes rebeldes. Esto ayudó a que algunos de estos agentes entraran a formar parte de la oposición legítima y a pasar por alto tanto su presunta responsabilidad por abusos contra los derechos humanos como su participación en grupos yihadistas que se encontraban excluidos de las conversaciones. Este artículo presenta un marco que demuestra cómo la negociación de las élites en torno a la rendición de cuentas siguió cuatro razones políticas y muestra cómo el enfoque selectivo de la justicia por parte de un Gobierno puede permitir a los agentes participantes utilizar los procesos de paz como un medio de impunidad y rehabilitación política. Esto contribuye a revelar la importancia política que tienen las medidas de amnistía implícitas, las cuales logran objetivos similares a los de las amnistías formales, pero sin llegar a cruzar la línea roja de proporcionar una amnistía formal para crímenes internacionales ni para violaciones graves de los derechos humanos.

Pourquoi les gouvernements bloquent-ils les efforts visant à tenir les auteurs de violations des droits de l'Homme pour responsables, notamment les acteurs liés à des groupes proscrits ? Cet article s'intéresse aux décisions du gouvernement malien de soutenir ou de suspendre les efforts de responsabilisation à l'encontre de personnes importantes lors des négociations de paix entre 2012 et 2017, y compris celles ayant des liens avec des groupes djihadistes. En retraçant les micro-processus qui déterminent comment et pourquoi certaines personnes ont répondu de leurs actes devant la justice et pas d'autres, l'article montre comment les autorités maliennes ont employé des mesures d'amnistie implicite comme outil de légitimation stratégique de certains leaders rebelles. Elles ont ainsi pu faire passer certains acteurs pour des membres légitimes de l'opposition, sans s'attarder sur leur responsabilité présumée dans des violations des droits de l'Homme ou leur implication dans des groupes djihadistes. L'article présente un cadre qui démontre que la négociation des élites autour de la responsabilité a suivi quatre logiques politiques et montre que l'approche sélective d'un gouvernement peut permettre aux acteurs d'utiliser les processus de paix pour obtenir l'impunité et la réhabilitation politique. Ainsi, l'importance politique des mesures d'amnistie implicite apparaît. Celle-ci s'accompagne de résultats similaires aux amnisties formelles, mais sans dépasser la ligne d'accorder formellement l'amnistie pour des crimes internationaux et de graves violations de droits de l'Homme.

Introduction

On September 27, 2016, Ahmad Al Faqi Al Mahdi became the first member of a jihadist armed group to be convicted by the International Criminal Court (ICC). Al Mahdi was a member of Ansar Dine, a Malian armed group with links to Al Qaeda in the Islamic Maghreb (AQIM), and was found guilty of the war crime of attacks against religious and historic buildings during the occupation of Timbuktu in 2012. Another member of Ansar Dine, Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud ("Al Hassan"), was later charged with war crimes and crimes against humanity allegedly committed during the same time. At the time of writing, his trial at the ICC is ongoing.

Both trials are major developments in holding perpetrators accountable for abuses committed since the crisis began in 2012. Yet, human rights organizations flagged their dismay that someone is missing from the docket (Pietrapiana 2016). Both Al Mahdi and Al Hassan were implementing decisions by the president of the Islamic

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Rosenberg, Sophie T. (2024) Terrorists versus Rebels: The Strategic Use of Implicit Amnesty in the Peace Process in Mali. *International Studies Quarterly*, https://doi.org/10.1093/isq/sqae011

Tribunal, known as Houka Houka Ag Alhousseini ("Houka Houka"), who worked closely with Ansar Dine and AQIM leaders. However, after being charged with abuses and arrested, Houka Houka was released by Malian authorities and remains free.

This emblematic case of impunity is one of many in Mali and raises a key question: Why did authorities offer protections from accountability for individuals linked to jihadist groups, despite engaging in counter-terrorism on the battlefield? More broadly, why do governments block accountability efforts during armed conflict, including against actors with links to proscribed groups?

Exploring the relationship between counter-terrorism and anti-impunity efforts, this article investigates how Malian authorities approached the thorny issue of accountability during five years of peace negotiations between the government and various armed groups, with the broader backdrop of the "war on terror." During the negotiations, authorities faced two normative prohibitions. The first, stemming from the "fight against terrorism" frame, draws a red line against negotiating with terrorist groups. The second stems from the "fight against impunity" frame and the anti-impunity norm, or "the idea that individuals should be held criminally accountable for committing international crimes, namely, war crimes, crimes against humanity, and genocide" (Han and Rosenberg 2020, 2). It draws a red line against amnesties that cover international crimes and serious human rights violations.

Drawing on elite interviews and documentary material, this article argues that Malian authorities simultaneously navigated around both red lines by strategically using a form of transactional impunity: implicit amnesty measures. Scholarship on why governments offer amnesties and how this influences conflict dynamics overlooks this important and common practice. Focusing on measures that *are* implemented, such as formal amnesties and trials, can obscure the political significance of obstructions to anti-impunity efforts. Implicit amnesty measures include the intentional nonenforcement of arrest warrants, the suspension of arrest warrants, the releases of detained or convicted individuals, the obstruction of investigations and trials, and other measures of government interference aimed at blocking judicial processes relating to international crimes and serious human rights violations—yet fall short of violating the red line of providing formal amnesty for these acts. As opposed to structural obstacles, such as the lack of capacity of the judiciary, these obstacles are an exercise of executive authority and political interference on the judicial sector. This article thus reveals the value of investigating implicit amnesty measures, or the actions behind the apparent inaction on accountability.

This article explores how Malian authorities used implicit amnesty measures as a tool of strategic legitimation of certain rebel leaders, having significant constitutive effects on crafting the "legitimate" opposition. Since 2012, when a Tuareg rebellion, coup d'état, and jihadist takeover sparked the ongoing crisis, authorities have engaged in negotiations with groups that reject jihadism and recognize the authority and territorial integrity of the Malian state while pursuing counter-terrorism operations against jihadist groups, with the assistance of regional and international forces. Yet, the purportedly clear distinction between "legitimate" nonjihadist and "illegitimate" jihadist groups does not duly reflect the messy reality, marked by extensive "group creation, fragmentation, fusion, disappearance, as well as switches of allegiances from one coalition to another" (Wing 2016; Desgrais, Guichaoua, Lebovich 2018, 656). Further, in addition to an ICC investigation, formal charges and arrest warrants for human rights abuses existed against influential rebel leaders, following valiant efforts by human rights groups and judicial actors. Identifying who the legitimate actors are, with whom the Malian authorities can and should negotiate, became a pivotal and fraught question.

Focusing on the period between 2012 and 2017, this article demonstrates how authorities used implicit amnesty measures to facilitate political settlements and help repoliticize certain influential actors, including those with previous involvement in jihadist groups and who were allegedly responsible for abuses. Through the discursive effects of the counter-terrorism and anti-impunity frames, the image of the "terrorist as international criminal"—a double enemy of humanity—served as a key axis around which the political reputations of rebel leaders were produced. By selectively supporting or blocking accountability processes, authorities helped constitute certain actors as both noncriminal and nonterrorist, and thus legitimate interlocutors to be integrated into the talks, as opposed to criminal terrorist, and thus illegitimate interlocutors to be excluded from the talks. Given the ambiguity of allegiances across groups, the government's selective approach to justice enabled actors to use the peace process as a means of impunity and political rehabilitation. The article presents a novel framework that captures how decision-making around accountability followed four rationales, based on several factors, namely, elite objectives, the individual's political influence, and their armed group affiliation.

Discourses and practices, in this case frames and accountability measures, thus contributed to constituting the legitimacy of political interlocutors. Exploring constitutive effects focuses attention on how "specific logics and rationales, self-understandings, hierarchies," and identities are constituted through certain discourses and practices (Cold-Ravnkilde and Jacobsen 2020, 858). This enables us to critically inquire into concepts' construction, their underlying abstractions, and consequences of the specific articulation of concepts—as opposed to taking it for granted (Cold-Ravnkilde and Jacobsen 2020, 861). In this case, it helps problematize how actors navigate distinctions and binaries between jihadists/nonjihadists, criminal/noncriminal, and peace participants/nonparticipants. In sum, elite decision-making reflects the effects of pressure by human rights actors, as authorities implemented measures that did not explicitly violate the anti-impunity norm. Yet, they ultimately instrumentalized accountability to reach elite bargains, perpetuating a contributing factor to protracted conflict: impunity for atrocities.

This article contributes to literature on the instrumentalization of human rights and international criminal justice norms by governments to pursue their conflict-related aims (Lessa and Payne 2012; Jeffery 2014; Lake 2017). Analyzing the selectivity behind governments' decisions to support or suspend accountability, existing scholarship identifies a range of reasons, including good faith efforts that are stymied by practical obstacles, disingenuous "human rights half-measures" to block pressure for further human rights investigations (Cronin-Furman 2020), and tactical prosecutions and amnesties to boost the legitimacy of state authorities and institutions (Subotić 2009; Igreja 2015; Miller 2017; Loken, Lake, and Cronin-Furman, 2018). Less is known about how it can shape the legitimacy of opposition actors—a crucial aspect of peace processes. Further, scholarship on the aims and effects of accountability tends to focus on *regulative* effects of *formal* measures, or links between amnesties and trials, and the likelihood of ending conflict and

sustaining peace (Snyder and Vinjamuri 2003/2004; Dancy 2018; Loyle and Binningsbo 2018; Mallinder 2018b; Daniels 2020, 2021a). This tends to draw on a "myth of peace as teleology," or "an assumption that a peaceful end-point can be reached if the right conditions are constructed or the right policies implemented" (Cold-Ravnkilde and Jacobsen 2020, 858 citing Charbonneau and Sears 2014, 195). By investigating *constitutive* effects of accountability, and specifically of *implicit* amnesties, this article demonstrates the importance of analyzing broader functions and types of accountability measures.

Simultaneously, this article uses the case of Mali to show how the anti-impunity norm and counter-terrorism interact—an important gap in the literature. Much has been written on impunity for abuses committed during counter-terror operations, the impact of counter-terrorism legislation on human rights, and the use of counter-terrorism to undermine international law (Scheinin 2013; Chinkin and Kaldor 2017; Nowak and Charbord 2018). Yet, we know surprisingly little about how impunity, political negotiations, and counter-terrorism interact.[1] Showing how Malian authorities used transactional impunity to navigate around the "red lines" in both human rights and counter-terrorism frameworks bridges these fields of inquiry. It also deepens our understanding of the Malian peace process by highlighting one tactic used to facilitate the settlements (Boutellis and Zahar 2017; Guichaoua and Desgrais 2018; Lebovich 2018; Zahar and Boutellis 2019) and develops scholarship on constitutive effects of international interventions in the Sahel (Cold-Ravnkilde and Jacobsen 2020; Cold-Ravnkilde and Nissen 2020; Guichaoua 2020). Further, as the few articles on the ICC cases against Malian defendants focus on their legal dimensions, this article links them to a wider political dynamics (Sterio 2017; Ba 2020; Lostal 2021).[2]

This article makes a three-pronged contribution: a new term for a common practice by governments, a novel conceptual framework, and original empirical material. Through a case study of the peace process between 2012 and 2017, which included the Preliminary Agreement to the Presidential Election and the Inclusive Peace Talks in Mali ("Ouagadougou Accord") in June 2013 and the landmark Agreement for Peace and Reconciliation in Mali ("Algiers Accord") in June 2015, this article reveals the micro-processes of elite decision-making. This is based on documentary material (government statements, UN reports, reports by human rights organizations, media reports, and legal transcripts) and on approximately forty interviews with respondents involved in, or closely observing, the negotiations as well as respondents working on accountability for human rights abuses. This includes members of the Malian government, diplomatic representatives from the United Nations, European Union, and African Union, MINUSMA officials, members of prominent human rights organizations, judicial actors, and expert political analysts. After first presenting the discursive effects of the counter-terrorism and anti-impunity frames, the article analyses implicit amnesty measures and identifies key parameters that determine how and why they are used. The case study then analyses their use as a bargaining resource during the negotiations.

[1]For exceptions, see Rangelov and Theros (2019), Van Schaack (2020), and Gallagher, Lawrinson, and Hunt (2022).

[2]As an exception, see Dijxhoorn (2016).

Parallel Frames: Counter-Terror and Anti-Impunity

Both the dominant "war on terror" lens and the anti-impunity lens were crucial in building the "architecture of enmity relevant to decision- and policy-making in Mali" (Charbonneau 2017, 14). While terrorism does not figure as an element of international criminal law, these frames bear similar discursive effects, namely, villainization and depoliticization of the accused. Perpetrators of both terrorism and international crimes form categories of malefactors that have, for different reasons, been deemed "enemies of humanity." When applied to the same conflict, these lenses arguably create a powerful image of the "terrorist as international criminal" and brand actors as both enemies of humanity and criminals against humanity—or *hostis generis humani*, twice over.

Labeling a group as terrorists has a stigmatizing and villainizing effect as it highlights their use of a type of violence that is considered especially immoral and even inhumane (Luban 2020, 567). Terrorists are deemed enemies of humanity not based on the objective harmfulness of their acts but rather on their use of "sneaky, perfidious forms of lethal violence" and tactics beyond "honourable warfare" that "inspire fear that far amplifies the harm they inflict" (Luban 2020, 567). This also has a depoliticization effect, as it frames the conflict as "a fight against criminal actors without a political agenda" and helps justify refusing to engage in negotiations and authorizing the use of force against "terrorists" (Haspeslagh 2021, 364–5).

Scholarship on the expressive functions of international criminal justice notes comparable effects. Evolving from early origins of international criminal law in designating pirates as such, the modern enemies of humanity are the perpetrators of core crimes. Their crimes "target the essence of what makes, at any given moment, the fabric of humanity" and the "radical evil" of their acts places them similarly outside—and against—humanity (Mégret 2013; Luban 2020, 569–72). Further, this lens can have a depoliticizing effect, as it focuses on analyzing acts in comparison to rules of criminal conduct that, if violated, require certain consequences. This minimizes consideration of the causes and contestable meaning of their actions within a collective context shaped by economic, political, legal, and cultural structures (Turan 2015, 29). This generates pressure against issuing amnesty and against including accused individuals in peace negotiations to avoid legitimizing them as political interlocutors.

These frames share another discursive effect. Perpetrators of both terrorism and core crimes are seen as threats to human diversity. Both counter-terrorism and international criminal justice are justified as responding to threats to such diversity—the former through force, the latter through law. Terrorist groups' fundamentalist ideology represents a threat to political, cultural, social, and religious diversity—locally and globally. Similarly, crimes against humanity "threaten the very conditions for politics and human action by corrupting the idea that the world is a place to be shared by peoples living in a multitude of cultures, habits, identities … " (Nouwen and Werner 2015, 159). Thus, in Arendt's words, international criminal law responds to conduct that amounts to "an attack on human diversity as such, that is, upon a characteristic of the "human status" without which the very words "mankind" or "humanity" would be devoid of meaning" (Arendt 1964, 268–9 as cited in Nouwen and Werner 2015, 158).

These lenses can thus frame an actor as "terrorist as international criminal," or *hostis generis humani*, by virtue not

only of the terrorist tactics but also of the abuses. By interpreting acts by "terrorist" groups through international criminal law, the heinousness of "terrorists" and "perpetrators of core crimes" is compounded, bringing together the "enemy of humanity" and "criminal against humanity." At the same time, Graf argues that these two concepts should be distinguished. This is because the "criminal against humanity" remains a member of humanity as they are recognized as having standing within the normative order governing humanity—unlike the "enemy of humanity," who stands outside (Graf 2019). The investigation and prosecution of individuals deemed "terrorists" as perpetrators of international crimes thus takes a particular meaning, as it amounts to acknowledging the "enemy of humanity" as part of the normative order governing humanity.

While the "terrorist as international criminal" is framed as having violated ties that bind humanity and thus "constitute" international society through the designation of its "other" (Mégret 2013), it can also help constitute the political reputations of opposition actors. Specifically, focusing on the "terrorist as international criminal" can concentrate attention on a limited scope of abusers and abuses—including signature violence such as beheadings, amputations, stonings, and the destruction of religious and cultural heritage sites. Focusing on certain "spectacular events or perpetrators may marginalize" others, such as abuses committed by other groups whose crimes are instead interpreted as expressions of political grievances (Stahn 2020, 404). As opposed to the terrorist, whose "rationality and relationship with politics are in perpetual doubt," the insurgent is "assumed to be rational and political" (Stampnitzky 2013, 49–82; Charbonneau 2017, 5). Designating one part of the opposition as "terrorist/criminal/illegitimate" can contribute to framing other parts as "nonterrorist/noncriminal/legitimate."

Implicit Amnesty Measures

The (de)legitimation of groups and leaders can have significant material effects, as it helps justify excluding those labelled as "terrorists" and perpetrators of international crimes and, by extension, helps justify including others as political interlocutors. This process of labeling is fluid and can entail "unlabeling." Noting scholarship has not sufficiently explored the "unlabeling" of proscribed actors, Haspeslagh (2021)coins the concept of a "linguistic ceasefire," or how governments use language to frame an actor as no longer a terrorist group but a political actor. Yet, given the anti-impunity norm, this is not enough to explain how an adversary can enter the realm of "normal politics." Like individuals labeled as "terrorists," individuals labeled as "human rights abusers" are similarly disinclined to join negotiations, especially when there are outstanding or likely criminal charges.

This article reveals how implicit amnesty can contribute to the political rehabilitation of interlocutors. These measures include the intentional nonenforcement of national arrest warrants, the lifting of national arrest warrants, the release of detained or convicted individuals, and the blocking of domestic legal proceedings. When the ICC is involved, this also includes the nonenforcement of ICC arrest warrants and the obstruction of ICC investigations and prosecutions. As products of "backstage negotiations between groups and elites," this influence over legal processes often takes place prior to a trial, in the investigative or pretrial phase (Lake 2017, 8–9).

They are distinct from formal amnesties, or "an extraordinary legal measure whose primary function is to remove the prospect and consequences of criminal liability for designated individuals or classes of persons in respect of designated types of offenses, irrespective of whether the persons concerned have been tried for such offenses in a court of law" (Freeman 2010, 13). They are also distinct from "de facto amnesty," referring to a situation where nothing has been done to challenge impunity, even when there is no amnesty law that would prevent prosecutions (Freeman 2010, 17). They are also distinct from a different meaning of "de facto amnesty," referring to legislation that would block investigations and prosecutions but that is not officially termed an amnesty (Amnesty International 2021). Rather, implicit amnesty measures are steps taken by elites to block accountability, contributing to what appears to be inaction. They fit within a category of "disguised amnesties," or measures adopted by states that "use deception or selectivity to appease demands for justice while actually allowing amnesties" (Jeffery 2014, 175–6).

Using implicit amnesties simultaneously allows governments to avoid explicitly violating the anti-impunity norm and avoid significant reputational risk by issuing formal amnesties for such heinous crimes while nevertheless undermining the norm. They navigate the ambiguity regarding the duty to prosecute and the permissibility of amnesty for international crimes. There is growing consensus that there is an emerging duty to bring to justice perpetrators of genocide, crimes against humanity, and war crimes (Robinson 2003, 491–3) and, in line with the UN's unequivocal position against blanket amnesties, that a prohibition against blanket amnesties is a matter of customary international law.[3] Similarly, the Rome Statute of the ICC "recall[s] that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes." As the ICC's purpose is to discourage states from trading away justice for political expedience and *realpolitik* (Robinson 2003, 483), the ICC Prosecutor is not blocked from investigating and prosecuting someone who benefits from amnesties. At the same time, others argue that the lack of consistent state practice and uniform prohibition against amnesties means states retain flexibility in the design of amnesties as "certain forms of amnesties for international crimes may be permissible under international law" (Mallinder 2018a, 5).[4] Equally, the ICC does not remove amnesty as a bargaining option for mediators. Ultimately, in the era of the ICC and greater pressure on states to hold perpetrators of atrocities criminally accountable, it is even more important to scrutinize how governments use implicit amnesties as a means to avoid directly violating the anti-impunity norm while nevertheless obstructing accountability.

During peace processes, governments may offer implicit amnesties for various aims, similar to those behind formal amnesties. However, they do not provide identical benefits. The aims include signaling a willingness to negotiate, persuading nonstate actors to enter into negotiations, incentivizing nonstate actors to disarm and demobilize, building

[3]This is based on a series of legal instruments, including the Convention on the Prevention and Punishment of the Crime of Genocide, the Convention Against Torture, and Other Cruel, Inhumane, or Degrading Treatment or Punishment, the Geneva Convention relative to the Protection of Civilian Persons in Times of War, and the International Covenant on Civil and Political Rights. Key resolutions and policy documents include the UN Commission on Human Rights Resolution 2002/79 on Impunity, the UN Secretary-General's reports *Rule of Law and Transitional Justice in Conflict and Post-Conflict Settings*, *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, and *Rule of Law Tools for Post-Conflict States: Amnesties*.

[4]See also Mallinder (2008) and Freeman (2010) .

trust, accommodating demands of nonstate actors by reducing the costs of surrender, and accommodating demands of state actors. Implicit amnesties for international crimes are particularly appealing, given the greater severity of punishment for these crimes. Yet, they are less convincing than formal amnesties in future-proofing the decision to reach a settlement. As they are unofficial, changeable, revocable, and contingent on elite objectives, they are less effective in reducing the commitment problem—or how rebels cannot trust the government not to renege on its commitments once rebels have disarmed (Daniels 2020, 1618–9). Authorities retain influence over the individual by maintaining the threat of future prosecution. Since "impunity is one of the currencies in which loyalty transactions are paid," its deployment is often a function of the "patronage bazaar" of the negotiations and reflects the bargaining relationship between officials and the individual (Nouwen 2013, 373).

The schematic approach below helps capture elite decision-making regarding accountability, given their political objectives and the imperatives of the peace process (Cheng, Goodhand, and Meehan 2018). Regarding its scope conditions, this framework applies to cases that include: peace processes amidst an internal armed conflict that features a variety of insurgent groups, some of which are included and others are excluded from negotiations; the commission of international crimes and serious human rights violations; and efforts by judicial actors and human rights groups to hold perpetrators criminally accountable. The focus on international crimes specifically, rather than a broader range of offenses, ensures a particular focus on the state's instrumentalization of the anti-impunity norm. Drawing on Lake's analysis of accountability in the Democratic Republic of the Congo, it is adapted to peace processes featuring various insurgent groups.

While the case of Mali also features jihadist groups and the ICC, the framework applies to cases that do not feature these two additional elements. First, the key feature is the existence of a distinction drawn between participant and nonparticipant groups. This echoes scholarship on how governments distinguish between rebel groups and negotiate with some over others, including based on the balance of power between parties and on socioeconomic factors such as public opinion (Cunningham 2013; Mallinder 2018a). While the distinction in Mali was between separatist and jihadist groups, the framework applies to cases with other distinctions. Second, as detailed at the end of this section, the dynamics of cooperation and obstruction of judicial proceedings presented in the chart apply to cases that do and do not feature ICC investigations.

The chart below (Table 1) unpacks decision-making around accountability and highlights two crucial factors:

> First, is the individual a member of an armed group that is participating in the negotiations or a member of a non-participant group? Notwithstanding the porosity across groups, an individual's formal affiliation is relevant.
>
> Second, what is the individual's political influence? Given their political and military role, support in key constituencies, or proximity to powerful actors, does the individual hold significant political influence in brokering a political settlement? Is the individual prominent and/or protected in the elite patronage networks?

As a result of the interaction between elite objectives, the individual's deal-brokering capital and political influence, and their affiliation, elite decision-making follows several objectives:

Enable Participation

Authorities seek to block accountability efforts against certain influential members of participant groups, including those who had "rehatted" from jihadist groups, to incentivize them to join the talks and to enable their participation in the negotiations. This behavior aims to broker deals and forge relationships of cooperation with certain opposition leaders, as displayed in Box 1.

Accommodate Demands

Authorities seek to block accountability efforts in order to accommodate demands made by influential members of participant groups. This is related but distinct from Box 1. While participants often demand impunity for their subordinates, their participation in the talks is not necessarily contingent on this. Box 3 depends on Box 1 to occur. However, Box 1 can occur without Box 3.

This sheds light on how influential participants may demand impunity for lower-ranking members of their own participant groups as a reflection of protection and patronage links, as displayed in Box 3. Less straightforwardly, it also captures how influential participants may display cross-group loyalties and request impunity for influential members of nonparticipant groups, as displayed in Box 2 (Lake 2017, 287–8 and 297–8). In Mali, this reflects continued ties between individuals who have and have not formally renounced affiliations to proscribed groups. This enables a more granular study of the selectivity of accountability and, more precisely, how members of proscribed groups may also benefit from transactional impunity.

Deflect Attention

Authorities do not seek to block accountability efforts in cases where the individual was neither a participant in the negotiations nor protected by an influential participant, given their low deal-brokering capital and political influence. As displayed in Box 4, this means their prosecution would not jeopardize the talks. Holding lower-ranking officers accountable may aim to deflect attention away from acts carried out by their superiors (Lake 2017, 17).

Weaken Extremist Challengers

Authorities do not seek to block accountability efforts when the targeted individual is an influential member of a nonparticipant-proscribed group but is not part of the demands of influential participants, as displayed in Box 2. These accused are often spoilers and threaten the peace process.

As mentioned earlier, this framework applies to cases that do and do not feature ICC investigations, as similar dynamics of elite support for, or opposition to, accountability are seen in both. As the Rome Statute does not require the ICC to respect national amnesties, the ICC Prosecutor would not be blocked from investigating and prosecuting someone who benefits from any type of amnesty. Since the ICC is based on a complementarity model, in which the ICC can exercise jurisdiction only if national authorities are unwilling or unable to genuinely carry out proceedings, a state's use of formal and implicit amnesties may be interpreted as seeking to shield perpetrators from

criminal responsibility and may thus be evidence of its unwillingness to carry out proceedings. At the same time, the Rome Statute is "purposely ambiguous" regarding whether the ICC should defer to national amnesty-for-peace arrangements (Scharf 1999, 526). It is within the prosecutor's discretion to determine whether to challenge domestic measures that protect individuals from accountability. Crucially, even though the ICC is formally independent, it relies on the government's cooperation to enforce arrest warrants and facilitate investigations, evidence collection, witness protection, and other essential tasks. The ICC Prosecutor is thus both independent and dependent on national authorities in practice.

The chart captures the ways governments may support or undermine ICC proceedings in practice. For instance, if the ICC issues an arrest warrant against an individual that the government seeks to protect, authorities may provide implicit amnesty measures by obstructing ICC proceedings, including by not enforcing arrest warrants. Alternatively, authorities may cooperate with ICC proceedings against an individual if this fits with the authorities' objectives during the negotiations. Further, and in a rarer scenario, authorities may use informal amnesty measures to block domestic proceedings against an individual whose impunity is not crucial to the negotiations to facilitate their prosecution before the ICC. In this scenario, implicit amnesty may signal to the ICC that the authorities are unable and unwilling to pursue domestic prosecutions against the person and would thus support ICC proceedings as a path to holding the person accountable.

In sum, these dynamics can reveal the inconsistencies generated by the influence of power relations on determining impunity, such as why certain members of proscribed groups benefit from impunity, why some higher-ranking individuals benefit from impunity while lower-ranking individuals are prosecuted, and how peace agreements that prohibit amnesties are achieved through transactional impunity. These dynamics play out primarily at the individual level, as they focus on individuals' political influence, patronage networks, criminal accountability, participation, demands, and legitimation. At the same time, the individual- and group-level dynamics are intertwined. The government's cost-benefit analysis is based in part on whether the individual is influential within, or protected by, a group that the government deems necessary for political settlements. Similarly, implicit amnesty serves as leverage to catalyze a settlement that concretizes the inclusion and exclusion of certain groups from the process.

The Maelstrom in Mali (2012–2017)

The case study below traces elite decision-making in Mali between 2012 and 2017. Facing pressure to negotiate with separatist groups and neutralize jihadist groups, authorities used impunity as a tactic to facilitate political settlements. Authorities' bargaining followed four rationales, as a function of their elite objectives, the accused individual's armed group affiliation, and the individual's political influence. Implicit amnesty helped devillainize and repoliticize certain actors, constituting them as both noncriminal and nonterrorist, and thus legitimate interlocutors. This sheds light on how the peace process offered individuals, including those with previous involvement in jihadist groups and who were allegedly responsible for abuses, a means for impunity and political rehabilitation.

The Conflict

In January 2012, the National Movement for the Liberation of the Azawad (MNLA) launched its rebellion and declared the state of "Azawad," encompassing the three northern regions of Timbuktu, Gao, and Kidal. The Tuareg separatist armed group MNLA was joined by three groups with affiliation to Al Qaeda, including the Ansar Dine (a Tuareg Salafist movement), AQIM, and an AQIM offshoot known as Movement for Unity and Jihad in West Africa (MUJWA). After sidelining the MNLA, these groups took control over northern Mali and established a jihadist proto-state. The occupation lasted until January 2013, when French military intervention temporarily dispersed these groups. In Bamako, the government was further weakened by a coup d'état in March 2012, which was prompted partly by the gruesome killing of around one hundred soldiers in early 2012, blamed on the MNLA and Ansar Dine.

Throughout 2012, efforts were made to generate dialogue between Bamako, the MNLA (who declared its rejection of jihadism and actively sought to negotiate), and Ansar Dine (which varyingly expressed support for jihadism as well as openness to negotiating with Bamako). Led by Algeria and Burkina Faso, this strategy aimed at prizing these groups away from the "hard core" terrorist groups (AQIM and MUJWA), who rejected the authority of the Malian state. However, following the French intervention and the proscription of Ansar Dine and Iyad Ag Ghaly as terrorist in February 2013 by the United States and the United Nations, armed groups splintered, emerged, and reconfigured to gain the most optimal position at the negotiating table. Many fighters who were part of jihadist groups rehatted to join participant groups.

The talks that led to the Ouagadougou Accord in June 2013 took place between the Malian government, the MNLA, and the High Council for the Unity of the Azawad (HCUA), a new offshoot of Ansar Dine and composed of former members of MNLA and Ansar Dine. In 2014, these two groups, the Arab Movement for Azawad (MAA), the newly formed Coalition pour l'Azawad (CPA), and the Coordination des mouvements et forces patriotiques de resistances (CM-FPR II), created a coalition—the Coordination of the Movements of the Azawad (CMA, or "Coordination"). The Coordination, which was anti-government and seen as legitimate by the government and international community, participated in the follow-up talks with the Malian government and the Platform coalition, a rival alliance seen as pro-government.[5] These talks led to the Algiers Accord in June 2015. This process excluded the proscribed groups—Ansar Dine, MUJWA, AQIM, and other groups that later joined the jihadist JNIM coalition.[6]

Despite the distinction made between the "participant/compliant/signatory/nonterrorist" groups—MNLA, HCUA, and eventually the "Coordination" and "Platform" coalitions—and the "nonparticipant/noncompliant/nonsignatory/terrorist" groups, there was nevertheless ambiguity across this divide. This does not mean that there was significant coordination between participant groups and jihadist groups, as there were extensive hostilities between them. More precisely, many leaders "operated across this blurred line" "with both sets

[5]The main groups in this coalition are the Groupe d'Autodéfense Tuareg Imghad et Alliés (GATIA), MAA-Plateforme, and the Coordination des mouvements et fronts patriotiques de resistances (CMFPR-1).

[6]This includes the Macina Liberation Front and Al-Mourabitoune.

of actors resorting to terrorist attacks" (Zahar and Boutellis 2019, 268–70). The participant groups include leaders and rank-and-file members who formerly belonged to jihadist groups or have family or tribal links to jihadist elements (International Crisis Group 2020). The same individual can be "party to the peace process in the morning, criminal in the afternoon, and terrorist in the evening."[7] This ambiguity, along with frequent fragmentation, mutual distrust among participants, and low enthusiasm for the talks amongst constituent populations, made the negotiations particularly difficult (Zahar and Boutellis 2019).

"Terrorists as International Criminals"

One of the first measures taken by authorities following the coup d'état was to appeal to international criminal justice for two objectives. Facing strong pressure by regional and international powers to negotiate with the MNLA and Ansar Dine, as opposed to MUJWA and AQIM, the government resisted this conceptualization of the enemy as it "hardly acknowledge[d] a difference between jihadists and Tuareg rebels"[8] and saw an opportunity to eliminate not only the "terrorist" groups but also the "nonterrorist" groups (Charbonneau and Sears 2014, 9; Notin 2014, 117). Elites in Bamako, including former President Amadou Toumani Touré, saw the Tuareg groups as "the real villains," for triggering the state's collapse and for abuses against soldiers in Aguelhok in 2012, while regarding Al Qaida's strengthening grip on the north "as either a secondary or the same issue as the Tuareg revolt" (Marchal 2013, 498; Chivvis 2016, 64–5 and 145; Charbonneau 2017, 7; Guichaoua 2020, 910).

Framing the groups as both enemies and criminals of humanity and conflating all groups into an undifferentiated "terrorists as international criminal" enemy, Malian authorities decided to refer the situation to the ICC in May 2012, as the ICC "provides a vocabulary with which opponents can label the enemy as a violator of universal norms" (Nouwen and Werner 2010, 962). Explaining the decision to ask the ICC "to investigate these odious acts that are no less than war crimes and crimes against humanity," Prime Minister Diarra stated to the UN General Assembly:

> [Mali's] territory is occupied by armed groups composed of *fundamentalist terrorists, drug traffickers, and other criminals of all types*. The most basic human rights are constantly being violated by *a hoard of faithless and lawless vandals*.[9]

The self-referral letter, issued in July 2012, reflects the government's intention to villainize and depoliticize all groups, framing them as illegitimate interlocutors and supporting its requests for military intervention. The letter highlights abuses committed by all groups, including the summary executions of Malian soldiers, blamed in large part on the MNLA and Ansar Dine, and the destruction of religious buildings, blamed on Ansar Dine and AQIM.[10] Conflating them with hard-line jihadist groups and denying them "the possibility of relevance or of becoming a political force" reflected popular resentment against the MNLA and Ansar Dine (Branch 2007, 191). According to then Prime Minister Diarra, "One of [Ansar Dine] just amputated people in Timbuktu. I call that extremist, not separatist. It's not the same."[11] Illustrating his skepticism toward negotiations, Diarra noted in September 2012, "The crisis has lasted eight months and I have not seen any non-military solution emerge. On the other hand, the situation is worsening every day with amputations, flagellations, rapes, and destruction of our sites in the north" (Chatelot 2012).

The government further highlighted its role as a defender of the diversity of humanity's heritage by spotlighting jihadists' groups destruction of the Timbuktu mausoleums. In May 2012, the same month as its decision to self-refer to the ICC, one of the first steps taken by Prime Minister Diarra's government was to appeal to UNESCO and agree on measures to protect cultural heritage with a focus on Timbuktu—hardly a typical response to an occupation by armed groups. It thus branded Ansar Dine, whose members worked with AQIM in destroying the mausoleums, as a double threat to the diversity of humanity, not only through its destruction of religious and cultural diversity but also through the commission of war crimes.

The authorities' objective was reinforced by the Prosecutor General's decision in February 2013 to issue arrest warrants against 28 leaders from MNLA, Ansar Dine, MUJWA, and AQIM. The charges included crimes against humanity, war crimes, genocide, as well as terrorism, sedition, crimes against integrity of the state, pillaging, crimes of racial and ethnic character (ORTM 2013; JeuneAfrique 2015b). Amplifying the threat of prosecution, human rights organizations filed complaints to the Bamako Commune III Court of First Instance on behalf of eighty women and girls and thirty-three victims in November 2014 and March 2015, respectively, for crimes including crimes against humanity and war crimes committed by armed groups (FIDH et al. 2014; Fondation Hirondelle 2015). Importantly, these measures targeted individuals across the spectrum of groups, including high-level rebels who were, or closely linked to, participants in the negotiations. This became a particularly controversial sticking point. According to the former Special Advisor to the African Union High Representative to Mali and the Sahel, who participated in the negotiations, "I remember being in a room and one of the armed group representatives said, 'I am sitting at the table, but there is an arrest warrant against me'."[12]

Deploying Implicit Amnesty during the Ouagadougou and Algiers Peace Processes

Given the "war on terror" and the authorities' villainizing and depoliticizing of all groups, a central question following the French intervention in January 2013 became: Who can the government negotiate with? The proscription of Ansar Dine and its prominent leader, Iyad Ag Ghaly, as terrorists in February 2013 marked a "do-or-die time for one's role" in Malian politics. Ag Ghaly had gone from "a broker between the anathematized [AQIM] and the mainstream" to being "considered fully jihadist and completely politically anathema" in Malian politics and internationally (Thurston 2020, 141–2, 144). Actors reconfigured and rehatted to avoid being considered terrorists despite previous involvement with proscribed groups.

The concept of the "terrorist as international criminal" thus served as an axis around which the (il)legitimacy of parties was constituted and reified a distinction between

[7] Di Razza (2018, 7) citing an interview with UN official, Bamako, June 10, 2018.

[8] Charbonneau (2017, 7) and Guichaoua (2017); Interview with member of the French Ministry of Defence, Paris, November 25, 2016.

[9] UN Doc. A/67/PV.11 (2012) [emphasis added].

[10] Mali Self-Referral to the ICC.

[11] Diarra (2012); interview with former Prime Minister of Mali Cheikh Modibo Diarra, Paris, September 11, 2017.

[12] Interview with former Special Advisor to the African Union High Representative to Mali and the Sahel, May 25, 2018.

Table 1. Individual's armed group affiliation

		Member of a group participating in the peace process	*Member of a group not participating in the peace process*
Individual's political influence and deal-brokering capital	High	Box 1: Authorities block accountability of influential members of participant groups to *enable their participation* in the peace process	Box 2: Authorities block accountability of influential members of nonparticipant groups if this is requested by influential members of participant groups to *accommodate their demands* OR Authorities do not block accountability of influential members of nonparticipant groups when participant groups *do not demand it*
	Low	Box 3: Authorities block accountability of less influential members of participant groups if this is requested by influential members of participant groups to *accommodate their demands*	Box 4: Authorities do not block accountability of less influential members of nonparticipant groups when participant groups *do not demand it*

participant and proscribed groups. This overshadowed much ambiguity, as "many of the actors of peace, who used to be actors of war, are not nice guys. They are even real bad guys capable of supporting terrorist attacks" (Yabi 2018). Reflecting clientelist practices, authorities' use of implicit amnesty followed four political rationales and helped gloss over individuals' alleged responsibility for human rights abuses and their involvement with jihadist groups.

According to the first rationale, authorities used transactional impunity to enable influential individuals who had rehatted and joined the participant groups to participate in the negotiations. This fits with Box 1 in table 1. These measures were first implicitly agreed to in the Ouagadougou Accord and later enacted. Indeed, a draft version of the accord explicitly called for the lifting of arrest warrants against members of the rebel groups who were signatories to the agreement. Displaying respect for the normative prohibition against blanket amnesties, the suspension of these warrants would not apply to "war crimes, crimes against humanity, crimes of genocide, sexual violence and other grave violations of international human rights and humanitarian law." Nevertheless, this caveat in Article 17 was deemed perfunctory and prompted strong opposition when it was circulated five days before the official signing (Whitehouse 2013). The final text deleted the controversial clause but replaced it, in Article 18, with a commitment to "confidence-building measures." Yet, this version did not mention that the "confidence-building measures" would not apply to grave crimes. This euphemistic phrasing allowed officials to deny having offered even limited impunity while enabling a common understanding that the arrest warrants would not be enforced. According to representative of an international organization, who participated in the negotiations, there was "a gentleman's agreement," or an implicit understanding that the arrest warrants would not be enforced. However, the government did not want to state that explicitly, due to popular pressure to not appear lenient to the armed groups.[13] In light of pressure on the government not to enforce the arrest warrants, observers said the warrants "look likely to be dropped" (AFP 2013b). One of the Tuareg delegation's leaders noted, "We will find out if Mali is operating in good faith" (AFP 2013a).

Suspicions of the implied agreement were confirmed when authorities lifted the arrest warrants in October 2013 for several representatives of the participant groups and released twenty-three of their members after armed group representatives pulled out of follow-up talks. Judicial authorities had not been consulted prior to the decisions to lift the arrest warrants, prompting the Prosecutor General to consider resigning.[14] One diplomat explained, "The government just sort of did it. The Ministry of Justice was not kept in the loop."[15] Similarly, in June 2015 during the Algiers talks, Malian authorities agreed to the CMA's requests to lift arrest warrants against fifteen CMA leaders after they refused to join the government and the Platform coalition in signing the Algiers Agreement.[16] As the charges reportedly included "crimes against humanity, genocide, war crimes," this undermined Article 46 of the Algiers Accord, which rules out amnesty for international crimes and grave violations of human rights (Mamadou 2015; Studio Tamani 2015). The beneficiaries of transactional impunity included several senior officers of signatory groups who, according to human rights groups, "may be guilty of serious crimes in the case of *Public Prosecutor v. Iyad Ag Ghali and 29 others*" (FIDH and AMDH 2017, 7).

Three cases are particularly illustrative. Alghabass Ag Intalla (HCUA) is a prominent Tuareg leader and the son of a highly influential hereditary traditional chief. His political trajectory and opportunistic allegiance-shifting reflect the cross-group fluidity. Between 2011 and 2014, Ag Intalla shifted from being a member of the National Assembly to belonging to four different armed groups and eventually again gaining a seat at the National Assembly, "coming full circle" (Wing 2016, 62). After helping create the Tuareg separatist group MNLA, he then joined Ansar Dine's leadership

[13] Interview with representative of an international organization, May 2018. "There was an implicit understanding that [the arrest warrants] will be just left inactivated but the government was very sensitive about putting that on paper. That is why it didn't appear in the final agreement … The Ouagadougou process was about the armed groups accepting that presidential elections be held throughout the country, including in Kidal, that was under their control. Whatever would facilitate that, the government would do it. But the government was, on the other hand, under immense popular pressure not to appear lenient vis-à-vis armed groups."

[14] Interview with an MINUSMA official, September 22, 2017; RFI (2013).

[15] Interview with a diplomat based in Bamako between 2014 and 2017, January 4, 2018.

[16] JeuneAfrique (2015a) and UN Doc. S/2015/732 (2015).

as its "Number Two" and served as a political representative throughout 2012 (Thurston 2020, 130). Following the French intervention, he broke away from Ansar Dine, which was no longer welcome at the negotiation table. He then created the Islamic Movement for Azawad (MIA) and joined the HCUA in May 2013, prior to the Ouagadougou negotiations. This helped ensure that the Ifoghas ruling family to which he belonged "would not be excluded from future local bargains and political deal making" (Guichaoua and Desgrais 2018, 21). However, while Ansar Dine was not officially part of the negotiations, there is wide speculation that Ag Intallah and others represented Ag Ghaly's interests and served as "key, unofficial conduits" during the subsequent Algiers talks (Thurston 2020, 142). Similarly, Ahmada ag Bibi was an elected representative in Mali's National Assembly in early 2012 and then joined Ansar Dine, reportedly serving as Ag Ghaly's deputy and "undoubtedly his most loyal lieutenant" (Carayol 2014). According to a confidante of Ag Bibi, he "is the voice of Iyad. If you negotiate with him, it's like if you were negotiating with Iyad" (Carayol 2014). He later joined the HCUA in 2013 and participated in the Ouagadougou negotiations.

These leaders' political influence is evident from government statements acknowledging the controversial decision to lift the arrest warrants against them. According to a presidential aide, "It was that or nothing, but we were heading for disaster if we hadn't been able to get an agreement on presidential elections in the Kidal region" (AFP 2013b). Further, a Ministry of Justice official noted that the warrants were lifted "to facilitate the conduct of the national reconciliation process" (Duhem 2013). As another presidential advisor noted, "[Ag Bibi] can play a role to bring his tribe back on the negotiation track" (Carayol 2014). Asked about the Prosecutor General's complaint that judicial authorities had not been consulted, Minister of Justice Bathily noted their political capital was a factor. "If they are the ones representing the political elements that are likely to take measures to build the restoration of peace, conditions should be created for them to assume the role of negotiators and that would allow the international community to make sure that the negotiations are conducted in the right conditions." He continued, "everything is negotiable, except for territorial integrity" (Le Monde 2013b).

Further, of the CMA leaders whose arrest warrants were lifted in June 2015, the case of the more hard-line Cheikh Ag Aoussa is particularly revealing. In 2012, he served as a senior military commander of Ansar Dine. In addition to his alleged responsibility in the execution of over one hundred Malian soldiers in Aguelhok in early 2012, Ag Aoussa was named as one of fifteen individuals accused of grave abuses against victims in Timbuktu. Despite serving as a long-time ally and "right-hand man" of Ag Ghaly, he later rehatted and became military chief of the HCUA in 2013. He also served as a principal interlocutor with the UN and French forces. One UN official noted, "Despite his toxic aspects, he is too vital to do without him" (RFI 2016). The implicit amnesty contributed to his rehabilitation as a noncriminal and nonjihadist, thereby helping constitute the legitimate opposition during the talks. Yet, reflecting the blurry line and fluidity between participating and proscribed groups, Ag Aoussa was widely believed to maintain his long-standing and close ties to Ag Ghaly (Lebovich 2017, 13; Thurston 2020, 130,134). Referring to Ag Aoussa, Prosecutor General Daniel Tessougué, who issued the arrest warrants, stated in frustration, "HCUA, MNLA, Ansar Dine, for us it's the same. The No. 2 of the HCUA was the No. 2 of Ansar Dine before the hostilities. So, try to understand the mutations that can take place, like a gangrene, like a cancer" (Diawara 2013).

According to the second rationale, authorities used implicit amnesty to incentivize deal-brokers in participant groups to join the negotiations while simultaneously allowing prosecution of their subordinates who had not similarly rehatted and were not politically influential. This refers to the processes in Boxes 1 and 4 in table 1. The case of Yoro Ould Dah, a high-ranking officer of the Islamic Police of MUJWA (an AQIM-aligned group) during their occupation of northern Mali in 2012, is illustrative. Well-known for his alleged responsibility for grave abuses, he was named in a criminal complaint for abuses committed in Gao. Several days after being arrested by French forces, he was released in August 2014. Crucially, four months earlier, he had joined the progovernment wing of the Arab Movement for Azawad (MAA-Platform), an armed group participating in the Algiers peace process and associated with the progovernment Platform coalition. Alluding to his new political identity, Yoro Ould Dah stated, "Everyone makes mistakes. Me too. Now, I've joined the MAA four months ago. I am not a terrorist" (Okello 2018). He also held significant political influence as he served as the military chief of staff of the MAA, led the Platform coalition, and worked with MINUSMA and other foreign forces (RFI 2015; Boutellis and Zahar 2017, 20).

Thus, despite his previous role as leader of the Islamic Police of a jihadist group, implicit amnesty facilitated his positioning as a noncriminal and nonterrorist participant in the talks. This fits in Box 1 in table 1. However, one of his subordinates who did not join a participant group, and was neither powerful nor protected in the patronage networks, did not benefit from such impunity. Reflecting Box 4 dynamics, Aliou Mahamane Touré was named in the same criminal complaint and was prosecuted, serving to deflect attention from his superiors. The self-proclaimed superintendent of MUJWA's Islamic Police during the occupation in 2012 was accused of carrying out sentences of the Islamic court "by inflicting heinous abuses ranging from whipping, illegal arrest and detention, assault, inhumane treatment, and amputating limbs of convicted persons" (FIDH and AMDH 2017, 14). In August 2017, he was found guilty and given a ten-year sentence. Welcomed as "an undeniable breakthrough," this marked not only the first national trial regarding abuses committed during the occupation but also the first time Malian courts grappled with the charge of war crimes.[17] Asked whether any participant groups requested Touré's release during the negotiations, several participants and observers confirmed this was not an issue, highlighting his low political influence and deal-brokering capital.[18] The cases below feature a similar dynamic of parallel protection of leadership and prosecution of "middle management" figures.

According to the third rationale, authorities blocked accountability against influential individuals who had involvement in nonparticipant jihadist groups but had not joined participant groups—if this accommodated the demands of influential participants. This fits in Box 2 in table 1. In parallel, authorities supported the prosecution of their subordinates in these nonparticipant groups, who were neither

[17]During his trial, Touré accused the judicial system of bias as he was the only person prosecuted for crimes committed in Gao and his leadership enjoyed impunity, citing Yoro Ould Dah. FIDH and AMDH (2017, 16).

[18]Interview with a former member of the UN Standby Team as a senior expert on mediation, May 7, 2018; interview with member of the UN mediation team within MINUSMA, August 30, 2018; interview with former Special Advisor to the AU High Representative for Mali and the Sahel, May 25, 2018.

influential nor protected within patronage networks. This fits in Box 4 in table 1. This is illustrated by the controversial case of Houka Houka, as mentioned in the introduction. A member of Ansar Dine, he was appointed by Ag Ghaly to serve as a judge of the Islamic Tribunal in Timbuktu. He reportedly issued punishments of amputations, stonings, and floggings and had numerous meetings with hard-liners from AQIM and Ansar Dine leadership.[19] Based on proceedings opened by the Public Prosecutor, Houka Houka was arrested by the Malian army in January 2014. However, despite being formally charged with acts that could constitute international crimes and other serious human rights abuses, he was released in August 2014 following requests by the CMA before the signing of a roadmap in the Algiers peace process. Civil society and UN human rights monitors expressed outrage.[20] However, Al Mahdi and Al Hassan, who implemented decisions taken by Houka Houka, were transferred to the ICC in September 2015 and March 2018, respectively.[21] This deflected attention from their superiors, in this case Houka Houka who was more politically influential.

The trials of Al Mahdi and Al Hassan were duly welcomed as landmark moments and a successful burden-sharing approach between Mali and the ICC, given the major practical challenges faced by the Malian judiciary, including the lack of material and human resources and both general and targeted insecurity.[22] Yet, the government's support for their trials is not exclusively a function of national authorities' inability to prosecute them domestically but also based on their relatively lower political influence. More specifically, several interviewees noted that the unique features of the Al Mahdi and Al Hassan cases meant domestic trials were likely feasible. Both Al Mahdi and Al Hassan were already detained. Extensive evidence against Al Mahdi, including video recordings, audio recordings, and satellite imagery, was publicly available (Rosenberg 2016). According to a lawyer for civil parties, "It was the easiest [case]. The images were streaming. He harangued the crowds. His speeches were translated. There was no way out."[23] A Malian scholar-practitioner with extensive experience in human rights protection explained, "There are no major obstacles—it would be possible."[24] Moreover, Touré's August 2017 trial was held prior to Al Hassan's transfer to the ICC, serving as a relevant precedent for domestic proceedings.

As such, beyond practical obstacles, Malian authorities' support for the ICC's proceedings against Al Mahdi and Al Hassan is at least partially linked to their limited political capital and patronage networks. Their transfers to the ICC did not provoke much contestation domestically. According to an international advisor to the negotiations, participants did not raise concerns regarding Al Mahdi's transfer and trial.[25] According to the former Special Advisor to the AU High Representative for Mali and the Sahel, "I can't remember any official reaction by an armed group because [Al Mahdi] was not considered an official member of those who were negotiating."[26] Indeed, their transfers and trials were not a point of contention. In contrast, Houka Houka had greater political influence. Commenting on his release, Minister of Justice Bathily noted his political influence, explaining, "Today, [Houka Houka] is revealing things that we are interested in knowing" (Dicko 2014). As of September 2020, he reportedly lived freely around Timbuktu and has served as a mediator, personally recommended by Alghabass Ag Intalla, following attacks between groups (RFI 2020).

Finally, according to the fourth logic, impunity was used to accommodate the demands of influential participants by blocking accountability against members of their groups who had lower political capital. This refers to Box 3 in table 1. As part of demands by the MNLA and HCUA in September 2013, authorities released twenty-three of their members in parallel to lifting the arrest warrants against Ag Intalla (HCUA) and Ag Bibi (HCUA). Also, in July and August 2014, around the same time as the release of Yoro Ould Dah and Houka Houka, the government released over forty armed group members before signing a road map for the Algiers peace process. Many had been charged with, or were under investigation for, international crimes in the north.[27] Between June 2012 and June 2017, of the 1,456 individuals detained in connection with the conflict that were released by Malian authorities, at least 245 individuals were released outside any legal framework, or "chiefly at the request of armed groups in the framework of the confidence-building measures outlined in the peace agreement" and "following interference by or on the instruction of political authorities."[28]

In sum, transactional impunity has long been offered as part of the "dividends" of political settlements for rebel leaders and as part of a long record of failed peace processes in Mali. Since 2012, though, it has served a particular political purpose, as the entrenchment of jihadist groups and the "war on terror" framework added a new cleavage that shaped the inclusion and exclusion of groups from political bargains and the peace process (Guichaoua and Desgrais 2018, 15, 21).

Conclusion

This article sheds new light on the puzzling practice of governments blocking accountability efforts against actors with links to proscribed groups. It also reveals the value of scrutinizing implicit, rather than explicit, amnesty to fully grasp the instrumentalization of human rights norms. Indeed, it illustrates how Malian authorities' deployment of implicit anti-impunity measures had constitutive effects on crafting the legitimacy of political interlocutors, "with whom one can make peace," organizing actors amidst ambiguity (Charbonneau 2017, 13). It had both ideational and material effects that were crucial to shaping national-level elite bargains and positioning actors around the "terrorist as international criminal" axis. By devillainizing and repoliticizing certain actors, it enabled the constitution of an opposition distinct from terrorist groups.

This unpacks paradoxes and disconnects. In a peace process that sought to reify the distinction between "nonterrorists/noncriminals" as opposed to "terrorists/criminals," and between legitimate and illegitimate opposition, implicit amnesty was offered to various actors with both involvement

[19] International Criminal Court (2019, 17); UN Panel of Experts on Mali (2020, 29).

[20] Human Rights Council (2015, 10), Human Rights Council (2016, 7), and FIDH and AMDH (2014a).

[21] International Criminal Court (2019, 17); UN Panel of Experts on Mali (2020, 29).

[22] Human Rights Council (2014, 8; 2015, 8–10; 2016, 6–7; 2017, 6–8; 2018, 6).

[23] Interview with Malian human rights lawyer, February 2, 2017.

[24] Interview with Professor of Law, former Chargé de Mission at the Ministry of Justice of Mali, and former Chief of Staff to the Prime Minister Modibo Keita, June 28, 2018.

[25] Interview with a former member of the UN Standby Team as a senior expert on mediation, May 7, 2018.

[26] Interview with former Special Advisor to the African Union High Representative to Mali and the Sahel, May 25, 2018.

[27] FIDH and AMDH (2014a) and Human Rights Council (2015, 9).

[28] Human Rights Council (2017) and MINUSMA and OHCHR (2018).

in jihadism and abuses. It also explains why authorities simultaneously supported three landmark trials while blocking accountability against both members and nonmembers of participant groups. It further shows how transactional impunity lays the groundwork for milestone advances toward both peace and justice, including the Ouagadougou and Algiers agreements, the first domestic trial for international crimes, and two trials at the ICC. Yet, deploying impunity to reach agreements that aim at enhancing the state's strength can contribute to its degradation by enabling armed groups to gain sway over state institutions, facilitating their renewed rise, and contributing to jihadist groups' ability to exploit a key grievance for recruitment—impunity.

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