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The International Criminal Court and Truth Commissions: A Framework for Cross-Interaction in the Sudan and Beyond*

Christopher D. Totten†

INTRODUCTION

¶1 Various commentators have addressed frameworks for interaction between truth commissions and international war crimes tribunals. These commentators have focused most prominently on the commission and tribunal that existed concurrently in Sierra Leone.[1] Given recent progress on investigations in particular countries by the recently formed International Criminal Court (ICC), this article will examine how this permanent international criminal court might interact with truth commissions that emerge in these countries.[2]

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† Assistant Professor, The College of New Jersey.
[1] *See, e.g.*, Elizabeth Evenson, Truth and Justice in Sierra Leone: Coordination Between Commission and Court, 104 COLUM. L. REV. 730 (2004); Michael Nesbitt, Lessons from the Sam Hinga Norman Decision of the Special Court for Sierra Leone: How Trials and Truth Commissions Can Co-Exist, 8 GERMAN L.J. 977 (2007); William Schabas, *Conjoined Twins of Transitional Justice? The Sierra Leone Truth and Reconciliation Commission and the Special Court*, 2 J. INT'L CRIM. JUST. 1082 (2004). Technically speaking, the war crimes tribunal for Sierra Leone is a "hybrid" domestic-international tribunal, and not a purely international tribunal, because it combines certain aspects of domestic and international crimes tribunals. See, e.g., Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. INTL. L. 295, 295 (2003) ("Comparatively little attention has been paid . . . to a . . . newly emerging[] form of accountability and reconciliation: hybrid domestic-international courts. Such courts are 'hybrid' because both the institutional apparatus and applicable law consist of a blend of the international and domestic. Foreign judges sit alongside their domestic counterparts to try cases prosecuted and defended by teams of local lawyers working with those from other countries. The judges apply domestic law that has been reformed to accord with international standards. This hybrid model has developed in a range of settings, generally postconflict situations where no politically viable full-fledged international tribunal exists, as in East Timor or Sierra Leone . . . ."); BARRY CARTER, PHILLIP TRIMBLE & ALLEN WEINER, INTERNATIONAL LAW 1191–1994 (5th ed. 2007) (explaining that the war crimes tribunal for Sierra Leone consists of both judges appointed by the international community acting through the United Nations and judges appointed by Sierra Leone). For sake of convenience and readability, this Article will refer to the war crimes tribunals in Sierra Leone and East Timor as international war crimes tribunals (as opposed to "hybrid" war crimes tribunals). In any event, for the comparative and conceptual aims of this Article, the exact terminology employed would appear to matter little.
[2] While this article will largely focus on a putative truth commission in the Sudan, other countries where the ICC is investigating violations of international criminal law have also expressed interest in a truth commission. For example, the Central African Republic had a short-lived Truth Commission in 2002 that investigated the causes of the human rights crisis in that country, and recommended specific reforms. *See* U.S. Dep't of State, *Central African Republic: Country Reports on Human Rights Crises – 2003* (Feb. 25, 2004), *available at* http://www.state.gov/g/drl/rls/hrrpt/2003/27718.htm. Also, in Uganda, a recent survey of citizens has indicated a desire for national and local authorities to form a strategy for peace and reconciliation in Uganda. Many citizens are willing to sacrifice formal justice to achieve peace; in

¶2 For example, the UN and human rights organizations have called for the development of a truth commission in the Sudan, a country where the ICC is also currently conducting an investigation.[3] As the ICC investigation proceeds in the Sudan, and prosecutions begin following the execution of recent arrest warrants,[4] the ICC is likely to encounter not only additional prosecutions carried out by Sudanese courts but also a Sudanese truth commission.[5] How the ICC interacts with truth commissions in countries like the Sudan is important for both the efficient operation of the individual institutions and for the successful transition of these countries out of periods of grave human rights abuses.

¶3 After providing an overview of the basic features of truth commissions, Part I of the Article will explore situations where truth commissions and international war crimes tribunals have co-existed, drawing in large part upon the experiences of Sierra Leone and East Timor. In addition, Part I will introduce the ICC as well as that Court's on-going case in the Sudan for crimes occurring in the Darfur region of the country.

¶4 Part II will focus on whether the work of a newly formed Sudanese truth commission would preclude ICC prosecutions of high-level Sudanese suspects in light of certain statutory provisions binding on the ICC. Part II will conclude that in all likelihood the ICC would not have to defer to a Sudanese truth commission and could continue its prosecutions of those who commit grave crimes in the Sudan. However, the Part will also attempt to develop a framework for when the ICC may be required to defer to the work of a truth commission. In this regard, Part II will draw upon other ICC cases and truth commissions such as the Commission for Reception, Truth and Reconciliation ("CAVR") in East Timor, and the ICC case in the Democratic Republic of the Congo. For example, deference may be appropriate when a truth commission process includes

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particular, they desire a public forum in which they can converse openly about their ordeals and in the process, establish an historical record. *See* Int'l Ctr. for Transitional Justice, Uganda, http://www.ictj.org/en/where/region1/629.html (last visited Jan. 5, 2009). Lastly, in the Democratic Republic of the Congo (DRC), the 2002 Sun City Accords established the Truth and Reconciliation Commission in the DRC. However, the Commission was never viewed as credible and did not hear a single case. Though many Congolese recognize the urgent need for a victim-oriented truth commission process to aid in transitional justice, no serious proposals have been put forth as of yet. Int'l Ctr. for Transitional Justice, The Democratic Republic of the Congo, http://www.ictj.org/en/where/region1/646.html (last visited Jan. 5, 2009).

[3] A recommendation for a truth commission was made by the UN Security Council in its resolution referring the Sudanese case to the ICC. *See* S.C. Res. 1593, ¶ 5, U.N. Doc. S/RES/1593 (Mar. 31, 2005) ("[E]mphasiz[ing] the need to promote healing and reconciliation [in Sudan] and encourag[ing] in this respect the creation of institutions, involving all sectors of Sudanese society, such as truth and/or reconciliation commissions, in order to complement judicial processes and thereby reinforce the efforts to restore long-lasting peace, with African Union and international support as necessary.").

[4] Following his initial investigations, the ICC Prosecutor, Luis Moreno-Ocampo, first obtained arrest warrants in the Sudan for Harun and Kushayb. These warrants are awaiting execution. *See* Marlise Simmons, *Judges Charge 2 Top Sudanese with Atrocities in Darfur Area*, N.Y. TIMES, May 3, 2007, at A10. In addition, the ICC Prosecutor, as a result of his continuing investigation in the Sudan, recently requested another arrest warrant from the Pre-Trial Chamber of the ICC. This warrant is for the sitting President of Sudan. *See* Press Release, Int'l Criminal Court, ICC Prosecutor Presents Case Against Sudanese President, Hassan Ahmad Al Bashir, for Genocide, Crimes Against Humanity and War Crimes in Darfur (July 14, 2008) [hereinafter Al Bashir Press Release], *available at* http://www.icc-cpi.int/press/pressreleases/406.html.

[5] For a discussion of the legal and other implications for the ICC of domestic prosecutions in the Sudan, *see generally* Christopher Totten & Nicholas Tyler (Student Author), *Arguing for an Integrated Approach to Resolving the Crisis in Darfur: The Challenges of Complementarity, Enforcement and Related Issues in the International Criminal Court*, 98 J. CRIM. L. & CRIMINOLOGY 1069 (2008).

widespread participation by victims and perpetrators, various forms of victim assistance, and available amnesty is not only individual and conditional in character but also directed specifically towards a certain class of perpetrators (i.e., "low-level" perpetrators who commit minor offenses over a prescribed period of time), as was the case in East Timor.

¶5 Part III will address information sharing between the ICC and a truth commission such as one in the Sudan. This Part will argue for a conditional approach to information sharing, whereby the Pre-Trial Chamber of the ICC serves as the primary decision-maker on all matters related to the sharing of information between a truth commission and the ICC. By accounting for certain aspects of information exchange between a truth commission and the ICC, at least some of the pitfalls experienced in other commission-Court relationships may be avoided (i.e., the uncertain nature of the sharing of confidential information between the international criminal tribunal and truth commission in Sierra Leone).

¶6 Finally, Part IV will turn its attention to the issue of sentencing for Sudanese human rights violation perpetrators who testify before a truth commission prior to successful prosecution and conviction before the ICC. This Part will argue that while the ICC should not honor any amnesty deals granted by a truth commission to high-level Sudanese perpetrators who committed grave crimes, the Court should take into account certain aspects of a perpetrator's participation in the commission process as mitigating factors prior to issuing its final sentence. In the case of low-level perpetrators, a Sudanese truth commission should adopt an approach similar to that of the truth commission in East Timor whereby individual perpetrators may be eligible for amnesty provided that they fulfill certain terms of a pre-approved reconciliation process, or agreement. In this way, the Sudanese commission will assist in the important task of reintegrating these types of perpetrators back into their respective communities while at the same time not encroaching upon the responsibility of the ICC to convict and sentence those who commit more grievous international crimes.

I. Background

A. Overview of Truth Commissions

¶7 In her seminal study on truth commissions, entitled *Fifteen Truth Commissions – 1974 to 1994: A Comparative Study*, Priscilla Hayner posits one working definition for truth commissions generally, which includes four components:

> First, a truth commission focuses on the past. Second, a truth commission is not focused on a specific event, but attempts to paint the overall picture of certain human rights abuses, or violations of international humanitarian law, over a period of time. Third, a truth commission usually exists temporarily and for a pre-defined period of time, ceasing to exist with the submission of a report of its findings. Finally, a truth commission is always vested with some sort of authority, by way of its sponsor, that

> allows it greater access to information, greater security or protection to dig into sensitive issues, and a greater impact with its report.[6]

¶8 In short, truth commissions are investigatory bodies usually created as part of a country's political transition to examine human right rights violations.[7] Truth commissions can be sponsored by domestic governments, most commonly the executive branch (though legislative branch sponsorship is also possible), or internationally by such bodies as the United Nations or non-governmental organizations (NGOs).[8] An example of a commission with NGO sponsorship is the truth commission instituted in Rwanda immediately preceding the 1994 genocide, which was the result of a politically negotiated settlement between the Hutu and Tutsi ethnic tribes.[9] Furthermore, truth commissions generally arise "during or immediately after a political transition in a country".[10] As part of this examination, they can provide an explanation of the facts surrounding these violations,[11] suggest reparations for the victims of the violations,[12] or even recommend certain, future steps be taken to avoid their repetition.[13]

¶9 In the context of comparing truth commissions to judicial trials, Martha Minow has argued that truth commissions may be a more suitable vehicle through which victims of human rights violations can acknowledge publicly the atrocities committed against them. This acknowledgment is crucial for the victims, as it represents their "chance to tell [their story] and be heard without interruption or skepticism," as would normally

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[6] Priscilla Hayner, *Fifteen Truth Commissions—1974 to 1994: A Comparative Study,* 16 HUM. RTS. Q. 597, 604 (1994). Priscilla Hayner is co-founder of the International Center for Transitional Justice in New York City.

[7] *Id*. at 600.

[8] *Id*. at 600-04.

[9] *Id*. at 630 ("The roots of the Rwandan truth commission lie in an agreement between the government and the armed forces to establish a commission of inquiry into past atrocities – agreed to in the Arusha Accords negotiated in Arusha, Tanzania, in late 1992."). This agreement refers specifically to the International Commission of Investigation on Human Rights Violations in Rwanda. Since October 1, 1990, the Commission, with its lengthy name but only moderate success, was sponsored, at the request of indigenous Rwandan NGOs, by foreign NGOs from the United States, Canada, France and Burkina Faso. *Id.*

[10] *Id.* at 608.

[11] Martha Minow posits that truth commissions may actually be better than trials in producing "a coherent, if complex narrative, about [an] entire nation's trauma, and the multiple sources and expressions of its violence." *See* MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS 58, 78 (1998). On the other hand, "trial records do not seek a full historical account beyond the action of particular individuals." *Id*. at 78. However, truth commissions, through "close historical analysis of testimony and documents [exposing] the influences of [various factors in causing the mass violence] . . . can do more than verdicts of guilt or innocence to produce a record for the nation and world, and a recasting of the past to develop bases for preventing future atrocities." *Id*. at 78-9.

[12] Other recommendations by truth commissions have addressed "military and police reform, the strengthening of democratic institutions, measures to promote national reconciliation, or reform of the judicial system." Hayner, *supra* note 6, at 609. As to the role of truth commissions in promoting national reconciliation, Hayner notes that there is scholarly disagreement as to the extent of the ability of a commission to do so. In fact, some have argued that commissions can "create deeper resentment and exacerbate old issues that have been dug up anew." *Id*.

[13] Hayner suggests that the reason truth commissions lessen the likelihood of future human rights violations may be because of their publishing of a reliable record of these violations, "with the hope that a more knowledgeable citizenry will recognize and resist any sign of return to repressive rule." *Id*. Thus, truth commissions are also educative in the particular sense of informing future generations of steps they can take to prevent the repetition of human rights abuses.

occur in a trial or tribunal setting.[14] Furthermore, Minow has argued that truth commissions offer victims of human rights violations a form of therapy by giving them an opportunity to speak about their trauma to a group of sympathetic witnesses.[15] In particular, "truth commissions can give context to the human rights violations, and remind a viewing public of the human costs that were suppressed or unknown."[16]

¶10 Additionally, truth commissions may provide perpetrators certain forms of protection from future criminal prosecutions, such as blanket or partial amnesties. These amnesties, in turn, may or may not be conditioned upon the fulfillment by the perpetrator of certain terms or conditions (e.g., in exchange for the amnesty). The South African truth commission, for example, provided a type of amnesty to individuals who came before it, provided a full disclosure of the facts related to their abuses, and whose abuses were committed for political ends.[17] (This is a type of partial, conditional amnesty since only politically-motivated crimes were eligible for amnesty, and amnesty was only obtained after the perpetrator disclosed certain facts before the truth commission body). Moreover, a truth commission may also opt to protect information provided by victims and witnesses from disclosure through the use of confidentiality clauses. For example, information could be provided in confidence to both the CAVR, and the Sierra Leone Truth and Reconciliation Commission.[18]

B. Sierra Leone

¶11 This section will begin by providing an overview of the human rights crisis in Sierra Leone before turning its attention to the Special Court for Sierra Leone and the Sierra Leone Truth and Reconciliation Commission (TRC).

¶12 Sierra Leone experienced a human rights conflict that lasted nearly a decade (1991-1999). This struggle resulted in tens of thousands of deaths and even more incidents of torture, mutilation, amputation, and rape.[19] This conflict stemmed from a struggle for control of diamond mines. Anti-government rebel groups used children as soldiers. Many of these children endured forced amputations as well.[20]

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[14] Minow, *supra* note 11, at 58.

[15] *Id*. at 66-74. Many observers and participants at court trials may be far from sympathetic. Minow argues that "when the societal goals include restoring dignity to victims, offering a basis for individual healing, and also promoting reconciliation across a divided nation, a truth commission again may be as powerful as or more powerful than prosecutions." *Id*. at 88-89.

[16] *Id*. at 76. Minow also comments that, as part of its role, a "truth commission is charged to produce a public report that recounts the facts gathered, and renders moral assessment. It casts its findings and conclusions not in terms of individual blame but instead in terms of what was wrong and never justifiable." *Id*. at 78.

[17] *Azanian Peoples Org. v. President of S. Afr.* 1996 (4) SA 672 (CC) at para. 5 (S. Afr.), *available at* http://www.saflii.org/za/cases/ZACC/1996/16.pdf.

[18] For a detailed discussion of the confidentiality clause in Sierra Leone, see *infra* note 48 and accompanying text. This power on the part of the truth commission in Sierra Leone to declare testimony confidential, and thereby prevent its disclosure to third parties, may have been subject to limitation. *Id*. For discussion o f confidentiality within the context of the truth commission in East Timor, see *infra* note 78 and accompanying text.

[19] Int'l Ctr. for Transitional Justice, Sierra Leone, http://www.ictj.org/en/where/region1/141.html (last visited Jan. 5, 2009) [hereinafter ICTJ website Sierra Leone].

[20] *See id.* The war in Sierra Leone received international media attention due to the widespread policy of forced amputations that were carried out on very young children as well as adults. *Id*.

¶13 The government of Sierra Leone and the rebel groups known as Revolutionary United Front (RUF)[21] finally made an attempt to end the violence with the signing of the Lomé peace agreement in July of 1999.[22] In particular, Lomé granted amnesty to all individuals who participated in the conflict.[23] The government and rebel groups included a provision for the establishment of a Truth and Reconciliation Commission.[24] A law implemented this Commission in 2000, although it did not become operational until 2002.[25]

¶14 Despite the peace agreement, violence erupted again in Sierra Leone in May of 2000. RUF forces captured a contingent of UN peacekeepers stationed in Sierra Leone, which prompted Britain to intervene on the peacekeepers' behalf.[26] Following this event, the government of Sierra Leone asked the UN to form a court to aid in the prosecution of the most serious violators of humanitarian law.[27] The process of prosecuting the most serious offenders began in 2002, and is expected to last several years.[28]

1. Special Court for Sierra Leone

¶15 In January of 2002, as part of a formal agreement, the United Nations and the Sierra Leone government jointly established the Special Court to prosecute the greatest violators of international and Sierra Leonean law that committed grave crimes after November 20, 1996.[29] As of January 2009, thirteen persons have been indicted by the Court. Two of these indictments have been withdrawn due to deaths of the accused before a judgment could be made. Two trials have been completed by the Court, and two trials are currently in progress, including the trial of former Liberian President Charles Taylor in the Hague.[30] Charges against indicted individuals before the Court include acts

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[21] The RUF traces its history to the late 1980s when students in Sierra Leone grew disgruntled over unemployment rates and the suppression of new ideas. These youth became involved with gangs, drugs, and violence. In 1987 and 1988, 25 to 50 Sierra Leoneans were trained in revolutionary tactics in Libya. Three of these members would later be involved in the RUF. In 1991, before general elections could be held, the RUF and the National Patriotic Front of Liberia attacked the borders of Sierra Leone with the purpose of ending the twenty-four year term of power of the All People's Congress. The weakness of the Sierra Leone military allowed the RUF to take control of large portions of the country after a few days. Global Security, Military: Revolutionary United Front, http://www.globalsecurity.org/military/world/para/ruf.htm (last visited Jan. 5, 2009).

[22] *See* Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, U.N. Doc. S/1999/777/Annex (July 7, 1999) [hereinafter Lomé Peace Accord], *available at* http://www.sierra-leone.org/lomeaccord.html. Article 1 dictates the terms of the cease-fire agreement: "The armed conflict between the Government of Sierra Leone and the RUF/SL is hereby ended with immediate effect. Accordingly, the two sides shall ensure that a total and permanent cessation of hostilities is observed forthwith." *Id.* art. 1.

[23] *Id.* art. 9.

[24] *Id.* arts. 6(2)(ix), 26.

[25] ICTJ website Sierra Leone, *supra* note 19.

[26] *Id.* In May 2000, 500 UN peacekeepers were captured. *Id.*

[27] *Id.*

[28] *Id.* In 2007, the Special Court for Sierra Leone began prosecuting its most important case to date, that of Liberian President Charles Ghankay Taylor. During his leadership, many of the human rights violations occurred in Sierra Leone. The trial of President Taylor is currently still in progress. *Id.*

[29] *See* Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, U.N. Doc. S/2002/246/Annex (Jan. 16, 2002) [hereinafter Joint Agreement] *available at* http://www.specialcourt.org/documents/SpecialCourtAgreementFinal.pdf.

[30] *See* Special Court for Sierra Leone, About the Special Court for Sierra Leone, http://www.sc-sl.org/ABOUT/tabid/70/Default.aspx (last visited Jan. 5, 2009). On March 7, 2003, the Special Court

of terror, enslavement, sexual slavery, conscription of children into militias, attacks on humanitarian workers, and many other serious war crimes.

¶16 The Agreement for a Special Court between the Sierra Leone government and the United Nations [the "Agreement"] was in response to UN Resolution 1315, which expressed the current grave situation in Sierra Leone.[31] The Agreement includes twenty-three articles that establish a working framework for the Special Court. For example, Article 5 of the Agreement states that: "The Government [of Sierra Leone] shall assist in the provision of premises for the Special Court and such utilities, facilities and other services as may be necessary for its operation."[32] While the Special Court is an independent body, it still requires various forms of assistance from Sierra Leone and other individual countries.[33]

¶17 Under Article 1, the Agreement establishes that if Sierra Leone cannot or will not investigate or prosecute a certain case, the UN Security Council can authorize the Special Court to do so.[34] Under Article 8, even though Sierra Leone courts and the Special Court have concurrent jurisdiction (e.g., "shared" jurisdiction), the Special Court is still able to formally request that a Sierra Leone court defer a case to it.[35] As a result, there are two ways in which the Special Court can acquire jurisdiction over particular cases: (1) if the Sierra Leone court is unwilling or unable to investigate or prosecute a case and the UN formally authorizes the Special Court to exert jurisdiction over that case;[36] and (2) if the Special Court formally requests to have jurisdiction over a particular case.[37]

¶18 In addition, the Agreement addresses the prosecution of juvenile offenders. Article 7 states that no child under fifteen (15) at the time of his or her crime will be open to prosecution by the Special Court.[38] While there is no formal prohibition against the

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indicted three RUF leaders: Issa Hassan Sesay, Morris Kallon, and Augustine Gbao. All three face a "17-count indictment for crimes against humanity, violations of Article 3 common to the Geneva Conventions and of Additional Protocol II (commonly known as war crimes), and other serious violations of international humanitarian law. " (An 18th count was later added). Special Court for Sierra Leone, Summary of Charges Against the RUF Accused, http://www.sc-sl.org/CASES/RevolutionaryUnitedFrontTrialRUF/RUFSummaryoftheCharges/tabid/185/Default.aspx (last visited Jan. 5, 2009). The Special Court for Sierra Leone has the ability to try the following crimes: crimes against humanity, violations of Article 3 common to the Geneva Conventions and of Additional Protocol II, other serious violations of international human rights law and certain crimes under the law of Sierra Leone. *See* Statute of the Special Court of Sierra Leone art. 2-5, Jan. 16, 2002, 2178 U.N.T.S. 138 [hereinafter Special Court Statute], *available at* http://www.specialcourt.org/documents/SpecialCourtStatuteFinal.pdf.

[31] *See* S.C. Res. 1315, U.N. Doc. S/Res/1315 (Aug. 14, 2000) (stating, in part, that the Security Council is "[d]eeply concerned at the very serious crimes committed within the territory of Sierra Leone against the people of Sierra Leone and United Nations and associated personnel and at the prevailing situation of impunity").

[32] Joint Agreement, *supra* note 29, art. 5; *see also* Special Court Statute, *supra* note 30.

[33] *See* Joint Agreement, *supra* note 29, art. 17; Special Court for Sierra Leone, Home, http://www.sc-sl.org (last visited Jan. 19th, 2009) (noting that the Special Court receives both monetary and in kind assistance from over forty individual countries, which is provided on a voluntary basis).

[34] Special Court Statute, *supra* note 30, art. 1(3) ("In the event the sending State [e.g., Sierra Leone] is unwilling or unable genuinely to carry out an investigation or prosecution, the Court may, if authorized by the Security Council on the proposal of any State, exercise jurisdiction over such persons.").

[35] *Id.* art. 8.

[36] *Id.* art. 1(3).

[37] *Id.* art. 8(2).

[38] *Id.* art. 7(1) ("The Special Court shall have no jurisdiction over any person who was under the age of 15 at the time of the alleged commission of the crime. Should any person who was at the time of the alleged commission of the crime between 15 and 18 years of age come before the Court, he or she shall be treated

prosecution of children between the ages of 15 and 18 in the Special Court, the Statute appears to favor alternative approaches to the handling of these cases.[39] A child between the ages of 15 and 18, "shall be treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation."[40] In particular, the Special Court may direct juvenile offenders into community service and foster care programs.[41] Notably, Article 15 of the Special Court Statute directs the Special Court Prosecutor to utilize truth and reconciliation commissions for the resolution of disputes involving juveniles to the extent they are available.[42]

¶19 Regarding amnesty, Article 10 of the Agreement declares that any amnesty given for crimes that fall within the Special Court's jurisdiction will not be a bar to prosecution.[43] This provision ensured that the amnesty given under the Lomé Agreement would not be honored by the Special Court.

2. Sierra Leone Truth and Reconciliation Commission (TRC)

¶20 The Lomé Peace Agreement established the TRC on July 7, 1999.[44] The TRC was charged with creating an impartial historical record of past human rights violations.[45] In addition, the Commission investigated particular violations, and worked to restore the

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with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society, and in accordance with international human rights standards, in particular the rights of the child.").

[39] *Id.* art. 7(2) ("In the disposition of a case against a juvenile offender, the Special Court shall order any of the following: care guidance and supervision orders, community service orders, counseling, foster care, correctional, educational and vocational training programmes, approved schools and, as appropriate, any programmes of disarmament, demobilization and reintegration or programmes of child protection agencies.").

[40] *Id.* art. 7(1).

[41] *Id.* art. 7(2).

[42] *Id.* art. 15(5) ("In the prosecution of juvenile offenders, the Prosecutor shall ensure that the child-rehabilitation programme is not placed at risk and that, where appropriate, resort should be had to alternative truth and reconciliation mechanisms, to the extent of their availability.").

[43] *Id.* art. 10 ("An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in articles 2 to 4 of the present Statute shall not be a bar to prosecution.").

[44] Lomé Peace Accord, *supra* note 22.

> The CCP [Commission for the Consolidation of Peace] shall ensure that all structures for national reconciliation and the consolidation of peace already in existence and those provided for in the present Agreement are operational and given the necessary resources for realizing their respective mandates. These structures shall comprise: (i) the Commission for the Management of Strategic Resources, National Reconstruction and Development; (ii) the Joint Monitoring Commission; (iii) the Provincial and District Cease-fire Monitoring Committees; (iv) the Committee for the Release of Prisoners of War and Non-Combatants; (v) the Committee for Humanitarian Assistance; (vi) the National Commission on Disarmament, Demobilization and Reintegration; (vii) the National Commission for Resettlement, Rehabilitation and Reconstruction; (viii) the Human Rights Commission; and (ix) the Truth and Reconciliation Commission.

Id. art 6(2).

[45] The Truth and Reconciliation Act of 2000, Supplement to the Sierra Leone Gazette, Vol. CXXXI, No. 9 (Feb. 10, 2000) § 6(1) [hereinafter Sierra Leone TRC Act], *available at* http://www.usip.org/library/tc/doc/charters/tc_sierra_leone_02102000.html ("The object for which the Commission is established is to create an impartial historical record of violations and abuses of human rights and international humanitarian law related to the armed conflict in Sierra Leone, from the beginning of the Conflict in 1991 to the signing of the Lomé Peace Agreement; to address impunity; to respond to the needs of the victims; to promote healing and reconciliation and to prevent a repetition of the violations and abuses suffered.").

dignity of victims.[46] To realize its goals, the TRC held numerous sessions where it heard testimony from both victims and perpetrators.[47] Information could be provided to the TRC in confidence.[48] Regarding explicit, pre-established norms for interaction between the TRC and the Special Court in Sierra Leone, these were limited to a stated preference for relying upon alternative mechanisms like the TRC for the handling of cases involving juveniles under eighteen (18) years of age.[49]

C. East Timor

¶21 This section provides an overview of the human rights crisis in East Timor before it turns its attention to the Serious Crimes Investigation Unit (SCU) and the Commission for Reception, Truth, and Reconciliation (CAVR) in East Timor.

¶22 Indonesia annexed East Timor by force in 1975. For twenty-four years after the annexation, Indonesia engaged in brutal violence to suppress nationalist guerrillas in East Timor.[50] During this time period, many severe human rights violations occurred.[51] This situation resulted in the death of 200,000 individuals, or one-third of the country's population.[52] In August 1999, Indonesia accepted that the citizens of East Timor would hold a referendum to discuss the future of the country.[53]

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[46] *Id.* § 6(2).

[47] The TRC is responsible for taking additional statements or gathering additional information to support its findings.

> The Commission shall, subject to this Act, solely determine its operating procedures and mode of work with regard to its functions which shall include the following three components: – (a) undertaking investigation and research into key events, causes, patterns of abuse or violation and the parties responsible; (b) holding sessions, some of which may be public, to hear from the victims and perpetrators of any abuses or violations or from other interested parties; and (c) taking individual statements and gathering additional information with regard to the matters referred to in paragraphs (a) or (b).

Id. § 7(1)

[48] *Id.* § 7(3) ("At the discretion of the Commission, any person shall be permitted to provide information to the Commission on a confidential basis and the Commission shall not be compelled to disclose any information given to it in confidence."). *But see* Special Court Agreement (Ratification) Act 2002, Supplement to the Sierra Leone Gazette, Vol. CXXXIII, No. 22 (Apr. 25, 2002) § 21(2) ("Notwithstanding any other law, every natural person, corporation, or other body created by or under Sierra Leone law shall comply with any direction specified in an order of the Special Court"). Various commentators have noted the apparent conflict between these two provisions. *See, e.g.*, Marieke Wierda, Priscilla Hayner & Paul van Zyl, Int'l Ctr. for Transitional Justice, *Exploring the Relationship Between the Special Court and the Truth and Reconciliation Commission of Sierra Leone*, at 4-5, (June 24, 2002) [hereinafter *Exploring the Relationship*], *available at* http://www.ictj.org/images/content/0/8/084.pdf; William Schabas, *A Synergistic Relationship: The Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone*, in TRUTH COMMISSIONS AND COURTS, 3, 25-41 (William A. Schabas & Shane Darcy eds., 2004) [hereinafter Schabas, *TRC*].

[49] Special Court Statute, *supra* note 30, art. 15(5).

[50] Int'l Ctr. for Transitional Justice, Timor-Leste, http://www.ictj.org/en/where/region3/628.html (last visited Jan. 5, 2009) [hereinafter ICTJ website Timor-Leste] ("For 24 years, [East Timor] suffered the effects of brutal counter-insurgency tactics used against nationalist guerillas.").

[51] Caitlin Reiger & Marieke Wierda, Int'l Ctr. for Transitional Justice, *The Serious Crimes Process in Timor-Leste: In Retrospect*, at 5, (Mar. 2006), *available at* http://www.ictj.org/static/Prosecutions/Timor.study.pdf. These human rights violations included the torture of members of the resistance, disappearances, rapes, theft of land, forced marriages, forced sterilizations, frequent massacres, and the general intimidation of the public. One of the massacres in 1991 included hundreds of unarmed protesters in a funeral procession. *Id.*

[52] *Id.* at 4. A large portion of these deaths result not only from military oppression but from disease and forced starvation as well. *Id.*

[53] ICTJ website Timor-Leste, *supra* note 50. The fall of the authoritarian regime led by General Soeharto

¶23 After East Timor voted for its independence in 1999, the Indonesian National Army and the militias in East Timor that supported Indonesia again responded with extreme violence. Using aggression and arson, these forces killed approximately 2,000 individuals and caused another 500,000 to evacuate their homes.[54] This crisis came to an end only as a result of UN involvement.[55] In 2002, East Timor finally achieved its goal of becoming an independent territory.[56]

1. Serious Crimes Investigation Unit (SCU)

¶24 The United Nations established the United Nations Transitional Administration in East Timor (UNTAET) on October 25, 1999.[57] The creation of UNTAET aimed to facilitate East Timor's transition to independence after the vote by the territory's people. Specifically, UNTAET exercised both legislative and executive authority during a critical time period, and supported the establishment of self-government in East Timor.[58] As a result, East Timor achieved its independence on May 20, 2002.[59]

¶25 Though UNTAET ceased to exist once East Timor gained its independence,[60] the UN immediately established a Mission of Support in East Timor (UNMISET) in order to continue supporting the new country's security and stability.[61] UN Resolution 1410 provided the framework and goals for UNMISET,[62] which were similar to those of UNTAET. The United Nations Security Council decided that the mandate of UNMISET would consist of three major aspects. These include providing assistance to administrative structures, establishing an interim law enforcement agency, and contributing to the maintenance of security in East Timor.[63]

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sparked this referendum. Seventy-eight percent of Timor-Leste's citizens voted for independence from Indonesia. *Id.*

[54] Global Policy Forum, Ad-Hoc Court for East Timor, http://www.globalpolicy.org/intljustice/etimorindx.htm (last visited Jan. 5, 2009).

[55] ICTJ website Timor-Leste, *supra* note 50 (explaining that United Nations troops intervened and the UN formed the transitional authority UNTAET).

[56] *Id.*

[57] *See* United Nations, East Timor-UNTAET Background, http://www.un.org/peace/etimor/UntaetB.htm (last visited Jan. 5, 2009) ("[O]n 25 October, the United Nations Security Council, by resolution 1272 (1999), established the United Nations Transitional Administration in East Timor (UNTAET) as an integrated, multidimentional [sic] peacekeeping operation fully responsible for the administration of East Timor during its transition to independence.").

[58] *See id.* ("Resolution 1272 mandated UNTAET to provide security and maintain law and order throughout the territory of East Timor; to establish an effective administration; to assist in the development of civil and social services; to ensure the coordination and delivery of humanitarian assistance, rehabilitation of humanitarian assistance, rehabilitation and development assistance; to support capacity-building for self-government; and to assist in the establishment of conditions for sustainable development.").

[59] *See* United Nations, United Nations Transitional Administration in East Timor (UNTAET), http://www.un.org/peace/etimor/etimor.htm (last visited Jan. 5, 2009).

[60] *See* United Nations, UNTAET Facts and Figures, http://www.un.org/peace/etimor/UntaetF.htm (last visited Jan. 5, 2009).

[61] *See* United Nations, United Nations Mission of Support in East Timor Background, http://www.un.org/Depts/dpko/missions/unmiset/background.html (last visited Jan. 5, 2009). The resolution creating this UN involvement was unanimously adopted by the UN Security Council on May 17, 2002. *Id.*

[62] *See* S.C. Res. 1410, U.N. Doc. S/Res/1410 (May 17, 2002). The Security Council "*decides* to establish, as of 20 May 2002 and for an initial period of 12 months, a United Nations Mission of Support in East Timor (UNMISET)." *Id.* ¶ 1.

[63] *Id.* ¶ 2(a)–(c) ("[UNMISET is] (a) [t]o provide assistance to core administrative structures critical to the viability and political stability of East Timor; (b) [t]o provide interim law enforcement and public security

¶26 From an organizational standpoint, UNMISET consists of a Special Representative appointed by the Secretary-General to head UNMISET, a Serious Crimes Unit (SCU), a Civilian Support Group, and a Human Rights Unit.[64] UNMISET also includes a sizeable civilian police force as well as a military force.[65]

¶27 The SCU, the prosecutorial authority of UNMISET, has indicted 395 individuals for serious crimes including crimes against humanity. The Unit has obtained 84 successful convictions.[66] The UN, in a document entitled "Policy on Justice and Return Procedures in East Timor," stated its procedures for offenders who wish to return to East Timor. Those offenders who have committed serious crimes are directed to the SCU.[67] Serious offenses committed in East Timor will be handled by East Timor's justice system, primarily the SCU.[68]

2. Commission for Reception, Truth, and Reconciliation (CAVR)

¶28 The United Nations, under UNTAET, established CAVR in 2001.[69] CAVR examined the facts behind the human rights violations that occurred between 1974 and 1999 in East Timor.[70] The objectives of CAVR require the commission to inquire about human rights violations, determine the nature of the offenses, and determine the practices

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and to assist in the development of a new law enforcement agency in East Timor, the East Timor Police Service (ETPS); (c) [t]o contribute to the maintenance of the external and internal security of East Timor.").

[64] *Id.* ¶ 3–3(a) ("[UNMISET will consist of a] civilian component comprising an office of the Special Representative of the Secretary-General with focal points for gender and HIV/AIDS, a Civilian Support Group of up to 100 personnel filling core functions, a Serious Crimes Unit and a Human Rights Unit.").

[65] *Id.* ¶ 3(b)–(c) ("[UNMISET shall consist of a] civilian police component initially comprised of 1,250 officers [and a] military component with an initial strength of up to 5,000 troops including 120 military observers.").

[66] ICTJ website Timor-Leste, *supra* note 50. The convictions were mainly low level offenders. The majority of those indicted still remain outside of East Timor in Indonesia while the Indonesian government refuses to cooperate. In some cases, the Indonesian government has held biased trials for some of the suspects. While the SCU technically completed its work in May of 2005 (at the end of its mandate), a UN Serious Crimes Investigation Team (SCIT) has formed in its place to investigate grave crimes committed in East Timor in 1999. The actual prosecution of any crimes uncovered by SCIT, however, will be determined by the local Timorese prosecutor-general. *Id.* *See also* UC Berkeley War Crimes Study Ctr, East Timor, http://socrates.berkeley.edu/~warcrime/ET.htm (last visited Jan. 19, 2009) (explaining that the SCU completed a total of fifty-five (55) trials, wherein, eighty-four (84) individuals were convicted and three (3) were acquitted). Note that "[a]ll charges brought by the SCU are [actually] tried before one of the Special Panels of Serious Crimes, which each consist of two international judges and one East Timorese judge." Website of the Serious Crimes Unit, http://socrates.berkeley.edu/~warcrime/Serious%20Crimes%20Unit%20Files/default.html (last visited Jan. 19, 2009).

[67] *See* UNTAET, *Policy on Justice and Return Procedures in East Timor*, Mar. 25, 2002, *available at* http://www.un.org/peace/etimor/DB/procedures.pdf. Part B of these procedures addresses those who have committed serious crimes during a particular period in 1999. *Id.* at pt. B ("A 'serious crime', for these purposes, includes acts such as murder, torture, sexual offences and large-scale crimes (e.g. organised destruction of property) committed between 1 January and 25 October 1999 as well as other Crimes Against Humanity.").

[68] *Id.* ("Serious crimes will be dealt with by East Timor's criminal justice system, in particular the *Serious Crimes Unit*, which is charged with investigating and prosecuting serious crimes, and the *Special Panels for Serious Crimes at the Dili District Court*.").

[69] *See* UNTAET, Regulation No. 2001/10, U.N. Doc. UNTAET/REG/2001/10 (July 13, 2001) [hereinafter CAVR Mandate], *available at* http://www.un.org/peace/etimor/untaetR/Reg10e.pdf. "There shall be established a Commission for Reception, Truth and Reconciliation." *Id.* § 2.1.

[70] ICTJ website Timor-Leste, *supra* note 50.

and policies that led to these violations. CAVR must refer to the prosecutor all offenses that CAVR deems appropriate, along with suggestions for prosecution.[71] CAVR shall also promote human rights, promote reconciliation, and help to restore the dignity of victims. One final objective of CAVR involved the re-integration of individuals into their communities who harmed those communities in some way through minor criminal or non-criminal offenses.[72]

¶29 The CAVR mandate included a Community Reconciliation Process (CRP) to assist individuals in re-integrating into their communities.[73] In particular, individuals responsible for less serious criminal or non-criminal acts could participate in the CRP by providing a statement that includes a description of their actions, an admission of responsibility for these acts, and a renunciation of the use of violence.[74] To determine eligibility to participate in the CRP, CAVR considers the nature of the acts committed, the total number of acts, and the individual's role in the crime. Serious criminal offenses are specifically excluded from consideration for CRP.[75] Prior to beginning CRP, clients must be informed that their statements will be given to the Office of the General Prosecutor and their statements may be used against them in future legal proceedings.[76]

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[71] See CAVR Mandate, *supra* note 69, § 3.1(e) (stating as an objective "the referral of *human rights violations* to the *Office of the General Prosecutor* with recommendations for the prosecution of offences where appropriate").

[72] *Id.* § 3.1(h). The nine objectives of the Commission include:

> (a) inquiring into *human rights violations* that have taken place in the context of the *political conflicts in East Timor*; (b) establishing the truth regarding past *human rights violations*; (c) reporting the nature of the *human rights violations* that have occurred and identifying the factors that may have led to such violations; (d) identifying practices and policies, whether of State or non-State actors which need to be addressed to prevent future recurrences of *human rights violations*; (e) the referral of *human rights violations* to the *Office of the General Prosecutor* with recommendations for the prosecution of offences where appropriate; (f) assisting in restoring the human dignity of *victims*; (g) promoting reconciliation; (h) supporting the reception and reintegration of individuals who have caused harm to their communities through the commission of minor criminal offences and other harmful acts through the facilitation of community based mechanisms for reconciliation; and (i) the promotion of human rights.

Id. § 3.1.

[73] *Id.* § 22.1. ("In seeking to assist the reception and reintegration of persons into their communities, the *Commission* may facilitate Community Reconciliation Processes . . . in relation to criminal or non-criminal acts committed within the context of the *political conflicts in East Timor* between 25 April 1974 and 25 October 1999 considered appropriate by the *Commission* under Section 24."

[74] *Id.* § 23.1. This section states:

> A person responsible for the commission of a criminal or non-criminal act (hereinafter: the Deponent) who wishes to participate in a Community Reconciliation Process in respect of such act must submit a written statement to the *Commission*. This statement must contain the following: (a) a full description of the relevant acts; (b) an admission of responsibility for such acts; (c) a explanation [sic] of the association of such acts with the *political conflicts in East Timor*; (d) an identification of the specific community in which the Deponent wishes to undertake a process of reconciliation and reintegration (hereinafter: the Community of Reception); (e) a request to participate in a Community Reconciliation Process; (f) a renunciation of the use of violence to achieve political objectives; and (g) the signature or other identifying mark of the Deponent.

Id.

[75] *Id.* at sched. 1. The criteria for an individual to be involved with the CRP include:

> (1) The nature of the crime committed by the Deponent: for example, offences such as theft, minor assault, arson (other than that resulting in death or injury), the killing of livestock or destruction of crops might be appropriate cases to form the subject of a Community Reconciliation Process. (2) The total number of acts which the Deponent committed. (3) The Deponent's role in the commission of the crime, that is, whether the Deponent organised, planned, instigated or ordered the crime or was following the orders of others in carrying out the crime. (4) In no circumstances shall a *serious criminal offence* be dealt with in a Community Reconciliation Process." *Id.*

[76] *Id.* § 23.3 ("Prior to the *Commission* accepting a statement under this Section, the Deponent must be

¶30 After CAVR deliberates based upon the individual's statements before the CRP, CAVR must inform the individual of the outcome and suggest an appropriate form of reconciliation. Acts of reconciliation may include community service, reparations, a public apology, or other acts of contrition.[77] The outcome of CRP as well as the suggestions for reconciliation made by CAVR form the basis of a final reconciliation agreement issued by CAVR. Information may be provided to CAVR on a confidential basis. If information is provided in this way, it must remain confidential except if requested by the Office of the General Prosecutor.[78] Finally, for an individual to be eligible to participate in CRP, that individual's particular acts had to be committed as part of the political crisis in East Timor between April 25, 1974 and October 25, 1999.[79]

¶31 CAVR, CRP and the prosecutorial arm of the United Nations, including the Office of the General Prosecutor and SCU, coexisted while respecting each other's specific jurisdictional reach and functions.[80] For example, before all CAVR hearings, the Office of the General Prosecutor was required to consider the case and agree that it should proceed through the CRP instead of being submitted for prosecution to the SCU or a similar prosecutorial body (i.e., as a result of constituting a serious crime). In addition, the final reconciliation agreement issued by CAVR as a result of a perpetrator's participation in CRP could take the form of a court order, which would allow for the perpetrator's immunity from prosecution by the SCU as long as the perpetrator fulfilled the terms of the reconciliation agreement.[81] Cases determined by the Prosecutor to be eligible for prosecution by the SCU, however, were not always prosecuted.[82] This allowed many serious offenders to go unpunished while less serious offenders voluntarily subjected themselves to what was often a humiliating process before the CRP.[83]

D. Strengths and Weaknesses of CAVR (East Timor) and TRC (Sierra Leone)

¶32 Both the truth commissions in East Timor and in Sierra Leone experienced differing degree of success. For example, in addition to creating an historical record of the abuses and providing a forum for perpetrator/ victim testimony, the Sierra Leone Truth Commission proposed various recommendations to the government of Sierra Leone.[84] These recommendations led directly to the creation of a UN mission in Sierra

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informed that a copy of the statement will be sent to the *Office of the General Prosecutor* and that its contents might be used against him or her in a court of law should the *Office of the General Prosecutor* choose to exercise jurisdiction. Only in circumstances where the Deponent indicates acceptance of this process and annotates the statement accordingly shall the statement be accepted by the *Commission*.").

[77] *Id.* § 27.7 ("Following the CRP Hearing, the CRP Panel shall deliberate upon the act of reconciliation which it considers most appropriate for the Deponent and inform the Deponent of the outcome of their deliberations. The act of reconciliation may include: (a) community service; (b) reparation; (c) public apology; and/or (d) other act of contrition.").

[78] *Id.* § 44.2 ("At the discretion of the *Commission*, any person shall be permitted to provide information to the *Commission* on a confidential basis. The *Commission* shall not be compelled to release information, except on request of the *Office of the General Prosecutor*.").

[79] *Id.* § 22.1.

[80] *See* CAVR, *Chega!: The CAVR Report*, at pt 9, ¶ 34, (2006) [hereinafter *CAVR Report*], *available at* http://www.cavr-timorleste.org/chegaFiles/finalReportEng/09-Community-Reconciliation.pdf.

[81] *Id.* at pt. 9, ¶ 5.

[82] *Id.* at pt. 9, ¶170 (stating that at the time of the final report, less than half of cases reported had been addressed).

[83] *Id.* (indicating that this situation led to unequal accountability and a lack of a sense of justice).

[84] ICTJ website Sierra Leone, *supra* note 19.

Leone, a Human Rights Commission, and various civil society groups charged with the task of implementing Truth Commission recommendations.[85] At the same time, however, there was a notable dearth in pre-established guidelines, or understandings, for how the Sierra Leone Truth Commission and Special Court were to interact, or co-exist, including how they shared information, how far their respective jurisdictions would reach (one notable exception perhaps being the handling of cases involving juvenile offenders), and how a dispute subject to resolution, or resolved, in one forum would be treated by the other forum.

¶33 On the other hand, the East Timor truth commission succeeded in the sense of reintegrating less serious offenders back into communities, and allowing communities to evaluate their own role in the human rights conflict.[86] However, the commission disappointed many community members by not being able to accommodate everyone who wished to participate in the reintegration process. Other related benefits provided by the reintegration process included giving communities an opportunity to celebrate the end of the conflict, training the East Timorese in arbitration methods, enforcing the value of the rule of law, providing an alternate means to justice, supporting the idea of forgiveness, and promoting future reintegration.[87] Although 1,400 cases were completed through the reintegration process, it is estimated that another 3,000 perpetrators could have participated if it had continued.[88]

¶34 Significantly, in contrast to the truth commission experience in Sierra Leone, the East Timor truth commission framework provided for a number of guidelines for how the commission was to interact with the prosecutorial arm of the UN (e.g., the Office of the Prosecutor and the SCU). For example, serious human rights abusers bypassed CAVR and CRP and went directly to the prosecutorial arm. In addition, various aspects of information exchange between CAVR/ CRP and the prosecutorial arm had been pre-arranged, including the exchange of confidential information. Finally, perpetrator/victim disputes resolved successfully by CAVR/ CRP (as evidenced by a perpetrator's fulfillment of the terms of a reconciliation agreement) were not subject to prosecution by the SCU, or a similar prosecutorial body.

E. The International Criminal Court: History and Structure[89]

¶35 The ad hoc tribunal created in Nuremberg after World War II set a precedent, in part, for the international community to hold individuals responsible for grave crimes.[90] The ad hoc criminal tribunals established by the United Nations to address the crises in the former Yugoslavia and in Rwanda continued the pattern of holding individuals responsible for grave breaches of human rights law.[91] Certain nations, however,

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[85] *Id.*
[86] *CAVR Report*, *supra* note 80, at pt. 9, ¶ 164.
[87] *Id.*
[88] *Id.* ¶ 167.
[89] *See* Totten & Tyler, *supra* note 5, at 1073-76.
[90] *See generally* Frederic Megret, *Epilogue to an Endless Debate: The International Criminal Court's Third Party Jurisdiction and the Looming Revolution of International Law*, 12 EUR. J. INT'L L. 247 (2001). Nuremberg dictum stating "crimes against international law are committed by men, not by abstract entities" has been used to affirm individual criminal responsibility for international crimes. *Id.* at 263 (citing The Trial of German Major War Criminals Sitting at Nuremberg, Judgment, 41-42 (1946).
[91] *See* Statute of the International Tribunal, May 25, 1993, 32 I.L.M. 1192 [hereinafter ICTY Statute],

recognized the need for a single, permanent court for the trial of these breaches because of the effort and cost, associated with the continual establishment of ad hoc tribunals in response to each period of grave human rights violations.[92]

¶36 The ICC was to be the first court established in advance of, rather than in response to, international human rights violations.[93] In constructing the definitions of crimes that would fall within the Court's jurisdiction, nations relied upon the statutes for the two regional criminal courts: the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR).[94]

¶37 In July of 1998, the Rome Statute was adopted at the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, also known as the Rome Conference.[95] On July 1, 2002, the Rome Statute entered into force after ratification by sixty State Parties.[96] A fundamental concept included in the Rome Statute

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available at http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept08_en.pdf. "The International Tribunal shall have the power to prosecute *persons* responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute." *Id.* art. 1 (emphasis added). Articles 2–5 contain definitions for crimes within the jurisdiction, such as genocide, crimes against humanity, and war crimes. *Id.* arts. 2-5; *see also* Statute of the International Criminal Tribunal for Rwanda, November 8, 1994, 33 I.L.M. 1602 [hereinafter ICTR Statute], *available at* http://www.un.org/ictr/statute.html. Article 1 states:

> The International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994, in accordance with the provisions of the present Statute.

Id. art. 1.

Articles 2-4 define the related crimes within the jurisdiction. *Id.* arts. 2-4.

[92] Mahnoush H. Arsanjani & W. Michael Reisman, *The Law-in-Action of the International Criminal Court*, 99 AM. J. INT'L. L. 385, 402 (2005).

[93] Previous ad hoc "tribunals at Nuremberg and Tokyo, may be called *ex post* tribunals, in that they are established *after* the acute and violent situation in which the alleged crimes occurred . . . . [*E*]*x ante* tribunals . . . are established *before* an international security problem has been resolved or even manifested itself . . . . The ICC is the archetypal *ex ante* tribunal." The ICC, as a permanent court, will deal with problems at times while they are still occurring. *Id.* at 385.

[94] For example, Article 6 of the Rome Statute, which defines genocide, contains text identical to that of Article 4(2) of the ICTY Statute. *Compare* Rome Statute, *infra* note 95, art. 6 ("'[G]enocide' means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such: [listing relevant acts]."), *with* ICTY Statute, *supra* note 91, art. 4(2) (identical language and listing relevant acts identical to those in the Rome Statute). Also, the listed acts in Article 7 of the Rome Statute, which defines crimes against humanity, is similar to the listed crimes against humanity in Article 5 of the ICTY Statute. Exceptions are Rome Statute Article 7(1)(d), which adds "forcible transfer of population," (1)(e), which adds other severe deprivations of liberty, (1)(g), which outlines additional sex crimes, (1)(h) which expands the definition of groups to be protected from persecution, and the additions of (1)(i) enforced disappearances and (j) apartheid. *Compare* Rome Statute, *infra* note 95, art. 7, *with* ICTY Statute, *supra* note 91, art. 5. Furthermore, Article 8 of the Rome Statute incorporates grave breaches of the Geneva Conventions of 1949 into its definition of war crimes. Rome Statute, *infra* note 95, art. 8. Similarly, the ICTR and ICTY Statutes also criminalize grave breaches of the Geneva Conventions. *See* ICTR Statute, *supra* note 911, art. 4 ("Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II"); ICTY Statute, *supra* note 911, art. 2 ("Grave breaches of the Geneva Conventions of 1949").

[95] Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute], *available at* http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf. The Rome Statute is an international treaty. However, because it is a treaty that establishes an institution—the International Criminal Court—it is referred to as a statute. *See id.* at pmbl., art. 1.

[96] Rome Statute, *supra* note 95, art. 126(1) ("This Statute shall enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations."). Following the adoption of the

is the concept of complementarity, whereby the ICC must respect and defer to an individual nation's investigation, or prosecution, of a criminal suspect who happens to also be of interest to the ICC. This respect, or deference, is only applicable, however, if the individual nation exhibits both an ability and willingness to investigate or prosecute the particular suspect.[97]

¶38 The International Criminal Court is comprised of the Presidency, an Appeals Chamber, the Trial Chamber, the Pre-Trial Chamber, the Office of the Prosecutor (Prosecutor's Office), and the Registry.[98] Judges are nominated and confirmed by the Assembly of State Parties (Assembly), and they are required to represent diverse geographic, gender, and legal backgrounds.[99] The Prosecutor is also nominated and confirmed by the Assembly. Critically, he or she has the independence to operate the Prosecutor's Office as a separate organ of the Court.[100] The Registry is responsible for all non-judicial aspects of the Court, including the Victims and Witnesses Unit that provides security and assistance for individuals testifying before the Court.[101] Although independent of the UN, the ICC does have an agreement of cooperation with the UN whereby both parties agree to exchange information and assist each other in various ways.[102] Funding is provided by the State Parties, the UN, and donations from non-governmental organizations (NGOs) and private donors.[103]

F. The International Criminal Court (ICC) and Sudan

¶39 The UN Security Council referred the Sudanese case to the ICC in March of 2005.[104] This referral occurred as a result of the serious violations of international human rights law in the Darfur region of Sudan. These violations, perpetrated by the Sudanese government and an affiliated militia known as the "Janjaweed," include the killing of

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Rome Statute at the Rome Conference in 1998, the Rome Statute entered into force on July 1, 2002 with the necessary number of countries having deposited ratifications to the UN Coalition for the International Criminal Court, History of the ICC, http://www.iccnow.org/?mod=icchistory (last visited Jan. 5, 2009). On July 18, 2008, Cook Islands acceded to the Rome Statute, bringing the total number of State Parties to 108. Coalition for the International Criminal Court, State Parties to the Rome Statute of the ICC as of July 18, 2008, http://www.iccnow.org/documents/RATIFICATIONSbyRegion_18_July-08.pdf (last visited Jan. 5, 2009).

[97] Rome Statute, *supra* note 95, art. 17(1)(a). The complementarity principle is defined in its entirety in Article 17 of the Rome Statute. *See infra*, note 118.

[98] Rome Statute, *supra* note 95, art. 34.

[99] *Id.* art. 36(4), (6)-(8). The Assembly consists of one representative for each State Party. *Id.* art. 112(1).

[100] *Id.* art. 42(1), (4). The Prosecutor can be removed by a vote of the Assembly if there is evidence of misconduct. *Id.* art. 46.

[101] *Id.* art. 43.

[102] *Id.* art. 2; Negotiated Relationship Agreement between the International Criminal Court and United Nations, U.N. Doc. A/58/874/Annex (Aug. 20, 2004), *available at* http://www.icc-cpi.int/library/asp/ICC-ASP-3-Res1_English.pdf. The negotiated agreement between the UN and the ICC is a basic agreement of mutual acknowledgment of status. Both organs agree to the exchange of information and cooperation in fulfilling their respective mandates. Relationship Agreement, *supra*, arts. 2, 5. UN officials are also permitted under the Agreement to testify before the Court if necessary. *Id.* art. 16.

[103] Rome Statute, *supra* note 95, arts. 115–16.

[104] S.C. Res. 1593, *supra* note 3. In addition to referral by the UN Security Council, there are two other ways cases can be brought before the ICC: 1) State Parties to the ICC may refer cases to the ICC, and 2) the Prosecutor may refer a case as a result of an independent investigation. *See* Rome Statute, *supra* note 95, arts. 13–15.

civilians, massacres, rape, looting, and other crimes against humanity and war crimes.[105] Upon the referral of the Sudanese case by the U.N, the ICC Prosecutor initiated an investigation into the situation in Darfur. The Prosecutor determined that there was sufficient evidence to request arrest warrants for two individuals involved in committing atrocities in Darfur.[106] The Pre-Trial Chamber of the ICC granted these requests in April of 2007, and issued the warrants for two Sudanese suspects.[107] Though Sudan has a legal obligation to turn over these suspects to the ICC for prosecution,[108] it has not done so as of yet.

II. INTERNATIONAL CRIMINAL COURT (ICC) DEFERRAL TO A SUDANESE TRUTH COMMISSION

¶40 After exploring the international community's support for a Sudanese truth commission, this Part argues that the International Criminal Court (ICC) would not have to defer to a Sudanese truth commission, and therefore could continue its prosecution of individuals for grave crimes committed in the Sudan. This argument has three principle bases for support: (1) the prosecution of high-level Sudanese suspects is in the "interests of justice;" (2) the Sudan has not shown a willingness to try suspects of human rights abuses in an impartial, independent fashion; and (3) prosecution by the ICC of Sudanese suspects is not a threat to international peace and security.

¶41 As in other countries where the ICC is investigating, the likelihood of a future Sudanese truth commission seems particularly high in light of the international community's continued insistence on the need for such a commission. In particular, the UN and prominent human rights groups have called for the development of a truth commission in the Sudan.[109] In a post-conflict Sudanese society, the UN, African Union (AU), and other groups, including non-governmental organizations (NGOs), may assist the Sudan in formulating such a commission.

¶42 Notably, the formation of a truth commission in the Sudan is unlikely to lead to a decision by the ICC Prosecutor not to prosecute any particular Sudanese suspect. There

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[105] Int'l Comm'n of Inquiry on Darfur, *Report to the United Nations Secretary-General*, § I(VI), U.N. Doc. S/2005/60 (Jan. 25, 2005) [hereinafter Report on Darfur], *available at* http://www.un.org/News/dh/sudan/com_inq_darfur.pdf. Under the governing Rome Statute, war crimes, crimes against humanity and genocide may be prosecuted by the ICC. *See* Rome Statute, *supra* note 95, art. 5(1). In addition, under the Statute, these crimes must be committed either by nationals of a State Party to the Statute or alternatively, the crimes themselves must occur in the territory of a State Party. *See id.* art 12(2). Finally, only crimes committed after July 1, 2002, may be prosecuted by the ICC. *See id.* art. 11.

[106] Int'l Criminal Court, Prosecutor's Application under Article 58(7), ICC-02/05-56, at 4, (Feb. 27, 2007), *available at* http://www.icc-cpi.int/library/cases/ICC-02-05-56_English.pdf (public redacted version) [hereinafter Prosecutor's Application].

[107] Int'l Criminal Court, Decision on the Prosecution Application under Article 58(7) of the Statute, ICC-02/05-01/07, at 42-43, (April 27, 2007), *available at* http://www.icc-cpi.int/library/cases/ICC-02-05-01-07-1_English.pdf. These suspects, Ahmad Harun and Ali Kushayb, have important roles in the government and military in the Sudan. For example, Harun is a government minister, and Kushayb led the Janjaweed, the primary militia affiliated with the Sudanese government. *See* Prosecutor's Application, *supra* note 106, at 31–33; s*ee also infra* note 111. The Prosecutor has recently sought an additional arrest warrant for the President of the Sudan. *See* Al Bashir Press Release, *supra* note 4.

[108] Rome Statute, *supra* note 95, art. 89(1).

[109] For a description of UN support for a Sudanese truth commission, see *supra* note 3. For a description of the development of truth commissions in other countries where the ICC is investigating, such as Uganda, the Central Africa Republic, and the Democratic Republic of Congo, see *supra* note 2.

are three possible ways that the ICC could defer to a national truth commission such as one in the Sudan, and thereby choose not to prosecute a particular suspect. First, the ICC Prosecutor could decide, and the Pre-Trial Chamber could agree, that the investigation and prosecution of a suspect is not in the "interests of justice."[110] Given the complicity of prominent, high-level Sudanese actors in the grave human rights violations in the Sudan,[111] and the relative environment of impunity such actors have encountered in the Sudan,[112] it would generally not be in the interest of justice for the ICC Prosecutor to defer to a Sudanese truth commission (e.g., refrain from prosecuting). This conclusion is

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[110] Rome Statute, *supra* note 95, art. 53(1). Article 53(1) states:

> The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether: . . . (c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the *interests of justice*.
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> *Id.* (emphasis added).

Also, Article 53(2) provides:

> If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because: . . . (c) A prosecution is not in the *interests of justice*, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime; the Prosecutor shall inform the Pre-Trial Chamber and the State making a referral under article 14 or the Security Council in a case under article 13, paragraph (b), of his or her conclusion and the reasons for the conclusion.
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> *Id.* (2) (emphasis added).

Note that the Pre-Trial Chamber (PTC) has the power to request that the Prosecutor reconsider his decision not to investigate. *Id.* art. 53(3)(a). The PTC also has the power to require the Prosecutor to investigate or prosecute a case, even if the Prosecutor had previously concluded it was not in the "interest of justice" to do so. *Id.* art. 53(3)(b).

[111] *See* Report on Darfur, *supra* note 105, at 74–77. According to this Report, the Sudanese government has direct ties to the Janjaweed, militia forces responsible for many of the human rights violations committed against Sudanese civilians. For example, the government provides military support to the Janjaweed, and even has ordered the militia to attack civilians. *Id.* Prominent members of the Sudanese government implicated in the massive human rights violations include Ahmad Harun, who was Minister of the Interior in the Sudan and head of the "Darfur Security desk" for the government in 2003 when many of the crimes occurred, Prosecutor's Application, *supra* note 106, at 31-32, and Sudanese President Hassan Ahmad Al Bashir. For further information regarding Harun' s involvement in the crimes in Darfur, see *id.* at 51-69. For further information regarding Al Bashir's involvement, *see* Al Bashir Press Release, *supra* note 4.

[112] As evidence of the current environment of impunity in the Sudan, consider the treatment by the Sudanese judicial system of two high-level suspects recently indicted by the ICC Prosecutor (and for whom arrests warrants have been issued): Ahmad Harun and Ali Kushayb. Kushayb has recently been released from prison for "lack of evidence." *See* Prosecutor of the Int'l Criminal Court, *Sixth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005)*, ¶13, (Dec. 5, 2007), *available at* http://www.icc-cpi.int/library/organs/otp/OTP-RP-20071205-UNSC-ENG.pdf [hereinafter Sixth Report to the UN Security Council] ("In relation to Ali Kushayb, against whom the [Sudanese government] had previously indicated that there were investigations, on 30 September then Foreign Affairs Minister Lam Akol reportedly stated that he was released for lack of evidence"). Harun has not been subject to any criminal proceedings or been investigated in any way. *See id.* ¶ 15 ("All public statements concerning Ahmad Harun indicate that he would neither be surrendered nor subject to national proceedings. The [Sudanese government] has not conducted nor is conducting any proceedings in relation to the Prosecution's case."). Moreover, though thirteen (13) national prosecutions for Darfur-related crimes have been carried out in the Sudan as of the Spring of 2007, these prosecutions were all of low-level criminal suspects. Human Rights Watch, *Sudan: National Courts Have Done Nothing on Darfur* (June 11, 2007), *available at* http://www.iccnow.org/documents/HRW_SudaneseCourts_Darfur_11june07_eng.pdf. For a further discussion of this environment of impunity, and its impact on the ICC's ability to continue prosecutions in the Sudan despite attempts at national prosecutions there, *see generally* Totten & Tyler, *supra* note 5, at 1095-1098.

supported by the mission of the ICC itself: to end cultures of impunity, like the one found in the Sudan, through prosecution of individual suspects who commit grave crimes.[113] In addition, international legal obligations may determine what is in "the interests of justice" in the Sudanese context. For example, there may be an international legal obligation for the ICC Prosecutor to pursue certain Sudanese suspects, especially those who have committed genocide and certain war crimes such as torture.[114] Both of these types of crimes have been committed by high-level Sudanese actors, including government officials.[115] Finally, due to the lack of meaningful and viable alternatives, justice in the Sudanese context may be best served through the prosecution of those most responsible for grave breaches of international criminal law. For example, local prosecutions have not been successful in bringing to justice high-level perpetrators in the Sudan.[116] It is unclear how a Sudanese truth commission could succeed in this task when the judicial system has failed.

¶43 In addition, the ICC Prosecutor would not be able to prosecute individual, high-level Sudanese suspects under the principle of complementarity **if** the Sudan showed a willingness and ability to either prosecute or investigate them. The Sudan has not shown such a willingness, however, as evidenced by its refusal to prosecute one ICC suspect (Harun), and its release of another from prison without formal prosecution (Kushayb). In fact, to date, the Sudanese judiciary has only tried a small number of low-level suspects for Darfur crimes.[117] In addition, under the complementarity principle, the ICC Prosecutor must defer to a local prosecution or investigation if it is legitimate in nature (i.e., not a "show trial" designed to shield an individual from liability or prosecution).[118]

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[113] *See* Rome Statute, *supra* note 95, at pmbl., paras. 4–5 ("Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation. Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.").

[114] This obligation stems from both treaty law and international customary law. For a discussion of applicable treaty law, see Darryl Robinson, *Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court*, 14 EUR. J. INT'L L. 481, 490-91 (2003) (citing Convention on the Prevention and Punishment of the Crime of Genocide art. 4, Dec. 9, 1949, 78 U.N.T.S. 277 [hereinafter Genocide Convention]; Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment art. 7, Dec. 10 1984, 23 I.L.M. 1027; Geneva Convention relative to the Protection of Civilian Persons in Times of War arts. 146–47, Aug. 12, 1949, 75 UNTS 287). For a discussion of international customary law supporting a duty to prosecute certain crimes, see Robinson, *supra* (citing Reservations to the Convention on the Prevention and Punishment of Genocide, Advisory Opinion, 1951 I.C.J. 15 (May 28), *available at* http://www.icj-cij.org/docket/files/12/4283.pdf; Prosecutor v. Anto Furundzija, Case No. IT-95-17/1-7, Judgment, paras. 137–148, 155 (Dec. 10, 1998)). *See also* Michael P. Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court*, 32 CORNELL INT'L L.J. 507, 514–521 (1999) [hereinafter *Amnesty Exception*] (describing in detail international legal obligation to prosecute "grave breaches" of the 1949 Geneva Conventions as well as genocide under the Genocide Convention).

[115] *See* Al Bashir Press Release, *supra* note 4.

[116] *See supra* note 112.

[117] *See id.*

[118] Rome Statute, *supra* note 95, at art. 17(2)(a)–(c). The complementarity provision in the Rome Statute resides principally in Article 17. The statute, in pertinent part, states:

> (1) Having regard to paragraph 10 of the preamble and article 1 [establishing the complementarity principle], the Court shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution. . . .
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> (2) In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

A truth commission proceeding might qualify as a legitimate investigation carried out to bring an individual to justice (i.e., through the payment of reparations, public shaming, lustration, etc.).[119] This would be especially the case if the investigation and proceeding by the commission was impartial, conducted without unnecessary delay, included participation by both victims and perpetrators, and allowed for various forms of victim assistance.[120] In the context of the Sudan, however, such a truth commission investigation and proceeding applied to high-level perpetrators seems unlikely given both the lackluster performance thus far of the Sudanese judiciary in trying prominent Darfur suspects, and the refusal of the Sudanese government to execute arrest warrants issued by the ICC for several of these suspects.[121] Accordingly, the ICC Prosecutor should view with suspicion any attempts by the Sudan to make high-level perpetrators immune from ICC prosecution under the complementarity principle by subjecting them to a local truth commission investigation and proceeding. (A possible truth commission for the Sudan, however, of more limited scope and directed towards low –level perpetrators, will be discussed in Part IV of this Article).

¶44 Note that in other contexts outside the Sudan, analysis of the ICC complementarity and interest of justice provisions may proceed differently. For example, victims of the human rights crisis in the Democratic Republic of the Congo (DRC) have expressed interest in a truth commission.[122] Should such a commission form in the DRC, where the ICC is also investigating and prosecuting individuals, it could perhaps be viewed with less skepticism than a similarly situated Sudanese commission. Unlike in the case of the Sudan, the DRC has cooperated with the ICC, in particular with the execution of arrest warrants for suspects committing human rights violations. The DRC also referred the violations to the ICC in the first place.[123] These types of actions by a

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(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5 [stating crimes in the Court's jurisdiction]; (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice; (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances is inconsistent with an intent to bring the person concerned to justice.

(3) In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

Id. at art. 17(1)–3.

[119] For further scholarly discussion on whether truth commissions constitute "investigations" and "proceedings" under the complementarity principle embodied in Article 17 of the Rome Statute, see Robinson, *supra* note 114, at 498–502; *Amnesty Exception*, supra note 114, at 524–25.

[120] Rome Statute, *supra* note 95, art. 17(2)(a)–(c) (the text of which *supra*, note 118); *See also* Declan Roche, *Truth Commission Amnesties and the International Criminal Court*, 45 BRIT. J. CRIMINOLOGY 565, 575-579 (2005) (arguing, in essence, that to satisfy the ICC complementarity principle, a truth commission should have five key attributes: (1) the commission's establishment should be supported by victims; (2) amnesties granted by the commission should be conditional in nature (e.g., contingent upon the perpetrator performing some act such as a confession); (3) widespread participation in the commission by victims and perpetrators; (4) significant efforts to assist victims [e.g., through payment of reparations, symbolic acts like building monuments in victims' honor and/ or providing an emotional "space" where victims can, among other things, confront perpetrators]; and (5) the commission should be part of a wider process of reconstruction and reform by the nation that experienced the period of human rights abuses).

[121] *See supra* note 112 and accompanying text (describing the lackluster efforts by the Sudanese judiciary and government in both executing arrest warrants for and prosecuting suspects also indicted by the ICC).

[122] *See supra,* note 2 (discussing expressions of interest in truth commissions in countries where the ICC is either investigating or prosecuting individuals).

[123] *See* Press Release, Int'l Criminal Court, First Arrest for the International Criminal Court (Mar. 17,

country where the ICC is investigating could serve at least as partial evidence that a truth commission was created legitimately, and not for the purpose of shielding individuals from prosecution. Of course, all aspects of a DRC truth commission would have to be evaluated before the ICC defers to it (e.g., suspend prosecution under the complementarity and/or interest of justice provisions). For example, before granting a deferral in any particular case, the ICC Prosecutor and Pre-Trial Chamber (PTC), as the two primary entities charged with the decision to defer under the Rome Statute, should examine such aspects as whether the commission had widespread public support and participation, included mechanisms for victim assistance, and avoided "blanket," non-conditional amnesties.[124]

¶45 In this regard, the Prosecutor and PTC should look to the Commission for Reception, Truth, and Reconciliation (CAVR) in East Timor as an example of a commission that could satisfy the ICC complementarity and interest of justice requirements. This Commission allowed for various forms of victim assistance, including the payment of reparations. In addition, CAVR allowed for the possibility of prosecution (e.g., avoided "blanket" amnesties), particularly in the case of suspects committing serious crimes. To the extent CAVR permitted amnesties, these were individual, conditional and available only for those who committed less serious offenses. Finally, CAVR permitted widespread participation by perpetrators and victims in their individual communities, most notably through CRP.[125]

¶46 As a final method of deferment to a Sudanese truth commission, the UN Security Council can require that the ICC Prosecutor withhold prosecuting cases such as the ICC case against high-level human rights violators in the Sudan.[126] To do this, the Security Council would have to determine that the continued prosecution of these perpetrators in the Sudan by the ICC represents a threat to international peace and security.[127] For

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2006), *available at* http://www.icc-cpi.int/pressrelease_details&id=132.html; *see also* Press Release, Int'l Criminal Court, Prosecutor Receives Referral of the Situation in the Democratic Republic of Congo (Apr. 19, 2004), *available at* http://www.icc-cpi.int/press/pressreleases/19.html; Totten & Tyler, *supra* note 5, at 1090 n.91, 1097 n.124 and accompanying text (describing failure of Sudan to cooperate with ICC in execution of arrest warrants for prominent ICC suspects).

[124] Under the Rome Statute, the ICC Prosecutor and PTC have a primary role in determining whether a case is admissible before the ICC under the complementarity and interest of justice principles. For example, a referring State or the Security Council (if it originally referred the case to the ICC) may request the PTC to review a decision by the ICC Prosecutor not to proceed with a case under the complementarity or interest of justice of principles. On the other hand, a decision by the ICC Prosecutor not to continue an investigation under the interest of justice provision is immediately reviewable by the PTC. *See* Rome Statute, *supra* note 95, art. 53; s*ee also id.* art. 18(2) ("At the request of that State, the Prosecutor shall defer [under the principle of complementarity] to the State's investigation of those persons unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation."). Finally, decisions regarding the admissibility of cases under the complementarity principle as well as under other jurisdictional provisions (e.g., the interest of justice principle) may be challenged in front of the PTC, an ICC Trial Chamber or Appeals Chamber. *See id.* art. 19(6).

[125] See *supra* notes 69 through 79 and accompanying text, for a detailed discussion of these characteristics of the truth commission in East Timor.

[126] *See* Rome Statute, *supra* note 95, art. 16 (" No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.").

[127] *See id.*; *see also* UN Charter ch. VII, art. 39 ("The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken . . . to maintain or restore international peace and security.").

example, the Council could find that a newly formed truth commission may promote peace in the Sudan and foster reconciliation in a way that ICC prosecutions of these perpetrators would not. The Council is unlikely to make this finding in the Sudanese context, however, because it actually referred the Sudan case to the ICC in the first place. In doing so, the Council determined that certain aspects of the human rights crisis in the Sudan do indeed constitute a threat to international peace and security.[128] Moreover, the environment of impunity that currently exists in the Sudan for high-level perpetrators suggests that Sudanese citizens will continue to be threatened and regional peace compromised, until an external entity like the ICC intervenes. Though any future Sudanese truth commission proceeding and investigation will not be a bar to the continued prosecution by the ICC of particular high-level perpetrators, such a commission may be able to play a pivotal role in fostering reconciliation between low-level perpetrators and their victims, and restoring dignity to the local community (for further discussion of the interrelationship between the ICC and truth commissions related to low-level perpetrators, see Parts III and IV).

III. INFORMATION SHARING BETWEEN THE ICC AND A SUDANESE TRUTH COMMISSION

¶47 While Part II of the Article posits that ICC prosecution of particular high-level Sudanese perpetrators can continue in spite of the formation of a truth commission in the Sudan, this Part will focus on how such a truth commission directed primarily towards reconciliation of victims and low-level perpetrators might interact with the ICC. For example, in the case of the Sudan as well as other countries where the ICC conducts investigations, the ICC simply does not have the human or financial resources to prosecute all criminals responsible for human rights violations. Rather, the ICC, in line with one of its founding purposes, focuses its efforts on those individuals most responsible for serious violations of international criminal law.[129] As a result, for the large numbers of low-level perpetrators in the Sudan and elsewhere, alternative justice mechanisms like a truth commission must be relied upon in addition to international and domestic prosecutions.

¶48 In the context of Sierra Leone, Priscilla Hayner and others have argued for a conditional approach to information sharing between the Truth and Reconciliation Commission and Special Court, whereby only certain information passed from the Commission to the Court.[130] The ICC should adopt a similar approach with respect to a

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[128] *See* S.C. Res. 1593, *supra* note 3; *see also* Rome Statute, *supra* note 95, art. 13, 13(b) ("The Court may exercise its jurisdiction with respect to a crime referred to in Article 5 in accordance with the provisions of this Statute if: . . . (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.").

[129] *See* Rome Statute *supra* note 95, at pmbl, ¶ 4; *id.* art. 5 ("The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole").

[130] *Exploring the Relationship, supra* note 48, at 10–15. Hayner et. al. also posit two other models for information sharing between truth commissions and international tribunals. *See supra* note 6. One is a "firewall" model whereby no information is shared by the truth commission with the international tribunal, or court. Hayner concludes that though this model has the benefit of encouraging testimony by perpetrators and others before the commission (i.e., perpetrators will not fear that the information they provide to a commission will be shared with a tribunal to prosecute them), this benefit is outweighed by the fact that not sharing certain information with a tribunal may lead to an unfair trial, and ultimately a miscarriage of justice (i.e., critical exculpatory information that would exonerate the accused will be withheld from the

truth commission that might form in one of the countries in which it is carrying on an investigation and conducting prosecutions, such as the Sudan. For example, if truth commission information has already been exposed to public scrutiny (i.e., testimony is provided to a truth commission during a public hearing), then the ICC should be able to utilize this information in carrying out one of its prosecutions.[131] In the Sudanese example, the ICC prosecutor could use public testimony given before a Sudanese truth commission to prosecute indicted individuals.

¶49 When information is provided to a truth commission under a promise of confidentiality, however, the ability of the ICC to use this information should be more restricted under the conditional approach. In the context of Sierra Leone, Hayner et. al. have argued that this type of information should only be available to prosecutors or defense counsel when: (1) it pertains to information which is essential to the fair determination of the case before it; and (2) the information cannot reasonably be obtained from another source.[132] Similarly, when the ICC Prosecutor or defense attorney seeks information provided to a truth commission in confidence, the request for information should satisfy these two requirements, and be as specific as possible.[133] Only if these

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tribunal). *See id.* at 8–9. Another model posited by Hayner et. al. is the "free access" model. This model would allow for information to pass freely from commission to tribunal. Hayner cautions against this model because of the chilling effect it would have on those otherwise willing to testify before the commission, and because of the perception it would create that the commission is "an investigative arm" of the tribunal; *See id*. at 9–10. Note that the laws applicable to the Sierra Leone Special Court and Truth and Reconciliation Commission were not entirely clear on whether information provided to the Commission in confidence could be ordered disclosed by the Special Court. *See supra*, note 48.

[131] *See Exploring the Relationship*, *supra* note 48, at 10.

[132] *Id.* at 12. Note that this approach to information sharing has not been actually adopted either in Sierra Leone or East Timor. In the case of Sierra Leone, there is uncertainty whether information provided to the Truth and Reconciliation Commission in confidence could be ordered disclosed by the Special Court. *See supra* note 48. In the case of East Timor, information provided to the truth commission in confidence is available to the Prosecutor upon request. *See supra* note 78 and accompanying text.

[133] William Schabas, in the context of Sierra Leone, has also argued that requests for confidential information from truth commissions by the prosecutor or defense counsel of an international tribunal should be as specific as possible. *See* Schabas, *TRC, supra* note 48, at 32 ("Probably, defense counsel will have to demonstrate with reasonable precision the nature of any evidence they believe to be in the possession of the [Sierra Leone Truth] Commission before judges [of the Special Court] would even entertain the issue of breaching the confidentiality of the Commission."). Interestingly, Schabas does not directly advocate for a conditional approach to the sharing of confidential information between a truth commission and international war crimes tribunal, at least in the case of Sierra Leone. Rather, Schabas contends that confidential information provided to a truth commission may be privileged, and cites Rule 71 [now Rule 73] of the Rules of Procedure and Evidence of the International Criminal Court to support his claim. *See id.* For the relevant portion of Rule 73, *see infra* note 134. Schabas argues for the applicability of this privilege because all three elements of Rule 71 (2) [now 73(2)] are satisfied: (1) those communicating information to a truth commission under promise of confidentiality do so with the understanding that their communication will remain private; (2) confidentiality is necessary to maintain the relationship between the truth commission and testifying individual (i.e., the testifying individual must feel free to reveal all relevant information); and (3) recognition of the privilege furthers the objectives of the Court by ensuring that Court and Commission are able to both contribute in the most profound way to justice and reconciliation. *See* Schabas, *TRC*, *supra* note 48, at 32-33. For the relevant portion of Rule 73, *see infra* note 134. But even Schabas admits that the privilege might not be applicable in all circumstances, especially when application of the privilege would undermine the right to a fair trial: "But even if the judges were prepared to recognize that TRC testimony given in confidence was privileged, they might also conclude that respect for the privilege entails a breach of the right to a fair trial. And all concerned parties, including the Prosecutor and the TRC, have an interest in fair trials taking place. A truth and reconciliation commission will hardly want to contribute to a system where the rights of the accused are compromised." Schabas, *TRC*, *supra* note 48, at 33–34. Perhaps meshing the approaches of Hayner et. al. and Schabas strikes the necessary balance here; that is, confidential information provided to a truth commission is

requirements are satisfied would the information provided in confidence to the truth commission not be "privileged" under the Rome Statute, and hence subject to disclosure to the ICC.[134]

¶50 Furthermore, in the case of the disclosure of confidential truth commission information to the ICC, the Prosecutor or defense counsel should seek an order from the Pre-Trial Chamber (PTC) of the ICC requesting that the truth commission in the affected country (i.e., the Sudan) disclose the information in question. In this way, the Pre-Trial Chamber will serve as the decision-maker on all matters related to information sharing between a truth commission and the ICC. Selecting the PTC as the final decision-maker in these matters finds support in the ICC statutory regime itself; for example, other significant powers, such as the power to issue arrest warrants,[135] authorize particular investigations,[136] and order prosecutions,[137] also reside in the PTC. In addition, using the PTC as the focal point for information sharing decisions ensures a greater degree of impartiality and independence in the making of the decisions than if a Trial Chamber itself was assigned this role. Unlike a Trial or Appeals chamber of the ICC, the PTC is not directly responsible for the actual trial of a particular case, including the determination of final judgment and sentence.[138] As a result, PTC judges' decisions whether to order disclosure of information will be more objective since they are further

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generally privileged and not subject to disclosure except when: (1) it pertains to information which is essential to the fair determination of the case before it; and (2) the information cannot reasonably be obtained from another source. Examples of this type of confidential information might be information tending to prove the innocence of an accused, (i.e., exculpatory information), or information which contradicts key information provided by a trial witness.

[134] *See supra* note 133. Rule 73 of the Rules of Procedure and Evidence of the International Criminal Court states in pertinent part:

> (1) [C]ommunications made in the context of the professional relationship between a person and his or her legal counsel shall be regarded as privileged, and consequently not subject to disclosure, unless: (a) The person consents in writing to such disclosure; or (b) The person voluntarily disclosed the content of the communication to a third party, and that third party then gives evidence of that disclosure.
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> (2) . . . [C]ommunications made in the context of a class of professional or other confidential relationships shall be regarded as privileged, and consequently not subject to disclosure, under the same terms as in sub-rules 1 (a) and 1 (b) if a Chamber decides in respect of that class that: (a) Communications occurring within that class of relationship are made in the course of a confidential relationship producing a reasonable expectation of privacy and non-disclosure; (b) Confidentiality is essential to the nature and type of relationship between the person and the confidant; and (c) Recognition of the privilege would further the objectives of the Statute and the Rules.

Int'l Criminal Court, *Rules of Procedure and Evidence*, R. 73, ICC-ASP/1/3 (Sept. 2002) [hereinafter *ICC Rules of Procedure and Evidence*], *available at* http://www.icc-cpi.int/library/about/officialjournal/Rules_of_Proc_and_Evid_070704-EN.pdf

[135] Rome Statute, *supra* note 95, art. 58(1) (bestowing power to issue an arrest warrant in the Pre-Trial Chamber).

[136] *Id.* art. 15(4) (conditioning power of Prosecutor to initiate an investigation on authorization by the Pre-trial Chamber); s*ee also id.* art. 57(3)(d) (establishing that Pre-Trial Chamber may authorize Prosecutor to investigate within a State Party without permission of the State if it is evident that the State is unable due to lack of authority). See *supra* note 110 and *infra* note 137, for another specific example of when the Pre-Trial Chamber can order an investigation by the Prosecutor.

[137] Rome Statute, *supra* note 95, art. 53(3)(b) (establishing that the PTC has the power to require the Prosecutor to investigate or prosecute a case, even if he had previously concluded it was not in the interest of justice to do so). See also *supra* note 110 and accompanying text, for an additional explanation of the interest of justice provision.

[138] For a description of the separate divisions, or chambers, within the ICC, see Rome Statute, *supra* note 95, art. 34(b) (creating an Appeals, Trial and Pre-Trial Division within the ICC); art. 39(1)–(2) (creating Chambers within each separate Division of the ICC, and assigning a certain number of judges to each of these Chambers).

removed from the actual hearing and prosecution of a case (which is the duty of the judges of the Trial and Appeals chambers). This removal, or distance, of PTC judges from the direct prosecution of a case is ensured by the ICC Statute itself, which prohibits a PTC judge from serving as a Trial Chamber judge on the same case.[139]

¶51 In the process of making its decision to order release of information belonging to a truth commission, the PTC should hold a hearing where it considers the opinion of commission officers, the victims, perpetrators or witnesses who originally provided the information to the commission, and the other side to the case (i.e., prosecutor or defense counsel).[140] After holding its hearing, the PTC will either order that the information be disclosed by the commission, or that the information is of a type that does not merit disclosure (i.e., it is not essential to the fair determination of a case, or it can be obtained from a source independent of the commission).[141]

¶52 Note that if the PTC orders disclosure to the ICC Prosecutor of information provided in confidence to a truth commission, the Prosecutor should be barred from using this information to prove the guilt of the person who originally provided the confidential information. This bar is consistent with the right against self-incrimination provided through the ICC Statute.[142] The bar also provides an incentive to perpetrators and others to provide information to the truth commission in the first place.[143] The confidential information ordered disclosed could, however, be used against others facing prosecution before the ICC. It also could also be used to impeach the credibility of the person who originally provided it (i.e., if the person later makes a statement before the ICC which is inconsistent with the information he or she provided in confidence to the truth commission).[144] While requests for information belonging to the truth commission

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[139] Interestingly, though judges of the Pre-Trial and Trial Divisions can serve in both Divisions, no judge from these Divisions can serve on the same case as a member of both Divisions. *See id.* art. 39(4) ("Nothing in this article shall, however, preclude the temporary attachment of judges from the Trial Division to the Pre-Trial Division or vice versa, if the Presidency considers that the efficient management of the Court's workload so requires, provided that under no circumstances shall a judge who has participated in the pre-trial phase of a case be eligible to sit on the Trial Chamber hearing that case."). This provision helps to ensure the effective independence and impartiality of judges in each of the divisions.

[140] *See Exploring the Relationship*, *supra* note 48, at 12. Hayner et al. argue that in the case of Sierra Leone, these individuals should be given an opportunity to be heard before the Special Court if it is in the interest of justice to do so. Hayner also argues that the safety of individuals who originally provided the information to the commission should likewise be considered by the Court, and when necessary, adequate protective measures should be applied when the Court determines such individuals to be at risk. *Id.* Similarly, the ICC should provide protective measures to individuals who feel at risk as result of disclosure of TRC information. These measures are clearly authorized by the Rome Statute. *See, e.g.*, Rome Statute, *supra* note 95, art. 43(6) (creating a Victims and Witnesses Unit within the Registry of the Court responsible for protecting victims and witnesses); art. 68(2) (allowing for evidence to be presented *in camera* when safety of witness, victim or accused endangered); art. 68(5) (allowing Prosecutor to submit evidence in summary form in pre-trial proceedings when disclosure by witness herself would cause grave threat to her safety).

[141] The PTC, if it orders disclosure, should evaluate the information received from the truth commission and verify that it meets the two pronged test discussed in the text. If, for some reason, it does not, then the information should still be withheld from the party requesting it. *See Exploring the Relationship*, *supra* note 48, at 12.

[142] Rome Statute, *supra* note 95, art. 67(1)(g) ("[The accused shall] [n]ot to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence.").

[143] *Exploring the Relationship*, *supra* note 48, at 13.

[144] *See id.; See supra* note 36.

should be as specific as possible,[145] the ICC Prosecutor and defense counsel may not always possess knowledge of certain key information in the hands of the commission. Accordingly, in the interest of promoting justice and fair play, information which would lead to the acquittal of an individual before the ICC (e.g., "critical exculpatory information") should be made available to a party by the commission even in the absence of a formal request.[146]

IV. SENTENCING CONSIDERATIONS FOR SUDANESE ICC DEFENDANTS WHO HAVE TESTIFIED BEFORE A TRUTH COMMISSION

¶53 A Sudanese truth commission as well as other commissions constituted in countries where the ICC is investigating should ideally be seeking testimony from witnesses, victims and low-level perpetrators in order to create a record of human rights abuses and reconcile post-conflict societies. Modern-day truth commissions should follow this general approach, similar to the one adopted by the truth commission in East Timor, to avoid any unnecessary conflict with the ICC.[147] Nevertheless, a situation may arise where a high-level perpetrator of interest to the ICC Prosecutor has provided testimony to a truth commission.[148] If the ICC seeks to prosecute such a perpetrator, one might question whether that perpetrator's participation in the truth commission process should in any way affect his or her prosecution or sentence (in the event of successful prosecution)? While the answer to this question may vary depending on the peculiarities of the situation in the particular country where the ICC is investigating, the Sudanese

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[145] For example, requests for information by a party should be "sufficiently specific so as not to be a 'fishing expedition,' but need not be so specific as to precisely identify which documents shall be disclosed." *Id.* at 14 (citing *Prosecutor v. Blaskic*, Case No. IT-95-14, Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, ¶ 4 (Sept. 26, 2000)). A request "may be deemed [sufficiently] specific if it asks for statements given *by* named persons, but may be deemed too broad if it asks for all statements given *about* named persons." *Id. See also* Schabas, *TRC*, *supra* note 48, at 32.

[146] *Exploring the Relationship, supra* note 48, at 14 ("In general, critical exculpatory information should be shared."). Regarding incriminating information, while the commission should encourage the release of this information to the ICC by the party providing it to the commission, the primary avenue to obtain this information should be a formal request by a party to the Pre-Trial Chamber of the ICC.

[147] The focus of the ICC Prosecutor under the Rome Statute is on perpetrators of grave international crimes (e.g., "high-level" perpetrators). *See supra* notes 113 and 129. For a description of the prohibition on the participation of high-level perpetrators in the truth commission process in East Timor, see *supra* note 75 and accompanying text. Note that juvenile perpetrators, even if "high-level," might still be handled principally by a truth commission in light of the lesser degree of culpability and greater possibility of rehabilitation typically associated with this class of perpetrators. Such treatment of juvenile offenders was encouraged in East Timor. *See supra* notes 38-42 and accompanying text.

[148] Note that the putative high-level perpetrator's testimony may be provided to the truth commission either before or *after* that perpetrator's indictment by the ICC. This possibility is apparently permitted by the Sam Hinga Norman decision of the Special Court for Sierra Leone. In the appeals decision issued in this case, the judge of the international tribunal (i.e., the Special Court) permitted the giving of testimony to a truth commission (i.e., the Sierra Leone Truth and Reconciliation Commission) by an indicted person in the tribunal's custody provided that: (1) the person's testimony was provided through sworn affidavit, and not given in public; and (2) any additional testimony provided by this person to the truth commission was given *in camera* (i.e., in a private hearing within the commission's chambers). *See* Michael Nesbitt, *Lessons from the Sam Hinga Norman Decision of the Special Court for Sierra Leone: How trials and Truth Commissions can Co-exist*, 8 GERMAN L.J. 977, 1002 (2007) (citing *Prosecutor v. Norman*, Case No. SCSL-2003-08-PT, Decision on Appeal by the TRC and Norman, paras. 39, 41 (Nov. 28, 2003), *available at* http://www.sc-sl.org/LinkClick.aspx?fileticket=rYK5weliv5I=&tabid=193).

example is illustrative of the range of options available to the Prosecutor. In particular, two options will be explored in this section: amnesty and reduced charges.

A. Amnesty

¶54 If a Sudanese truth commission decided to grant a "blanket," unconditional amnesty to high level perpetrators, this should not bar the ICC from prosecuting this class of perpetrators. Drawing upon the arguments in Part II of this article, a truth commission amnesty in the Sudanese context would not serve the "interests of justice" if applied to a high-level perpetrator. As a result, the ICC Prosecutor could still proceed with the prosecution of such a perpetrator under the Rome Statute.[149] Factors for deciding whether the application of a truth commission amnesty to a particular perpetrator is in the "interests of justice," include the gravity of the crime and the role of the perpetrator in the crime.[150] Because high-level perpetrators are those who commit grave crimes, and have a significant role in these crimes, the "interests of justice" would be best served by allowing the ICC Prosecutor to prosecute these individuals. Moreover, in the particular context of Sudan, justice would not be served through truth commission granted amnesty to high-level perpetrators because these very perpetrators maintain high-level positions in government and the military, and therefore would, in all likelihood, be the ones creating the opportunity for amnesty.[151] Not prosecuting these high-level perpetrators would only

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[149] *See* Rome Statute, *supra* note 95, art. 53.

[150] *Id.* art. 53(2)(c).

[151] For a discussion of the governmental and military roles of high-level human rights violators in the Sudan, and the overall environment of impunity in which they operate, see *supra* notes 4, 107, and 111–112. *See also* Thomas Hethe Clark, *The Prosecutor of the International Criminal Court, Amnesties, and the Interests of Justice: Striking a Delicate Balance*, 4 WASH. U. GLOBAL STUD. L. REV. 389, 409-410 (2005) [hereinafter *Delicate Balance*].

> It is important to determine whether the amnesty will serve the security and social-rehabilitation requirements of the transitional society. A crucial indicator of whether the amnesty was granted with the proper purposes in mind is the identities of the parties responsible for the amnesty.
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> . . . [P]rograms of self-amnesty by a former regime will generally not qualify [as being in the interest of justice, and hence meriting deferral by the ICC Prosecutor]. This is particularly so in cases where the military was a main perpetrator. Amnesties should, under no circumstances, be given to the military in order simply to relieve the potentially great pressure that the armed forces can bring to bear. Despite the danger to the transitional government, the harmful effects of impunity are compounded in situations where groups formerly in power are able to negotiate impunity for crimes they have committed.
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> *Id.*

Significantly, Clark and other commentators have recognized instances when amnesties might be in the interest of justice, thereby warranting ICC prosecutorial deferral. For instance, the ICC Prosecutor might choose to defer to an amnesty when "amnesty was granted under an internationally negotiated agreement, in which parties from the former regime, representatives from the newly-installed government and international officials and observers participated . . . . The presence of representation of the transitional regime at these negotiations—especially if democratically elected—is particularly credible evidence that the amnesty should be respected." *Id.* at 410. Factors Clark posits should be examined to determine when an amnesty is in the interest of justice include: (1) whether the amnesty is part of a "scheme" to break with a country's troubled past, and transition into a newly constituted government; (2) whether the amnesty is accepted by the populace; and (3) whether those granted amnesty fall into "strictly defined categories." *Id.* at 409. *See also Amnesty Exception*, *supra* note 114, at 512 ("Although providing amnesty may sometimes be necessary to achieve peace, there are important considerations favoring prosecution that suggest amnesty should be a bargaining tool of last resort reserved only for extreme situations."). Given the Sudan government's unwillingness to cooperate with international actors, most notably the ICC itself, the likelihood that amnesty in the Sudan would be anything more than "a gift" from the government to itself is highly unlikely. In other words, amnesty in the Sudan would not likely be the result of a consensus of the populace and "outside" observers but rather part of a "program of self-amnesty." *See Delicate Balance*, *supra*, at 410.

further foster the environment of impunity already existing in Sudan. For example, the Sudanese judiciary has yet to carry out a prosecution of a high-level perpetrator, and recently released from jail one such perpetrator (e.g., Ali Kushayb).[152] In addition, for at least some of the crimes committed by this category of perpetrators, such as genocide and torture, the ICC is prohibited from complying with any amnesty deal under international law.[153] Finally, not prosecuting the leaders of the international crimes in Sudan might lead victims to carry out private acts of revenge against them, and encourage future human rights violations by leaders.[154]

¶55 In very specific contexts like that of South Africa and East Timor where the state and its populace are in the midst of a transition to a more stable, democratic existence, amnesties may be permitted if they are reserved for a specific category of perpetrators (i.e., directed at perpetrators who committed abuses during a certain time period), **and** if the amnesties are withheld until the eligible perpetrator fulfills certain pre-determined terms and conditions (i.e., the perpetrator pays reparations to the victim, performs community service, discloses relevant facts, etc.). For example, in upholding the individual, partial and conditional amnesty provided by the South African Truth Commission, the Constitutional Court of South Africa noted:

> The amnesty contemplated is not a blanket amnesty against criminal prosecution for all . . . . It is specifically authorized for the purposes of effecting a constructive transition towards a democratic order [e.g., by giving perpetrators an incentive to disclose particular human rights abuses and victims and survivors an opportunity to learn the nature of those abuses]. It is available only when there is a full disclosure of all the facts to the Amnesty Committee and where it is clear that the particular transgression was perpetrated during the prescribed period and with a political objective committed in the course of the conflicts of the past. That objective has to be evaluated having regard to . . . careful criteria . . . .[155]

¶56 As it did in South Africa, amnesty may also have a role where criminal evidence forming the basis for prosecutions is scarce, or even non-existent,[156] or the state is simply too fragile, or unstable, to undergo systematic prosecutions.[157] But these reasons seem less relevant in the Sudan where there is no visible societal or governmental transition to

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[152] *See supra* note 112 and accompanying text.
[153] *See supra* note 114 and accompanying text.
[154] *See id.* at 512–514.
[155] *Azanian Peoples Org. v. President of S. Afr.* 1996 (4) SA 672 (CC) at para. 32 (S. Afr.), *available at* http://www.saflii.org/za/cases/ZACC/1996/16.pdf.
[156] *See id.* at para. 17; *see also* Antonio Cassese, *Reflections on International Criminal Justice*, 61 MOD. L. REV. 1, 3–6 (1998) [hereinafter *Reflections*].
[157] *See Azanian Peoples Org.* 1996 (4) SA 637, at paras. 18–19; *see also Reflections*, *supra* note 156, at 4. In addition, Cassese argues in his article that "the notion of domestic prosecutions is sometimes dismissed in favour of amnesty and truth commissions when the society in question is too fragile to survive the destabilizing effects of politically charged trials. . . . [T]his consideration would only operate as a bar to domestic tribunals — an international tribunal, by contrast, could conduct the work at a distance — both physical and political — from the destabilizing national forces. This is a reason for preferring international tribunals to national courts, in certain circumstances . . . ." *Id.*

democracy, and the ICC Prosecutor and others have uncovered ample evidence of on-going, grave crimes. Moreover, though there is certainly some instability in Sudan, most international criminal trials of high-level human rights abusers should cause little, if any, additional destabilization of Sudanese government or society. These trials are sufficiently removed from Sudan, and are generally not accessible to the general populace, or even all state actors. In addition, the very concept of amnesty under international human rights law for the types of grave human rights abuses committed in the Sudan has been called into question in landmark cases decided by prominent supervisory bodies in the field of international human rights, such as the UN Human Rights Committee and the Inter-American Commission for Human Rights.[158] Finally, in light of the fractured state of Sudanese society, it may be difficult to reach local agreement, or consensus, on the appropriateness of an amnesty for high-level perpetrators. To ensure reconciliation in conflict-ridden societies like the Sudan, such a consensus (as reflected by a national vote, or referendum) should be required before governments institute amnesty programs for this category of perpetrators.[159]

¶57 Note, however, that international human rights law and related policy considerations would not appear to prohibit partial, conditional amnesties for particular individuals committing minor criminal or non-criminal offenses in the Sudan. For example, the UN-supported truth commission in East Timor possessed the ability to grant amnesty to specific perpetrators who committed minor offenses so long as the perpetrator fulfilled the terms of the relevant reconciliation agreement. In the Sudanese context, like in East Timor, the overall reconciliation process as well as future transition to more stable, democratic government might be best facilitated by allowing for a limited form of amnesty for low-level perpetrators (e.g., a partial, conditional amnesty). Moreover, such an amnesty takes into account the scarce, limited resources in the Sudan or elsewhere that would be available to investigate, try and convict the large number of low-level Sudanese perpetrators from the human rights crisis in Darfur. In particular, providing an incentive in the form of a limited amnesty for individual, low-level perpetrators may encourage these individuals to come forward and participate in the truth commission process, thereby enabling victims and survivors to learn new details of particular abuses and perpetrators an opportunity to reconcile themselves with their former communities.

¶58 In addition, interest of justice considerations reflected in the ICC statutory regime that disfavor amnesty for high-level perpetrators in the Sudan appear to be markedly different in the case of low-level perpetrators. The latter class of perpetrators, by their very nature and status, commit less serious crimes, are less likely to have a role in the very creation of the opportunity for amnesty, and can be more easily reconciled and

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[158] *See, e.g.*, *Rodriguez v. Uruguay*, UN ICCPR Human Rights Comm., 51st Sess., ¶ 12.4, U.N. Doc. CCPR/C/51/D/322/1988/Annex (Aug. 9, 1994) ("The [Human Rights] Committee moreover reaffirms its position that amnesties for gross violations of human rights . . . are incompatible with the obligations of the State Party under the [International] Covenant [on Civil and Political Rights]."); *Chanfeau-Orayce v. Chile, Case* 11.505 et al., Inter-Am. C.H.R., Report No. 25/98, OEA/ser.L/V/II.98, doc. 6 rev. ¶ 109 (1998) ("[Inter-Am. Comm. on Human Rights agrees:] [t]o recommend that the State of Chile adjust its domestic legislation by derogating the [amnesty law for crimes committed by Chilean government officials during the military regime of General Augusto Pinochet], in order to comply with the provisions of the American Convention on Human Rights, in order that the human rights violations of the military de facto government may be investigated and the perpetrators may be identified, their responsibility established and that they may be effectively punished, thus guaranteeing for the victims and their families the right to justice.").

[159] *See Delicate Balance*, *supra* note 151, at 409.

reintegrated back into their communities (without the heightened concern for private, multiple acts of revenge present in the case of high-level perpetrators). As a result, the ICC statutory regime, including both its interest of justice provisions and its overall mission to prosecute grave crimes of international concern, does not appear to be violated by a limited amnesty directed toward low-level perpetrators. Finally, even if the ICC Prosecutor was, for some reason, determined to prosecute one of these low-level perpetrators eligible to participate in a Sudanese truth commission amnesty process, he may be prohibited from doing so under the principle of complementarity maintained under the ICC framework. This is because the considerations and factors that make it unlikely that high-level perpetrators can be adjudicated in an independent and impartial manner in the Sudan do not appear to be as strongly present in the case of low-level perpetrators. For example, through successful domestic prosecutions, the Sudanese have demonstrated an ability to deal impartially and effectively with low-level abusers. In addition, future Sudanese truth commission officers, like the local judges and jurors involved in the domestic-level prosecutions, will most likely not fear retaliation or reprisal as strongly in cases involving investigation and adjudication of low-level perpetrators. Such concern or fear, however, would likely be heightened in the case of adjudication of high-level perpetrators who would tend to have close, extant relationships with current or recently deposed military or governmental leaders. In other words, like the East Timorese, the Sudanese may be capable, especially with the help of the international community, of fair and impartial truth and reconciliation proceedings, including ones involving the possibility of amnesty, once the leaders of the grave human rights abuses are effectively dealt with by the international forum (e.g., the ICC).

¶59 Drawing upon the truth commission experience in East Timor, a Sudanese truth commission amnesty framework should specifically delineate its terms and conditions. For example, Sudanese low level perpetrators committing minor criminal and non-criminal offenses related to the period of the human rights crisis in Darfur should be allowed to obtain amnesty for these offenses **only if** they reconcile themselves successfully with their respective communities. Eligibility for participation in this limited amnesty process should be determined by the appropriate truth commission body in consultation with the ICC Prosecutor or his or her designee. Only if the ICC Prosecutor agrees to participation by the perpetrator in the amnesty process should the process be allowed to proceed. Successful reconciliation by the perpetrator might take the form of a full disclosure of the facts underlying the abuse, acknowledgment by the perpetrator of his/her role in inflicting the abuse, the payment of reparations or a similar act performed by the perpetrator (i.e., community service) directly to the victim and/ or the victim's community, and a renunciation of future violence. The appropriate Sudanese truth commission body could decide the precise reconciliation terms, and monitor compliance with the reconciliation agreement.

¶60 In addition, individuals attempting to obtain amnesty in this way before the Sudanese commission (as well as all individuals testifying before the commission) should be informed of their opportunity to provide information in confidence to the commission. Such an opportunity will provide an incentive for individuals to come forward and participate in the truth commission process, including the amnesty and reconciliation process. In particular, the promise of confidentiality will help to mitigate any concern or fear on the part of perpetrators that they will not be ultimately determined eligible for the

amnesty process, or that the information they provide will be shared with judicial prosecutors, including the ICC Prosecutor. If information is provided in confidence to the commission, including information constituting an admission of responsibility, this information should not be disclosed to the ICC Prosecutor except if specifically requested by the Prosecutor. Even if the ICC Prosecutor requests the information in this way, it should not be disclosed to the Prosecutor unless the PTC determines it is essential to the fair determination of a case before the ICC, and cannot be obtained from an independent source. Note that even in the event of authorization by the PTC and eventual disclosure, the confidential information should not be used by the Prosecutor to prosecute the individual who provided it to the commission but it could be used, for example, as evidence to prosecute another person. (See Part II for further discussion of the role of the PTC regarding information sharing decisions). In this way, by providing for a limited amnesty mechanism and by pre-arranging the terms under which information can be shared with the ICC, a future Sudanese truth commission will avoid at least some of the pitfalls that befell the Sierra Leonean truth commission in its relationship with the Special Court, and more closely resemble the overall commission-court structure imposed in East Timor.

B. Reduced Charges

¶61 Rather than respecting any amnesty granted by a Sudanese truth commission to leaders of human rights abuses, the ICC should instead consider reducing the sentence of a leader who has participated meaningfully in the truth commission process, and is later successfully prosecuted. Following such an approach would seem to better strike the balance between respecting a likely illegitimate Sudanese amnesty for these leaders and essentially ignoring the leader's participation in the truth commission process. In addition, this approach finds support in the ICC Statute, which allows the Court to consider certain mitigating factors when determining an appropriate criminal sentence.[160] These mitigating factors focus, in part, on the conduct of convicted persons, including any compensation these persons provided to victims and any cooperation they exhibited towards the Court.[161] Of course, before awarding any reduction in sentence, the Court should ensure itself that the Sudanese leader's participation in the commission process was indeed meaningful and "cooperative," and not just accomplished hastily, half-heartedly and for the sole purpose of obtaining leniency. Measures, or factors, that the

[160] Rome Statute, *supra* note 95, art. 76(1) ("In the event of a conviction, the Trial Chamber shall consider the appropriate sentence to be imposed and shall take into account the evidence presented and submissions made during the trial that are relevant to the sentence."). For particular "mitigating" evidence the Trial Chamber of the ICC can take into account in sentencing an individual convict before the ICC, *see infra* note 161.

[161] *ICC Rules of Procedure and Evidence*, *supra* note 134, R. 145(2)(a)(i)–(ii). Mitigating circumstances the Court may consider in determining a particular sentence include: "(i) The circumstances falling short of constituting grounds for exclusion of criminal responsibility, such as substantially diminished mental capacity or duress; (ii) The convicted person's conduct after the act, including any efforts by the person to compensate the victims and any cooperation with the Court." *Id.* For the provision dealing with the overall sentencing determination, *see id.* R. 145(1)(a)–(b). For a list of "other" factors the Court may consider in sentencing a convicted person, *see id.* R. 145(1)(c). For a list of specific aggravating circumstances the Court may consider, *see id.* R. 145(2)(b). *See also* Rome Statute, *supra* note 95, art. 78(1) ("In determining the sentence, the Court shall, in accordance with the Rules of Procedure and Evidence, take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.").

Court should consider in making this determination include: (1) whether the Sudanese leader who perpetrated grave human rights abuses provided financial or other compensation to victims as part of the commission process;[162] (2) whether the perpetrator accepted responsibility for his/her role in the abuses; (3) whether the perpetrator provided testimony to the truth commission that contributed significantly to the historical record of the abuses; (4) whether the perpetrator provided testimony to the commission that contributed significantly to knowledge of whereabouts of victims' remains; and (5) whether the perpetrator complied with victim requests to confront the perpetrator about particular abuses he or she may have participated in.[163] If consideration of these factors leads the Court to conclude that the convicted person cooperated in a meaningful way with the truth commission,[164] then the Court could mitigate the sentence accordingly. Of course, before reaching its final sentencing determination, the Court must also take into account any aggravating factors on the part of the convicted person. Only after weighing all of the aggravating and mitigating circumstances, including the perpetrator's participation in a truth commission process, would the court reach its final sentencing decision.[165] In the case of a convicted Sudanese defendant, any mitigation by the ICC as a result of participation in a truth commission process would take the form of a reduced prison sentence or a reduced fine.[166]

V. CONCLUSION

¶62 Similar to the international tribunals in East Timor and Sierra Leone, the ICC will eventually interact with a truth commission, whether in the Sudan, DRC or in another country. As a result, a deeper understanding of how the ICC must interact with these bodies is paramount. Attention should first be directed to whether the ICC must defer to a national truth commission process, or whether it can proceed with the criminal prosecution of perpetrators. In making this determination, the ICC should consider whether the commission had widespread public support and participation, included mechanisms for victim assistance, and avoided "blanket," non-conditional amnesties. In addition, the ICC could examine the nature and level of cooperation provided by national officials in the investigation, adjudication and enforcement of human rights abuses.

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[162] This factor finds support in the *ICC Rules of Procedure and Evidence*. *See id.* R. 145(2)(a)(ii).

[163] Many of these factors were mentioned in the Truth and Reconciliation Report, or Rettig Report, by the Chilean truth commission in the form of recommendations by the commission for dealing with the period of human rights abuses during the Pinochet regime. *See* Chilean Nat'l Comm. on Truth and Reconciliation, *Report of the Chilean National Commission on Truth and Reconciliation*, Part II, (Phillip Berryman trans., 2 vols., 1993), *available at* http://www.usip.org/library/tc/doc/reports/chile/chile_1993_toc.html.

[164] The Court's determination of whether to mitigate a sentence because of meaningful cooperation by the convicted person with a truth commission process, would take place in a special hearing held by the Trial Chamber on its own calling, or at the request of either the convict or the Prosecutor. *See* Rome Statute, *supra* note 95, art. 76(2) ("[T]he Trial Chamber may on its own motion and shall, at the request of the Prosecutor or the accused, hold a further hearing to hear any additional evidence or submissions relevant to the sentence, in accordance with the Rules of Procedure and Evidence."). All interested parties (e.g., the Prosecutor, accused, and victims) may participate in such a hearing. *Id.* at arts. 76(3), 75(3).

[165] *ICC Rules of Procedure and Evidence*, *supra* note 134, R. 145(1), (1)(b) ("In its determination of the sentence . . . , the Court shall: . . . (b) Balance all the relevant factors, including any mitig1ating and aggravating factors and consider the circumstances both of the convicted person and of the crime."). For a list of aggravating circumstances or factors that the Court must take into account, *see id.* R. 145(2)(b).

[166] *See* Rome Statute, *supra* note 95, art. 77.

¶63 Moreover, a set of principles for how information, especially confidential information, should be passed from a truth commission to the ICC must be formulated. The balance between sharing "too little" of the commission's information (and risking unfair trials before the ICC) and sharing "too much" (and risking non-participation by perpetrators in the truth commission process itself) is perhaps best struck through a conditional approach to information sharing. Under this approach, the Pre-Trial Chamber of the ICC could serve as the principal decision-maker on all matters related to the disclosure of truth commission information.

¶64 Finally, in the event a high-level perpetrator testifies before a truth commission and then is subsequently convicted by the ICC, the Court should examine carefully the perpetrator's participation in the overall commission process prior to determining its final sentence. While any amnesties granted by truth commissions to high-level perpetrators should be viewed with a large degree of skepticism, certain aspects, or qualities, of the high-level perpetrator's participation may lead the ICC to consider a statutory reduction in sentence. In the case of low-level perpetrators participating in a truth commission amnesty process in a country where an ICC investigation is on-going, the ICC may legitimately defer to such a process provided the process itself meets certain criteria. For example, in the Sudan, these criteria may include restrictions on the types of offenses eligible for truth commission amnesty (i.e., minor versus grave offenses), the time period for which the amnesty applies (i.e., crimes committed during the duration of the crisis in Darfur), and precise reconciliation terms that must be fulfilled before amnesty is actually granted (i.e., terms related to payment of reparations, performance of community service acts, disclosure of facts, etc.).