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Article

THE INTERNATIONAL CRIMINAL COURT AND TRUTH COMMISSIONS: A FRAMEWORK FOR CROSS-INTERACTION IN THE SUDAN AND BEYOND [FNa1]

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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. [FN1] 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. [FN2]

***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. [FN3] As the ICC investigation proceeds in the Sudan, and prosecutions begin following the execution of recent arrest warrants, [FN4] the ICC is likely to encounter not only additional prosecutions carried out by Sudanese courts but also a Sudanese truth commission. [FN5] 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 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. [FN6]

***8** In short, truth commissions are investigatory bodies usually created as part of a country's political transition to examine human right rights violations. [FN7] 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). [FN8] 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. [FN9] Furthermore, truth commissions generally arise "during or immediately after a political transition in a country". [FN10] As part of this examination, they can provide an explanation of the facts surrounding these violations, [FN11] suggest reparations for the victims of the violations, [FN12] or even recommend certain, future steps be taken to avoid their repetition. [FN13]

***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 occur in a trial or tribunal setting. [FN14] 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. [FN15] 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." [FN16]

***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. [FN17] (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. [FN18]

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. [FN19] 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. [FN20]

***13** The government of Sierra Leone and the rebel groups known as Revolutionary United Front (RUF) [FN21] finally made an attempt to end the violence with the signing of the Lomé peace agreement in July of 1999. [FN22] In particular, Lomé granted amnesty to all individuals who participated in the conflict. [FN23] The government and rebel groups included a provision for the establishment of a Truth and Reconciliation Commission. [FN24] A law implemented this Commission in 2000, although it did not become operational until 2002. [FN25]

***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. [FN26] 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. [FN27] The process of prosecuting the most serious offenders began in 2002, and is expected to last several years. [FN28]

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. [FN29] 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. [FN30] Charges against indicted individuals before the Court include acts 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. [FN31] 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." [FN32] While the Special Court is an independent body, it still requires various forms of assistance from Sierra Leone and other individual countries. [FN33]

***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. [FN34] 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. [FN35] 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; [FN36] and (2) if the Special Court formally requests to have jurisdiction over a particular case. [FN37]

***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. [FN38] While there is no formal prohibition against the 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. [FN39] 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." [FN40] In particular, the Special Court may direct juvenile offenders into community service and foster care programs. [FN41] 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. [FN42]

***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. [FN43] 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. [FN44] The TRC was charged with creating an impartial historical record of past human rights violations. [FN45] In addition, the Commission investigated particular violations, and worked to restore the dignity of victims. [FN46] To realize its goals, the TRC held numerous sessions where it heard testimony from both victims and perpetrators. [FN47] Information could be provided to the TRC in confidence. [FN48] 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. [FN49]

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. [FN50] During this time period, many severe human rights violations occurred. [FN51] This situation resulted in the death of 200,000 individuals, or one-third of the country's population. [FN52] In August 1999, Indonesia accepted that the citizens of East Timor would hold a referendum to discuss the future of the country. [FN53]

***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. [FN54] This crisis came to an end only as a result of UN involvement. [FN55] In 2002, East Timor finally achieved its goal of becoming an independent territory. [FN56]

1. Serious Crimes Investigation Unit (SCU)

***24** The United Nations established the United Nations Transitional Administration in East Timor (UNTAET) on October 25, 1999. [FN57] 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. [FN58] As a result, East Timor achieved its independence on May 20, 2002. [FN59]

***25** Though UNTAET ceased to exist once East Timor gained its independence, [FN60] the UN immediately established a Mission of Support in East Timor (UNMISET) in order to continue supporting the new country's security and stability. [FN61] UN Resolution 1410 provided the framework and goals for UNMISET, [FN62] 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. [FN63]

***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. [FN64] UNMISET also includes a sizeable civilian police force as well as a military force. [FN65]

***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. [FN66] 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. [FN67] Serious offenses committed in East Timor will be handled by East Timor's justice system, primarily the SCU. [FN68]

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

***28** The United Nations, under UNTAET, established CAVR in 2001. [FN69] CAVR

examined the facts behind the human rights violations that occurred between 1974 and 1999 in East Timor. [FN70] The objectives of CAVR require the commission to inquire about human rights violations, determine the nature of the offenses, and determine the practices and policies that led to these violations. CAVR must refer to the prosecutor all offenses that CAVR deems appropriate, along with suggestions for prosecution. [FN71] 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. [FN72]

***29** The CAVR mandate included a Community Reconciliation Process (CRP) to assist individuals in re-integrating into their communities. [FN73] 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. [FN74] 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. [FN75] 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. [FN76]

***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. [FN77] 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. [FN78] 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. [FN79]

***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. [FN80] 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. [FN81] Cases determined by the Prosecutor to be eligible for prosecution by the SCU, however, were not always prosecuted. [FN82] 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. [FN83]

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. [FN84] These recommendations led directly to the creation of a UN mission in Sierra Leone, a Human Rights Commission, and various civil society groups charged with the task of implementing Truth Commission recommendations. [FN85] 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. [FN86] 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. [FN87] 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. [FN88]

***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 prearranged, 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 [FN89]

***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. [FN90] 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. [FN91] Certain nations, however, 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. [FN92]

***36** The ICC was to be the first court established in advance of, rather than in response to, international human rights violations. [FN93] 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). [FN94]

***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. [FN95] On July 1, 2002, the Rome Statute entered into force after ratification by sixty State Parties. [FN96] A fundamental concept included in the Rome Statute 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. [FN97]

***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. [FN98] Judges are nominated and confirmed by the Assembly of State Parties (Assembly), and they are required to represent diverse geographic, gender, and legal backgrounds. [FN99] 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. [FN100] 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. [FN101] 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.

[FN102] Funding is provided by the State Parties, the UN, and donations from nongovernmental organizations (NGOs) and private donors. [FN103]

F. The International Criminal Court (ICC) and Sudan

***39** The UN Security Council referred the Sudanese case to the ICC in March of 2005. [FN104] 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 civilians, massacres, rape, looting, and other crimes against humanity and war crimes. [FN105] 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. [FN106] The Pre-Trial Chamber of the ICC granted these requests in April of 2007, and issued the warrants for two Sudanese suspects. [FN107] Though Sudan has a legal obligation to turn over these suspects to the ICC for prosecution, [FN108] 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. [FN109] 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 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." [FN110] Given the complicity of prominent, high-level Sudanese actors in the grave human rights violations in the Sudan, [FN111] and the relative environment of impunity such actors have encountered in the Sudan, [FN112] 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 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. [FN113] 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. [FN114] Both of these types of crimes have been committed by high-level Sudanese actors, including government officials. [FN115] 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. [FN116] 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. [FN117] 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). [FN118] 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.). [FN119] 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. [FN120] 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. [FN121] 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. [FN122] 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. [FN123] These types of actions by a 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. [FN124]

***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. [FN125]

***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. [FN126] 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. [FN127] For 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. [FN128] 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. [FN129] 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. [FN130] The ICC should adopt a similar approach with respect to a 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. [FN131] 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. [FN132] 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. [FN133] Only if these 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. [FN134]

***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, [FN135] authorize particular investigations, [FN136] and order prosecutions, [FN137] 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. [FN138] As a result, PTC judges' decisions whether to order disclosure of information will be more objective since they are further 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. [FN139]

***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). [FN140] 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). [FN141]

***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. [FN142] The bar also provides an incentive to perpetrators and others to provide information to the truth commission in the first place. [FN143] 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). [FN144] While requests for information belonging to the truth commission should be as specific as possible, [FN145] 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. [FN146]

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. [FN147] Nevertheless, a situation may arise where a high-level perpetrator of interest to the ICC Prosecutor has provided testimony to a truth commission. [FN148] 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 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. [FN149] 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. [FN150] 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. [FN151] Not prosecuting these high-level perpetrators would only 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). [FN152] 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. [FN153] 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. [FN154]

***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 .... [FN155]

***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, [FN156] or the state is simply too fragile, or unstable, to undergo systematic prosecutions. [FN157] But these reasons seem less relevant in the Sudan where there is no visible societal or governmental transition to 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. [FN158] 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. [FN159]

***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 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 noncriminal 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. [FN160] 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. [FN161] 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, halfheartedly and for the sole purpose of obtaining leniency. Measures, or factors, that the 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; [FN162]

(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. [FN163] If consideration of these factors leads the Court to conclude that the convicted person cooperated in a meaningful way with the truth commission, [FN164] 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. [FN165] 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. [FN166]

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.

***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.).

[FNa1]. I would like to thank my Research Assistant, Timothy Petty, for his assistance with this Article (The College of New Jersey, Class of 2008; Seton Hall University School of Law, 1L). Timothy provided both consistent and valuable assistance, especially with regard to the Background section of this Article.

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[FN1]. *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.

[FN2]. 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 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).

[FN3]. 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.").

[FN4]. 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.

[FN5]. 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).