

U.C. DAVIS JOURNAL OF
INTERNATIONAL LAW &
POLICY



VOLUME 18

FALL 2011

NUMBER 1

REPORT

TOWARD PEACE WITH JUSTICE IN DARFUR: A FRAMEWORK FOR
ACCOUNTABILITY

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of Law and the Robert F. Kennedy Center for Justice & Human Rights;
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University of California, Davis, Journal of International Law & Policy*

DEDICATION

*To the people of Darfur, Sudan for their continued pursuit of justice,
peace, and accountability; to their unwavering commitment to stability,
freedom, and equality that may serve as an inspiration to us all; and lastly
to the hope that as a result of these efforts, transitional justice will bring an
end to the suffering and impunity in Darfur and make way for reconciliation.*

PREFACE

*Toward Peace with Justice in Darfur: A Framework for Accountability
is dedicated to the Darfuri people, who have a right to justice,*

accountability and who have, for too long, called for the crisis in Darfur to end. The report is designed to be used as a tool for Darfur's civil society to rebuild once the region is stabilized. It may also be used to engage civil society in discourse around the needs of the people in a post-conflict environment. At the time this report is being published, the government of Sudan is continuing its violence against the Darfuri communities. It is our hope that in the very near future the conditions in Darfur and Sudan as a whole will allow for long-term peace and reconciliation.

This project began in 2007, soon after Dr. Mohammed Ahmed Abdallah Eisa received the Robert F. Kennedy Human Rights Award. With the guidance and direction of Dr. Mohammed Ahmed, and as part of a larger partnership between the Robert F. Kennedy Center for Justice & Human Rights (RFK Center), and the California International Law Center (CILC) at King Hall, University of California, Davis, School of Law, this report was developed to examine the transitional justice mechanisms available in Darfur as well as other countries' models for post-conflict transitional justice. The report draws largely from the comparative experiences of the similarly situated African nations of Liberia, Sierra Leone, and Rwanda. However, recognizing that accountability for atrocities is a global struggle and that much can be learned from outside the regional context, the experiences to seek truth and justice in Canada, Cambodia, Peru, and the former Yugoslavia are also analyzed.

Following a conflict, peace and justice are often sought through two primary mechanisms: criminal prosecutions and truth commissions. As investigations of persons allegedly responsible for atrocities in Darfur are already underway both in Sudan and in international fora, the success of such efforts depend on Sudan's recognition of the various international and national laws it has obligated itself to obey as well as traditional dispute resolution mechanisms. This report looks in depth at these legal obligations, with special attention paid to accountability of non-state actors, prosecuting sexual violence, and ensuring the fair trial and due process rights of the accused.

Too often, Darfuris and other survivors of conflict are told what they must do, should do, or what they could have done differently in the past. In this report, we sought to foster a different approach. We aimed to create a text that would serve as a tool to enhance dialogue and discuss the impact of transitional justice in similar conflict situations world-wide. This report is ultimately designed to assist in the creation and implementation of a peace and reconciliation framework guided by the Darfuri people as they work

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towards a future where the atrocities they survived are addressed and there is assurance they can never be repeated.

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EXECUTIVE SUMMARY

As the Darfur region of Sudan makes the transition to peace it will face a host of issues, from rebuilding infrastructure to resettling the millions of people displaced by the conflict. This report, the result of a partnership between the California International Law Center at King Hall and the Robert F. Kennedy Center for Justice & Human Rights, explores methods for approaching one aspect of Darfur's post-conflict transition: ensuring that those responsible for atrocity are held accountable.

In **Chapter I**, the introduction, background information on the conflict is provided, along with a detailed statement of the goals of the report. It stresses that this text is not intended to be prescriptive. Rather, it is designed as a tool for Darfuris to understand the legal landscape that applies to transitional justice efforts around the world and to provide context through examples of other post-conflict settings for how such retributive and reconciliatory mechanisms function.

Chapter II, Prosecutions and Commissions of Inquiry in Darfur, explains in detail the status of various accountability methods already being utilized or available for use. Starting with the International Criminal Court's engagement of Sudan through indictment of several conflict participants on the international level, this chapter also explores the state of the Sudanese national court system and the courts convened by the national government specifically for prosecuting perpetrators of violence in Darfur. This section also looks at various longstanding sub-national dispute resolution systems present in Sudan. Finally, it provides background on the truth-seeking inquiries focused on Darfur that have already taken place.

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Chapter III, Legal Framework Applicable to Prosecutions in Darfur, delves into the law applicable to any accountability mechanisms to be employed in Sudan. It explains Sudan's obligations under international and regional law, and provides a sketch of the municipal law that would apply to prosecuting those responsible for atrocity in Darfur. It also examines the legal underpinnings governing the creation of truth commissions.

Chapter IV, African Case Studies, looks at three case studies from the region: Liberia, Sierra Leone, and Rwanda. In each case, the history of the local conflict is analyzed, and the transitional justice plan employed by each country is explored. Particular attention is paid to both international and local solutions to the problem of impunity.

Similarly, in **Chapter V**, Global Case Studies, conflicts occurring elsewhere in the world are discussed. The examples of Canada, Cambodia, Peru, and Yugoslavia provide context that the struggle for justice and reconciliation is not limited to the African continent but common to all post-conflict societies.

Chapter VI, Analysis, provides a synthesis of the legal obligations and mechanisms available to the Darfur region. In particular, it draws lessons from the case studies that may be considered by Darfuris in deciding which methods to employ and how to implement them in the pursuit of justice.

Finally, in **Chapter VII**, the report concludes that a combination of prosecutions at various levels and truth seeking mechanisms are important for any transitional society. It stresses that local political will and engagement with the international community have historically been crucial for the success of any post-conflict plan. Finally, it emphasizes that it must be the people of Darfur that lead this process, ensuring for themselves justice for past wrongs and a future free from violence.

I. INTRODUCTION

In the last decade the people of Sudan's westernmost region, Darfur, have suffered the tragic consequences of protracted armed conflict¹ between

* With generous permission from the California International Law Center at King Hall (CILC), University of California, Davis, the Robert F. Kennedy Center for Justice and Human Rights, and Kathleen A. Doty, 2009-2011 CILC Fellow and Publications & Program Manager at the American Society of International Law since 2011, this article reprints the March 1, 2011, report entitled *Toward Peace With Justice in Darfur: A Framework for Accountability*, published by CILC and the Robert F. Kennedy Center for Justice and Human Rights, © March 2011. Its descriptions of events are current through that date. Kathleen A. Doty served as principal author of the report, which was prepared under the direction of: Diane Marie Amann, who served as Founding Director of CILC from 2008 to 2011, and now is the Emily and

the government and rebel groups.² Hundreds of thousands of children, women, and men have been killed.³ More than 2.7 million Darfuris remain

Ernest Woodruff Chair in International Law, University of Georgia School of Law; Dr. Mohammed Ahmed Abdallah Eisa, 2007 Robert F. Kennedy Human Rights Award Laureate; and Monika Kalra Varma, who earned her J.D. degree from the University of California, Davis, School of Law in 2000, served as Director of the Robert F. Kennedy Center for Human Rights from 2002 to 2011, and now is Executive Director of the District of Columbia Bar Pro Bono Program. Detailed dedications are listed in the appendix at the end of the report.

¹ The root causes of the conflict in Darfur are multifaceted. A nuanced consideration of the history of the region reveals that, “[t]he seeds of the conflict have been sown by decades of deliberate marginalisation and neglect of the region; disproportionate power sharing to the favour of the riverine elites; manipulation of and persistent inequity in resource allocation; and incitement of tribal and ethnic conflicts.” Eltigani Seisi M. Ateem, *The Root Causes of Conflicts in Sudan and the Making of the Darfur Tragedy* 45 (unpublished manuscript) (on file with author). In particular, the post-independence 1956 Constitutional declaration that Sudan is an Islamic-Arab state confounds the identity crisis in the region. Abdullahi Osman El-Tom, *Darfur People: Too Black for the Arab-Islamic Project of Sudan* (unpublished manuscript) (on file with author); see also Khalid Abu Ahmed, *Dar Fur Watergate & Disaster* (Regime Lying Politics), *Regime Neglecting Policy and Ignoring the Truth* (Aug. 2004) (unpublished manuscript) (on file with author).

² See Robert F. Kennedy Ctr. for Justice & Human Rights, *The Need for a Regional Approach to Solve the Crisis in Sudan, Chad, and the Central African Republic*, Mar. 18, 2009, http://rfkcenter.org/attachments/1208_regionalapproachdarfur.pdf (last visited Feb. 14, 2010). At first, the two main rebel groups active in Darfur were the Sudan Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM). Int’l Comm’n of Inquiry on Darfur, Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, 37 (Jan. 25, 2005), available at http://www.un.org/news/dh/sudan/com_inq_darfur.pdf. The SLM/A is comprised mostly of Zaghawa, Fur, Masaalit, and some members of Arab tribes. It claims to advocate for a national, rather than tribal, agenda and seeks to “create a united democratic Sudan on a new basis of equality, complete restructuring and devolution of power, even development, cultural and political pluralism and moral and material prosperity for all Sudanese.” *Id.* ¶¶ 127–28, at 37–38. The JEM is indistinguishable from the SLM/A in the field, as it is also made up mostly of people from the Zaghawa tribe, and reports on rebel activities often do not distinguish between the two groups. *Id.* ¶ 133, at 39. That said, JEM tends to have a lesser military capacity than the SLM/A, and is primarily known for its political manifesto, the “Black Book,” which argues that there has been a total economic, political, and social marginalization of Darfur and other regions of Sudan. *Id.* ¶ 35, at 39. In 2004, other rebel groups began to emerge and the groups began to break into factions and then reorganize into coalitions. *Id.* ¶ 137, at 39. By August of 2009, the UN-African Union mission’s political chief, Rodolphe Adada reported that most of the rebel groups had fragmented. *Military: Darfur Liberation Front*, GLOBALSECURITY.ORG, <http://www.globalsecurity.org/military/world/para/darfur.htm> (last visited Feb. 20, 2011). Opposing the rebel groups are government forces, and various militia groups. The government forces in Sudan are a conventional army, air force, and navy. Int’l Comm’n of Inquiry on Darfur, Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, ¶ 77, at 27. (Jan. 25, 2005), available at http://www.un.org/news/dh/sudan/com_inq_darfur.pdf. These forces are supplemented by the mobilization of civilians and reservists into the Popular Defence Forces (PDF), a paramilitary force. *Id.* ¶ 81, at 28. Militia groups, or Janjaweed, are also present and able to be divided into three main categories: first, those that

internally displaced, while another estimated 250,000 are refugees in neighboring countries such as Chad and the Central African Republic. Approximately 15,000 Darfuris are located in the Central African Republic alone.⁴ Within and outside the camps, people suffer from disease, malnutrition, and the lingering effects of trauma from sexual and other assaults. Humanitarian aid campaigns are often blocked by the government. To date, efforts to hold persons responsible for this tragedy have also shown little success and violence is again on the rise in the region.⁵

Post-conflict societies have many pressing needs—from ensuring that persons responsible for atrocities are held accountable to rebuilding destroyed infrastructure. The University of California, Davis, School of Law-based California International Law Center, in partnership with the Robert F. Kennedy Center for Justice and Human Rights and their 2007 Robert F. Kennedy Human Rights Award Laureate, Dr. Mohammed Ahmed Abdallah Eisa, have partnered to explore means to address a host of these post-conflict needs. This report focuses on accountability for atrocities in Darfur, Sudan. It does not advocate for a particular solution; rather, this report was developed as a resource for the Darfuri community on the strengths and weaknesses of transitional justice mechanisms that have been employed elsewhere in the world. It is intended to facilitate discussion within the affected communities about the most appropriate strategy for seeking and achieving justice for the atrocities committed during the Darfur conflict.

are loosely affiliated with the government through receipt of supplies and operated primarily under tribal management structure; second, those that have paramilitary structures and operate in parallel to regular forces (such as “the Strike Force,” the Mujahedeen, or the Fursan); finally, members of the PDF or Border Intelligence divisions of the armed forces may be considered militia groups. *Id.* ¶¶ 106–08, at 33.

³ Edith M. Lederer, *Darfur conflict shows no signs of ending*, AP WORLDSTREAM, Dec. 20, 2008, available at <http://www.mg.co.za/article/2008-12-20-darfur-conflict-shows-no-signs-of-ending> (last visited Feb. 20, 2011) (citing UN estimate of 300,000 dead between 2003 and 2008). Quantifying the loss of life resulting from the Darfur conflict is a political exercise. Some studies have found that the total violent mortality among displaced Darfuris alone is 305,250 through July 2009. Eric Reeves, *Quantifying Genocide: Darfur Mortality Update*, THE SUDAN TRIBUNE, Aug. 6, 2010, <http://www.sudantribune.com/QUANTIFYING-GENOCIDE-Darfur,35911> (last visited Feb. 20, 2011). Other studies are more conservative, arguing that violence does not explain the high death toll, but rather disease affecting displaced persons is to blame. Olivier Degome & Debarati Guha-Sapir, *Patterns of Mortality Rates in Darfur Conflict*, 375 THE LANCET 294, 299 (2010).

⁴ Eric Reeves, *Quantifying Genocide: Darfur Mortality Update*, THE SUDAN TRIBUNE, Aug. 6, 2010, <http://www.sudantribune.com/QUANTIFYING-GENOCIDE-Darfur,35911> (last visited Feb. 20, 2011).

⁵ *Darfur death toll rises to two-year high in Sudan*, BBC NEWS, June 7, 2010, available at <http://news.bbc.co.uk/2/hi/world/africa/10259604.stm> (last visited Feb. 20, 2011).

Following a conflict, the path to peace and justice can be sought through various accountability mechanisms. Chief among them are criminal prosecutions, which can occur on the international, national, and sub-national levels. A rebuilding society must ensure that it comports with its legal obligations at these various levels, with special attention paid to the accountability of state and non-state actors, prosecuting sexual violence, and ensuring the fair trial and due process rights of the accused. Truth commissions constitute another fundamental tool for rebuilding a society ravaged by conflict. As a venue for victims and perpetrators alike to tell their stories, truth commissions may serve as a meaningful complement to reparations. This is particularly the case when inadequacies in resources and infrastructure make awards of significant monetary or other tangible compensation unlikely.

Criminal investigations of persons allegedly responsible for atrocities in Darfur already have begun in Sudan and in international fora. Efforts to seek justice and rehabilitate the war-torn region of Darfur depend on Sudan's recognition of the various international and national laws it has obligated itself to obey as well as traditional dispute resolution mechanisms. Adherence to those laws and traditional methods of conflict resolution, coupled with attention to lessons learned from similarly situated regional post-conflict challenges in Rwanda, Sierra Leone, and Liberia, as well as international lessons from Cambodia, Peru, Canada, and Yugoslavia can guide the path toward justice and reconstruction in Sudanese society.

II. PROSECUTIONS AND COMMISSIONS OF INQUIRY IN DARFUR

Horror at the massive loss of life and property and the displacement of peoples has prompted multiple efforts to secure accountability for abuses of human rights in Darfur. At the international level, The Hague-based International Criminal Court (ICC) has issued indictments, and its Prosecutor has signaled his intentions to go forward with prosecutions of Sudan's President and others. At the national level, the Sudanese government responded by creating a court that it has charged with trying alleged perpetrators within Sudan's own legal system. At the sub-national level within Darfur itself, various dispute resolution systems may serve to complement formal prosecutions at other levels. Each of these three paths to accountability will be discussed in turn.

A. International Prosecutions

The International Criminal Court obtained jurisdiction over the crimes committed in Darfur through a referral from the Security Council of the United Nations. On March 31, 2005, the Security Council, acting under

Chapter VII of the UN Charter, adopted Resolution 1593 (2005).⁶ This resolution mandated that the Government of Sudan and all other parties to the conflict in Darfur cooperate fully and provide any necessary assistance to the Court and the Prosecutor.⁷ Article 13(b) of the Rome Statute, the governing statute of the ICC, authorizes this referral procedure as a means of gaining jurisdiction over certain crimes.⁸ Consequently, ICC Prosecutor Luis Moreno-Ocampo opened an investigation into the Darfur conflict on June 1, 2005.⁹ Initially, he sought to bring charges against four individuals.

To date, the ICC has brought charges against six individuals for crimes committed in Darfur. One of these individuals is a Darfuri rebel leader, Bahar Idriss Abu Garda.¹⁰ The Chairman and General Coordinator of Military Operations of the United Resistance Front, Abu Garda is alleged to have committed murder, intentionally directed attacks against peacekeeping missions, and pillaged. He made his first court appearance voluntarily, on May 18, 2009, pursuant to a summons to appear in court issued on May 7,

⁶ S.C. Res. 1593, U.N. Doc. S/RES/1593 (Mar. 31, 2005) [hereinafter S.C. Res. 1593]; see Press Release, Security Council, Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court, U.N. Press Release SC/8351 (Mar. 31, 2005), available at <http://www.un.org/News/Press/docs/2005/sc8351.doc.htm> [hereinafter S.C. Press Release].

⁷ S.C. Press Release, *supra* note 6.

⁸ Rome Statute of the International Criminal Court, art. 13(b), U.N. Doc. No. A/CONF.183/9 (July 17, 1998), reprinted in 37 I.L.M. 999 (1998) [hereinafter Rome Statute] (providing that the ICC may only exercise jurisdiction when: first, a situation or crimes are referred to the Prosecutor by a State Party; second, when the Security Council acts under Chapter VII and refers a situation or case to the Prosecutor; finally, when the Prosecutor initiates an investigation *proprio motu*).

⁹ Press Release, Office of the Prosecutor, International Criminal Court, The Prosecutor of the ICC opens investigation in Darfur, ICC-OTP-0606-104 (June 7, 2005), available at <http://www.iccpi.int/menus/icc/press%20and%20media/press%20releases/2005/the%20prosecutor%20of%20the%20icc%20opens%20investigation%20in%20darfur?lan=en-GB>.

¹⁰ Prosecutor v. Bahar Idriss Abu Garda, ICC-02/05-02/09, <http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200205/related%20cases/icc02050209/icc02050209> (last visited Feb. 20, 2011). The United Resistance Front (URF) is a coalition of rebel factions including the Sudan Liberation Movement/Army of Khamis Abakr, the SLM-Field Leadership led by Adam Bahkeit, the Movement for National Reformation and Development led by Jibril Abdel-Karim, the United Revolutionary Front led by Ibrahim al-Zubaidi, and the Justice and Equality Movement led by Bahar Idriss Abu Garda, also chief of the URF. The group was formed in 2008, and lost some of its members after negotiations in Juba in July of that year. *Three Darfur Rebel groups splint from a UN Sponsored Front*, THE SUDAN TRIBUNE, July 27, 2008, <http://www.sudantribune.com/Three-Darfur-rebel-groups-splint,28043> (last visited Feb. 20, 2011). In August of 2009, the URF again combined with four other factions. Argaw Ashine, *Sudan: Darfur Rebel Factions Unite for Peace Talks*, ALLAFRICA, Aug. 24, 2009, <http://allafrica.com/stories/200908241183.html> (last visited Feb. 20, 2011).

2009.¹¹ Article 58 of the Rome Statute permits the pre-trial chamber of the ICC to issue a summons to appear instead of an arrest warrant if the judges are satisfied that a summons is sufficient to ensure that the person will appear before the court.¹² Less than a year after Abu Garda's first court appearance, proceedings against him ended when Pre-Trial Chamber I declined to confirm the charges against him because the prosecution failed to produce sufficient evidence showing that he participated in attacks.¹³ The Prosecutor appealed this decision, but the Pre-Trial Chamber rejected the application to appeal on April 23, 2010.¹⁴ Without additional evidence, the case against Abu Garda, is over for now.¹⁵ However, cases relating to the other three individuals, all persons aligned with the government of Sudan, remain pending.

The first two, Ahmad Muhammad Harun, the current Governor of South Kordofan State and the former Minister of State for the Interior of the Government of Sudan and the Minister of State for Humanitarian Affairs of Sudan,¹⁶ and Ali Muhammad Ali Abd-Al-Rahman, also known as Ali Kushayb, an alleged leader of the *janjaweed* militia,¹⁷ are charged with various war crimes and crimes against humanity. The warrants were issued on May 2, 2007, pursuant to a prosecution application made on February 27, 2007.¹⁸ To date, both men remain at large.¹⁹

¹¹ Prosecutor v. Bahar Idriss Abu Garda, ICC-02/05-02/09, <http://www.icc-cpi.int/menu/icc/situations%20and%20cases/situations/situation%20icc%200205/related%20cases/icc02050209/icc02050209> (last visited Feb. 8, 2010).

¹² Rome Statute, *supra* note 8, art. 58 (7).

¹³ Press Release, International Criminal Court, Pre-Trial Chamber I declines to confirm the charges against Bahar Idriss Abu Garda, ICC-CPI-20100208-PR495 (Feb. 8, 2010) available at <http://www.icc-cpi.int/menu/icc/situations%20and%20cases/situations/situation%20icc%200205/related%20cases/icc02050209/press%20release/pr495> (last visited Feb. 20, 2011).

¹⁴ Press Release, International Criminal Court, Pre-Trial Chamber I rejects the Prosecutor's application to appeal the decision declining to confirm the charges in the *Abu Garda* case, ICC-CPI-20100426-PR516 (Apr. 26, 2010) available at <http://www.icc-cpi.int/menu/icc/situations%20and%20cases/situations/situation%20icc%200205/related%20cases/icc02050209/press%20release/pr516> (last visited Feb. 20, 2011).

¹⁵ *Id.*

¹⁶ ICC-02/05: *Situation in Darfur, Sudan*, INT'L CRIM. CT., <http://www.icc-cpi.int/Menu/ICC/Situations+and+Cases/Situations/Situation+ICC+0205/> (last visited Feb. 20, 2011) [hereinafter *ICC, Situation in Darfur*].

¹⁷ *Id.*

¹⁸ Prosecutor v. Ahmad Muhammad Harun (Ahmad Harun) and Ali Muhammad Ali Abd-Al-Rahman (Ali Kushayb), ICC-02/05-01/07, International Criminal Court, http://www.icc-cpi.int/Menu/ICC/Situations+and+Cases/Situations/Situation+ICC+0205/Related+Cases/ICC+0205+0107/Darfur_+Sudan.htm (last visited Feb. 20, 2011).

¹⁹ *Id.*

The third person who has been indicted is Omar Hassan Ahmad al-Bashir, the elected President of the Republic of Sudan since October 16, 1993.²⁰ On July 14, 2008, ICC Prosecutor Moreno-Ocampo sought issuance of a warrant for al-Bashir's arrest on three counts of genocide, five counts of crimes against humanity, including murder, extermination, forcible transfer, rape, and two counts of war crimes.²¹ Pre-Trial Chamber I issued a warrant for all but the genocide counts, but on February 3, 2010, the Appeals Chamber reversed that decision and ordered the Pre-Trial Chamber to reconsider allowing the genocide counts to go forward.²² A second arrest warrant was issued by the Pre-Trial Chamber on July 12, 2010, which includes charges of genocide.²³ Meanwhile, al-Bashir remains in office and out of the custody of the ICC.²⁴

International prosecutions are a priority for peoples displaced from Darfur. Most internally displaced people "remain afraid to return to their places of origin out of fear of renewed attacks due to the prevailing situation of impunity for acts of violence being committed against the civilian population."²⁵ A 2010 survey of more than 2,000 Darfuri refugees in Chad revealed that 98 percent of respondents wanted to see al-Bashir put on trial at the ICC, and the most common answer to the question of what development would most likely help bring peace to Darfur was the arrest and prosecution of al-Bashir.²⁶ Many civil society groups also share the view that the ICC as "the only way" to achieve justice.²⁷

²⁰ ICC, *Situation in Darfur*, *supra* note 16.

²¹ Peter Walker & James Sturcke, *Darfur genocide charges for Sudanese president Omar al-Bashir*, THE GUARDIAN, July 14, 2008, available at <http://www.guardian.co.uk/world/2008/jul/14/sudan.warcrimes1> (last visited Feb. 20, 2011); see Beth Van Schaack, *Atrocity Crimes Litigation: 2008 Year-in-Review Article*, 7 NW. U. J. INT'L HUM. RTS. 2, 217 (2009) (noting that prosecution's request "implicitly rejected" an earlier inquiry commission which had found "insufficient evidence to conclude the existence of a state policy to commit genocide").

²² Prosecutor v. Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09, Appeals Chamber Judgment on the appeal of the Prosecutor against the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir," (Feb. 3, 2010), <http://www.icc-cpi.int/iccdocs/doc/doc817969.pdf>.

²³ Prosecutor v. Omar Hassan Ahman Al Bashir, Case No. ICC-02/05-01/09-95, Pre-Trial Chamber I, Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir (July 12, 2010), <http://www.icc-cpi.int/iccdocs/doc/doc907140.pdf>.

²⁴ *Darfur Crimes Continue and Sudan Still Not Cooperating with ICC – Prosecutor*, UN NEWS CTR. (Dec. 4, 2009), <http://www.un.org/apps/news/story.asp?NewsID=33149&Cr=darfur&Cr1> (last visited Feb. 20, 2011).

²⁵ Int'l Comm'n of Inquiry on Darfur, Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, ¶197, at 56 (Jan. 25, 2005), available at http://www.un.org/news/dh/sudan/com_inq_darfur.pdf.

²⁶ Rebecca Hamilton, *Survey Charts Darfur Opinion for First Time*, FOREIGN POL'Y, July 15, 2010, available at http://www.foreignpolicy.com/articles/2010/07/14/survey_charts_

B. National Prosecutions

The Rome Statute of the International Criminal Court is designed to secure accountability “for the most serious crimes of concern to the international community as a whole,” in a manner “complementary to national criminal jurisdictions.”²⁸ By this principle of complementarity, genocide, crimes against humanity, and war crimes may not be adjudicated by the ICC unless a state with jurisdiction over the case “is unwilling or unable genuinely to carry out the investigation or prosecution.”²⁹ Thus, consideration of the capability and willingness with which Sudan’s national criminal justice system might pursue persons suspected of having committed serious human rights abuses during the conflict in Darfur is in order.

Under the Judiciary Act of 1986 (Judiciary Act), the court system is structured along the administrative divisions of the country. This Act was partially amended by the National Judicial Service Commission Act 2005; however, sections of the 1986 Act that cover the structure of the court system remain the same. Pursuant to the Judiciary Act, each of the country’s twenty-six states has its own judicial structure that consists of general and district courts, as well as a court of appeal in the state’s capital. These courts include, in ascending hierarchy, the Town and Rural Courts, District Courts (First, Second, and Third Criminal Courts), Public Courts, and the Court of Appeal.³⁰ Article 6 of the Criminal Procedure Act of 1991 details the jurisdiction of each one of these courts. At the national level, Sudan has the National Courts of Appeal as well as the National Supreme Court, which sits in Khartoum, as a final review court in the country.³¹

On the surface, Sudan seems to have a satisfactory conventional judiciary system. However, the non-governmental organization Transparency International ranks Sudan’s judiciary among the most corrupt in the world.³² Also, according to a recent article, multiple human rights

darfur_opinion_for_first_time (last visited Feb. 20, 2011).

²⁷ Elizabeth Rubin, *If Not Peace, Then Justice*, N.Y. TIMES MAGAZINE, Apr. 2, 2006, at 9, available at <http://www.nytimes.com/2006/04/02/magazine/02darfur.html> (last visited Feb. 20, 2011).

²⁸ Rome Statute, *supra* note 8, art. 1.

²⁹ *Id.* art. 17.

³⁰ MAUDE FOURNIER, A COMPREHENSIVE OVERVIEW OF SUDAN’S LEGAL FRAMEWORK IN LIGHT OF THE DARFUR CRISIS 8–9 (Pearson Peacekeeping Center 2008), http://www.peaceoperations.org/wp-content/uploads/2010/02/OP3_Fournier.pdf.

³¹ *Id.* at 9.

³² Press Release, Transparency International, Corruption Threatens Global Economic Recovery, Greatly Challenges Countries in Conflict (Nov. 17, 2009), available at http://www.transparency.org/news_room/latest_news/press_releases/2009/2009_11_17_cpi2009_en (last visited Feb. 20, 2011).

organizations have “questioned the ability of any national court in Sudan to prosecute crimes which have been committed by officials of the government.”³³

Both the Judiciary Act and the Emergency and Public Safety Act of 1997 allow for the establishment of special and specialized criminal courts as deemed necessary by the executive.³⁴ Dr. Amin M. Medanim, a prominent Sudanese jurist, notes that the “special courts, where the basic principles of a fair trial are absent, are normally established to try opposition members for offenses against the State.”³⁵ Accordingly, in June 2005, then Justice Minister Ali Mohamed Osman Yassin formed the Special Criminal Court for the Events of Darfur, (SCCED)³⁶ by decree, to hear cases against 160 persons accused of committing crimes in Darfur.³⁷ The SCCED, seated in Elfashir, the capital of North Darfur,³⁸ was initially a single court, formed to assume jurisdiction over any act constituting a crime under Sudan’s Penal Code, which includes any charge that may be submitted to Sudan government’s Commission of Inquiry or the Chief Justice.³⁹ At the end of 2005, a subsequent amendment widened the scope of the SCCED’s jurisdiction to include international humanitarian law.⁴⁰

Sudan, which has rebuffed ICC prosecutions and other international interventions, asserted that the new court would prove that the country could

³³ Christopher D. Totten & Nicholas Tyler, *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, 1098 (2008).

³⁴ Emergency and Public Safety Act, art. 6(2) (1997); Judiciary Act, art. 10(1)(e) (1986).

³⁵ Dr. Amin M. Medani, *Criminal Law and Justice in Sudan*, CRIM. L. REFORM IN SUDAN, at 25 (2010), www.pclrs.org/Amin_Mekki_Medani_Paper.pdf.

³⁶ A copy of the establishment decree of the SCCED, issued by the Chief Justice can be found at <http://www.sudanjudiciary.org/newse/news.php?id=8>.

³⁷ *Sudan Sets up War Crimes Tribunal*, BBC NEWS, June 14, 2005, <http://news.bbc.co.uk/2/hi/africa/4091146.stm> (last visited Feb. 20, 2011) [hereinafter BBC NEWS, *War Crimes Tribunal*]; see also *Sudan: National Courts to Try Suspects of Darfur Crimes*, GLOBALSECURITY.ORG, June 15, 2005, <http://www.globalsecurity.org/military/library/news/2005/06/mil-050615-irin02.htm#> (last visited Feb. 20, 2011).

³⁸ BBC NEWS, *War Crimes Tribunal*, *supra* note 37; *Sudan: National Courts to Try Suspects of Darfur Crimes*, GLOBALSECURITY.ORG, June 15, 2005, <http://www.globalsecurity.org/military/library/news/2005/06/mil-050615-irin02.htm#> (last visited Feb. 20, 2011); Establishment of the Criminal Court in Darfur—Alfashir, REPUBLIC OF SUDAN: THE JUDICIARY, June 7, 2005, <http://www.sudanjudiciary.org/newse/news.php?id=8>.

³⁹ HUMAN RIGHTS WATCH, LACK OF CONVICTION—THE SPECIAL CRIMINAL COURT ON THE EVENTS IN DARFUR 9 (June 8, 2006), available at <http://www.unhcr.org/refworld/docid/44c765c74.html> (last visited Feb. 25 2011) [hereinafter LACK OF CONVICTION].

⁴⁰ *Id.*

try accused criminals of war internally.⁴¹ Yet in December 2005, Juan Méndez, then Special Adviser of the Secretary-General on the Prevention of Genocide, reported that the special court had produced “discouraging” results. “They have dealt with some cases that seem to be marginal to the serious events that happened in 2003 and 2004.”⁴² Similar criticism was expressed within Sudan. Spokesman Mahjoub Hussein of the Sudan Liberation Movement, or SLM, one of the rebel groups fighting against the government, said that the SLM “does not accept this special court. The so-called 160 suspects the court is planning to try are petty criminals.”⁴³ It is also telling that the Court was formed “one day after the prosecutor of the International Criminal Court announced he was opening investigations into the events in Darfur.”⁴⁴

After completing six trials, the SCCED was replaced by special courts for each of the three states into which Sudanese law divides Darfur: North, West, and South.⁴⁵ Sima Samar, the UN Special Rapporteur on Human Rights in Sudan, stated in March 2006: “There has not been much accountability for the serious crimes that have been committed in Darfur. A special court established to bring people to justice has so far not accused or prosecuted anyone with command responsibility.”⁴⁶ As of late spring 2007, the special courts had completed only thirteen cases against low-level perpetrators.⁴⁷ There is little information available on the status of the court since then, although in February 2010, Human Rights Watch restated earlier criticisms. “The cases before the court so far involve ordinary crimes, like theft and receiving stolen goods—which don’t begin to reflect the massive scale of destruction in Darfur.”⁴⁸

In recognition that scant justice had been achieved internally, the African Union (AU) in 2009 called for the creation of a “Hybrid Court,”

⁴¹ *Sudan: UN Special Rapporteur on Human Rights in Sudan’s Recent Assessment of Darfur Courts, Obsanjo Envoy and Sudan MoJ Discuss ICC*, COALITION FOR THE INT’L CRIM. CT. (Mar. 7, 2006), <http://www.iccnw.org/?mod=newsdetail&news=391> (last visited Feb. 20, 2011) [hereinafter CICC, *Sudan*].

⁴² *Sudan’s special court on Darfur crimes not satisfactory, UN genocide expert says*, UN NEWS CTR. (Dec. 16, 2005), <http://www.un.org/apps/news/storyAr.asp?NewsID=16966&Cr=Sudan&Cr1=Darfur&Kw1=Juan+Mendez&Kw2=&Kw3=> (last visited Feb. 20, 2011).

⁴³ BBC NEWS, *War Crimes Tribunal*, *supra* note 37.

⁴⁴ LACK OF CONVICTION, *supra* note 39, at 1.

⁴⁵ Totten & Tyler, *supra* note 33, at 1096.

⁴⁶ CICC, *Sudan*, *supra* note 41.

⁴⁷ Totten & Tyler, *supra* note 33, at 1096.

⁴⁸ Vessela Evrova, *Sudan Condemns ICC Ruling on Bashir Genocide Charges*, RADIO NEDERLAND WERELDOMPOEP, Feb. 4, 2010, <http://www.rnw.nl/int-justice/article/sudan-condemns-icc-ruling-bashir-genocide-charges> (last visited Feb. 20, 2011) (quoting “Human Rights Watch” without further naming source of comment).

located in Sudan, whose staff would include foreign judges, to handle Darfur-related crimes.⁴⁹ The AU suggested the creation of the Court in response to the need for Sudan's judiciary "to regain its credibility and esteem in the eyes of the people of Darfur and nationally."⁵⁰

The AU envisioned this to be achieved by a Hybrid Court because victims' "confidence in any national response needs to be rebuilt with credible measures which ensure their meaningful participation in the justice and reconciliation proceedings and processes, thereby satisfying their hunger for justice."⁵¹ The African Union also advocated for changes in Sudanese law, among them lifting the immunity from prosecution granted to security forces, as well as removing legal obstacles to prosecutions for rape.⁵²

At the outset, the AU proposal was not rejected by the Sudanese government, which indicated it would consider the proposal "to ensure that it does not run counter to the Sudanese constitution."⁵³ After some consideration, Al-Tayib Haroun of the Human Rights Advisory Council in the Ministry of Justice stated that "foreigners have no place prosecuting Sudanese." He explained that under Sudanese law, only Sudanese are permitted to act as judges, and that the matter touches on the principle of the sovereignty of the state and its judiciary. He argued that agreeing to foreign justices would mean admitting inadequacies, and, he added, "it would bring the country into dangerous territory."⁵⁴ However, Haroun did note that some of the report's suggestions were well-received, such as the sections relating

⁴⁹ *African Union Panel of Darfur Recommends Formation of Special Court*, MIRAYA FM, Oct. 23, 2009, http://www.mirayafm.org/index.php?option=com_content&view=article&id=683:african-union-panel-on-darfur-recommends-formation-of-special-court&catid=85:85&Itemid=278 (last visited Feb. 20, 2011). Specifically, the mandate of the proposed court would be to "deal particularly with the most serious crimes" arising from the conflict. Report of the African Union High-Level Panel on Darfur (AUPD), A.U. Doc. PSC/AHG/2(CCVII), ¶ 25(b) (Oct. 2009), available at <http://www.ausitroom-psd.org/Documents/PSC2009/207th/Report/AUPDReportDarfurEng.pdf>.

⁵⁰ Report of the African Union High-Level Panel on Darfur (AUPD), A.U. Doc. PSC/AHG/2(CCVII), ¶ 19 (Oct. 2009), available at <http://www.ausitroom-psd.org/Documents/PSC2009/207th/Report/AUPDReportDarfurEng.pdf>.

⁵¹ *Id.* ¶¶ 19–20.

⁵² MIRAYA FM, *supra* note 49. For a discussion of current rape laws in Sudan, see *infra* Chapter III.B.

⁵³ *African Leaders Agree to Establish a Special Court for Darfur*, BBC NEWS, Oct. 31, 2009, http://www.sudanile.com/index.php?view=article&catid=42%3A2008-05-19-17-29&id=6971%3A2009-10-31-06-275&tmpl=component&print=1&layout=default&page=&option=com_content&Itemid=56 (translation from Arabic on file with author).

⁵⁴ *Justice Official: Foreigners Have No Place Prosecuting Sudanese*, AL-SAHAFI, Oct. 25, 2009, http://www.sudanile.com/index.php?view=article&catid=42%3A2008-05-19-17-16-29&id=6771%3A2009-10-25-09-55-33&tmpl=component&print=1&layout=default&page=&option=com_content&Itemid=56 (translation from Arabic on file with author).

to the formation of justice and reconciliation councils.⁵⁵ On the part of the rebel groups, the Justice and Equality Movement “described the proposal as impractical” although it did not reject it.⁵⁶

Despite calling for justice in Darfur, the African Union, the inter-governmental regional organization comprising every country on the continent, has not supported the International Criminal Court in its endeavors to prosecute alleged perpetrators for their roles in the Darfur conflict. In 2009, the African Union applied to the UN Security Council to suspend the ICC’s Darfur investigations.⁵⁷ Receiving no reply, the African Union issued a strong statement during a July 2009 meeting in Libya, in which it mandated that African Union member states “shall not co-operate” with the ICC “relating to immunities for the arrest and surrender of Sudanese President Omar al-Bashir.”⁵⁸ Some states nevertheless objected to the African Union statement, and pledged to arrest President Bashir if he travels to their countries.⁵⁹ While this appears to have somewhat limited al-Bashir’s travel to ICC signatory states, he has been welcomed by both Chad and Kenya, ICC state parties, without incident.⁶⁰ However, due to the ICC arrest warrant pending against President al-Bashir, as recently as December 2010, the Central African Republic did not invite him to their 50th anniversary of independence celebrations. This issue has strained the bilateral diplomatic relations of countries in the region as it forces states to choose between obligations owed to the AU and to the ICC.⁶¹ It remains to be seen how the African Union and its member states will resolve this conflict, and whether

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *AU Votes Against Cooperating with ICC Arrest Warrant for Bashir*, FRANCE 24, July 3, 2009, <http://www.france24.com/en/20090703-african-union-votes-end-cooperation-over-bashir-indictment-sudan-icc-darfur> (last visited Feb. 20, 2011).

⁵⁸ *African Union in Rift with Court*, BBC NEWS, July 3, 2009, <http://news.bbc.co.uk/2/hi/8133925.stm> (last visited Feb. 20, 2011).

⁵⁹ Godfrey Olukya, *Uganda: Bashir Will Be Arrested If He Comes Here*, HUFFINGTON POST, July 13, 2009, http://www.huffingtonpost.com/2009/07/13/uganda-bashir-will-be-arr_n_230613.html (last visited Feb. 20, 2011).

⁶⁰ Xan Rice, *Chad refuses to arrest Omar al-Bashir on genocide charges*, THE GUARDIAN, July 22, 2010, <http://www.guardian.co.uk/world/2010/jul/22/chad-refuses-arrest-omar-al-bashir> (last visited Feb. 20, 2011); *War Crimes Court: Arrest Sudan’s al-Bashir*, ASSOCIATED PRESS, Dec. 1, 2010, available at <http://www.allvoices.com/news/7491449-war-crimes-court-arrest-sudans-albashir> (last visited Feb. 20, 2011) (noting also that al-Bashir planned to visit the Central African Republic in December 2010).

⁶¹ Mihret Aschalew, *ICC, AU and Darfur Peace Process*, THE REPORTER, July 31, 2010, http://www.ethiopianreporter.com/english/index.php?option=com_content&view=article&id=898:icc-au-and-darfur-peace-process&catid=103:politics-and-law&Itemid=513 (last visited Feb. 20, 2011).

they will assist the ICC by arresting the accused for trial at either the national or international level.

C. *Sub-national Prosecutions*

Local mechanisms for achieving justice in the Sudan include three that merit particular attention, including *Diya* ceremonies; peace conferences; and *judiyya*, or mediation. *Diya* refers to blood money and *diya* ceremonies seek to compensate victims by requiring perpetrators of crimes to pay for the harm suffered by giving cattle to the victim or by performing an act of community service that benefits the victim.⁶²

The peace conference, a community-wide mechanism, has been used to resolve tribal disputes for centuries.⁶³ International organizations have supported the most recent peace conferences, which have secured local peace with some measure of success.⁶⁴ The South Sudan Wunlit Conference of 1991, which sought to end Dinka-Nuer hostilities, is the most successful recent peace effort.⁶⁵ The Conference was primarily organized by the New Sudan Council of Churches, a Christian organization, and used a combination of both traditional and modern conflict resolution techniques to build peace.⁶⁶ The role of Christian churches in this process became a unifying factor in an otherwise ethnically diverse group of communities.⁶⁷

The *judiyya* system is considered one of the most successful traditional institutions for administering justice. This mediation mechanism is deeply rooted in the culture of all communities within the region.⁶⁸ Historically, *judiyya* proceedings, called *mutamarat al sulh*,⁶⁹ have been used to settle disputes between individuals, including spouses, or between social groups,

⁶² Totten & Tyler, *supra* note 33, at 1105–06; *Comparative Criminal Law and Enforcement: Islam—Homicide And Bodily Harm (Jinayat)*, AMERICAN LAW AND LEGAL INFORMATION, available at <http://law.jrank.org/pages/667/Comparative-Criminal-Law-Enforcement-Islam-Homicide-bodily-harm-jinayat.html> (last visited Feb. 20, 2011).

⁶³ ABDELBAGI JIBRIL, THE IMPACT OF RESTITUTION, REPARATIONS, AND COMPENSATION ON THE PEACE PROCESS IN DARFUR 9 (Oct. 2009), available at http://www.darfurconsortium.org/member_publications/2009/October/DRDC.ImpactofReparations.100909.pdf (“Restorative justice is natural and well inculcated in the collective psyche of the people of Darfur with their different ethnic groupings and tribal affiliations.”).

⁶⁴ MARK BRADBURY ET AL., LOCAL PEACE PROCESSES IN SUDAN: A BASELINE STUDY 6 (Rift Valley Institute 2006), available at http://www.riftvalley.net/documents/Local_Peace_Processes_in_Sudan_-_May_2006.pdf.

⁶⁵ *Id.* at 31.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Dr. Yousif Kh. Aburaffas, *The Role of Juddiyya in Conflict Resolution in Sudan: Darfur Case Study*, www.iua.edu.sd/iua_magazine/african_studies/37/009.doc (Arabic).

⁶⁹ BRADBURY ET AL., *supra* note 64, at 86.

including clans and tribes. Highly respected individuals are informally selected by their communities to preside over the *judiyya* proceedings, known as *ajaweed*.⁷⁰

In the *judiyya* system, the *ajaweed* are not neutral. They take on various roles, and even pressure the aggrieved parties by using positive incentives or veiled threats, in order to achieve consensus.⁷¹ The *judiyya* meeting begins with a prayer, following which each party to the dispute presents its complaints and demands, both orally and in writing.⁷² The *ajaweed* meet in private to reach their decision, returning to convince the parties to agree to their solution.⁷³ Failure to respect *judiyya* rulings results in communal disapproval and labeling as a “deviant.”⁷⁴ In discussing the perception of *judiyya* when compared to national courts, Adam Azzain Mohamed, former local government officer in Darfur and professor at the Institute for the Study of Public Administration and Federal Governance at the University of Khartoum, explained in 2002 that, “[t]he court declares one of the disputants victorious; the other will [resent] being the loser and will never forgive the victor. The *judiyya*, on the other hand, makes both disputants satisfied with its decision, thus pre-empting future tense relations.”⁷⁵ This system offers a means of achieving local reconciliation.

While *judiyya* proceedings are respected socially, their rulings are not legally binding on the parties. However, if a party is not satisfied, it can appeal the decision by seeking justice in the state’s judiciary;⁷⁶ nonetheless, this may be a prohibitively costly option for many.⁷⁷ In practice, the parties typically consent to the *judiyya*’s ruling with a sincere agreement, solidified by shaking hands and offering or accepting forgiveness.⁷⁸

The employment of the *judiyya* system in Darfur is not without problems. For example, due to gradual changes in the social fabric of the region, the tribal leaders who traditionally acted as *ajaweed* have less influence over their constituents than in the past.⁷⁹ Additionally, the

⁷⁰ E-mail from Mohamed A. Elnu'man, Sudanese Legal Scholar (Feb. 15, 2011, 02:47 EST) (on file with author).

⁷¹ Adam Azzain Mohamed, *Intergroup Conflicts and Customary Mediation: Experiences from Sudan*, 2.2 AFR. J. CONFLICT RESOL. 2, 5 (2002).

⁷² BRADBURY ET AL., *supra* note 64, at 88–89.

⁷³ *Id.*

⁷⁴ E-mail from Mohamed A. Elnu'man, Sudanese Legal Scholar (Feb. 15, 2011, 02:47 EST) (on file with author).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Dr. Yousif Kh. Aburaffas, *supra* note 68, at 7.

⁷⁹ BRADBURY ET AL., *supra* note 64, at 103.

sociopolitical realities of the conflict have facilitated the emergence of a younger tribal elite who revolted against the government and have somewhat undermined the historical role of traditional community leaders.⁸⁰ In the midst of such conflict, militia leaders garnered authority, even as the central government has continuously curtailed the power of local leaders.⁸¹

Government officials are now sometimes asked to act as *ajaweed* rather than the local elders.⁸² Furthermore, it is unknown to what extent tribal elders have been targeted as victims of violence or have been displaced during the conflict. Nonetheless, with some redefinition to adequately address the needs resulting from this conflict, it may be possible to employ this system to achieve justice in Darfur.⁸³ Despite these challenges, an integrated approach to accountability that includes some, and perhaps all, of these mechanisms is imperative to achieving meaningful justice in Darfur.⁸⁴

The African Union High-Level Panel on Darfur (AUPD), led by the former South African president Thabo Mbeki, published a comprehensive report in October 2010 that addresses the *judiyya* system. The report notes that the effectiveness of traditional reconciliatory mechanisms has been significantly undermined. The report finds that this is the result of “the political nature and magnitude of the war; poor security; the economic inability of much of the population to pay ‘blood money’ (*diya*) as compensation for loss of life; mutual suspicions; and the weaknesses of the native administrations.”⁸⁵

Notwithstanding formal prosecution, the AUPD report recommends that Darfuri communities should be given an opportunity to restore and resort to their traditional *judiyya* system “to deal with those perpetrators who appear to bear responsibility for crimes other than the most serious violations.”⁸⁶ This opportunity will not be meaningful without the political will of the government. The AUPD report recommends “[p]articular measures and strategies, and where necessary, legislation, should be adopted

⁸⁰ E-mail from Mohamed A. Elnu'man, Sudanese Legal Scholar (Feb. 15, 2011, 02:47 EST) (on file with author).

⁸¹ *Id.*

⁸² *Id.* at 88.

⁸³ For a discussion of how Rwanda modified the *gacaca* system to address crimes resulting from the genocide, see *infra* Chapter IV.C.

⁸⁴ Totten & Tyler, *supra* note 33, at 1106. One of the most promising areas where the *judiyya* mechanism may deliver justice and promote reconciliation is land disputes. INSTITUTE FOR WAR AND PEACE REPORTING (IWPR), ROLE FOR LOCAL JUSTICE IN DARFUR?, Sept. 28, 2010, <http://iwpr.net/report-news/role-local-justice-darfur>.

⁸⁵ Report of the African Union High-Level Panel on Darfur (AUPD), A.U. Doc. PSC/AHG/2(CCVII), at 48 (Oct. 2009), available at <http://www.ausitroom-psd.org/Documents/PSC2009/207th/Report/AUPDReportDarfurEng.pdf>.

⁸⁶ *Id.* at 93.

to ensure that traditional justice measures operate fairly and do not exclude the concerns of any group wishing to participate in justice proceedings.”⁸⁷

D. Truth Commissions

Although to date a truth commission has not been established for Darfur, on May 9, 2004, Sudanese President Omar al-Bashir created a Fact-Finding Committee to investigate the human rights situation in Darfur.⁸⁸ The Committee, after holding meetings, listening to witnesses, and touring the region, released its findings in a report. Of note, the Commission found that violations of human rights and crimes against humanity⁸⁹ had taken place. However, it did not find that this rose to the level of genocide because “it was not proven to the Committee that any group, irrespective of its race or creed, has been subjected to physical and mental harm or hard living conditions with the intention of particularly or wholly annihilating it.”⁹⁰

Moreover, the Commission acknowledged that rapes occurred in the region, but found that “these incidents were not committed in a systematic manner, nor were they committed on a large scale, hence they do not constitute a crime against humanity as was alleged.”⁹¹ Finally, the Commission conducted a study on the number of people killed. While it was unable to generate a precise number, it “confirmed that the total number killed from all parties including the armed forces and police does not exceed some thousands. Figures circulated by media and some international organizations were inaccurate.”⁹²

The Commission recommended taking judicial action for some of the violent acts it had recorded. Furthermore, it encouraged the formation of an in-depth study on the root causes of the conflict with a vision to create and implement urgent short and long-term initiatives to resolve the conflict in Darfur.⁹³ There is no indication that any follow-up committee has been created by the government. Moreover, even from the outset, human rights

⁸⁷ *Id.*

⁸⁸ Press Release, Sudan Human Rights Organization, Human Rights Commission and Other Human Rights Groups Must Join the Darfur’s Fact Finding Committee (May 11, 2004), <http://www.shro-cairo.org/pressreleases/04/may/darfur-may11.htm> (last visited Feb. 20, 2011) [hereinafter SHRO Press Release].

⁸⁹ Including burning villages, killings, rape, forced displacement, arrests, torture, and extrajudicial executions. *Fact-Finding Committee Report on Allegations of Human Rights Violations in Darfu* [sic], SUDAN VISION, Jan. 29, 2005, <http://www.sudanvisiondaily.com/modules.php?name=News&file=article&sid=5100>.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

groups criticized the Commission, alleging that foreign affairs and senior justice officials were “responsible for unacceptable illegal intrusion to influence the Fact-Finding Committee even before it [began] lawful investigation unto the Darfur’s Crisis.”⁹⁴ Thus, this attempt falls short of finishing the task of seeking the truth of the conflict.

The international community conducted a similar inquiry in 2004.⁹⁵ In a report released in January 2005, however, it released strikingly different results than the ones issued by the Sudanese Commission. It found that the “[g]overnment forces and militias conducted indiscriminate attacks, including killing of civilians, torture, enforced disappearances, destruction of villages, rape and other forms of sexual violence, pillaging and forced displacement, throughout Darfur.”⁹⁶ The Commission found that the acts were conducted on widespread and systematic basis (including rape), therefore rising to the level of crimes against humanity. Like the Sudanese Commission, however, the UN Commission found that the Government of Sudan had not necessarily pursued a policy of genocide.⁹⁷

The atrocity that both reports have uncovered may be addressed, at least symbolically, through the implementation of a truth commission to address the Darfur crisis. The recommendations of both the prior inquiries should be taken into account by any legitimate and capable body established for this purpose.

III. LEGAL FRAMEWORK APPLICABLE TO PROSECUTIONS IN DARFUR

Effective deployment of multilevel prosecutions and of local dispute resolutions systems depends on the adherence by Sudan to legal obligations it has assumed, not only at the national but also at the international and regional levels.

A. *International Law*

A host of international law is pertinent to the conflict in Darfur. Human rights law applies most directly, given that the contours of protracted conflict in that region have not always fit neatly into the framework

⁹⁴ SHRO Press Release, *supra* note 88.

⁹⁵ S.C. Res. 1574, U.N. Doc. S/RES/1574 (Nov. 19, 2004).

⁹⁶ Int’l Comm’n of Inquiry on Darfur, Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, 3 (Jan. 25, 2005), *available at* http://www.un.org/news/dh/sudan/com_inq_darfur.pdf.

⁹⁷ *Id.* at 4.

envisioned by international humanitarian law.⁹⁸ In applying human rights law, it is important to note at the outset that all factions involved in the conflict may be held criminally responsible for their actions. While international criminal law originally “presupposed that crimes against humanity were committed by agents of a state,” over time the doctrine has evolved to allow criminal responsibility for non-state actors.⁹⁹

A member state of the United Nations since November 12, 1956,¹⁰⁰ Sudan has obligated itself to obey resolutions of the Security Council made pursuant to Chapter VII of the UN Charter.¹⁰¹ Sudan is not a state party to the Rome Statute of the International Criminal Court.¹⁰² Nevertheless, by means of Security Council Resolution 1593, enacted in 2005 pursuant to Chapter VII, Sudan is obliged to cooperate with the ICC in the investigation and prosecution of war crimes resulting from the conflict in Darfur.¹⁰³

The Security Council referral is one of several ways contemplated by the Rome Statute for a case to reach the ICC. Article 13 of the Rome Statute provides that the ICC may exercise jurisdiction either when a situation or crimes are referred to the Prosecutor by a State Party, when the Security Council acts under Chapter VII and refers a situation or case to the

⁹⁸ Sudan has ratified the 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; the Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea; and the Geneva Convention Relative to the Treatment of Prisoners of War. However, Sudan has not signed the Geneva Convention Relative to the Protection of Civilian Persons in Time of War. Additionally, in 2006, Sudan acceded to both Protocols to the Geneva Conventions of 1949—Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims on Non-International Armed Conflicts (Protocol II). University of Minnesota, Human Rights Library, Ratification of International Human Rights Treaties—Sudan, <http://www1.umn.edu/humanrts/research/sudan-ratification1.html> (last visited Feb. 20, 2011) [hereinafter Human Rights Treaties—Sudan].

⁹⁹ David Luban, *A Theory of Crimes Against Humanity*, 29 YALE J. INT’L L. 85, 96–97 (2004) (The Tadić judgment of the ICTY first did away with the state action doctrine and held that “entities exercising de facto control over a particular territory but without international recognition of formal status of a de jure state, or by a terrorist group or organization” could be held criminally responsible. Overtime, this has further relaxed, as in the case of the ICC which requires that the offense of crimes against humanity flow only from “a State or organizational policy,” thereby abandoning the control requirement.)

¹⁰⁰ *Member States of the United Nations*, UNITED NATIONS, July 3, 2006, <http://www.un.org/en/members/index.shtml> (last visited Feb. 20, 2011).

¹⁰¹ U.N. Charter art. 25.

¹⁰² See *States Parties: African States*, INT’L CRIM. CT., <http://www.icc-cpi.int/Menus/ASP/States+Parties/African%20States> (last visited Feb. 20, 2011); Human Rights Treaties—Sudan, *supra* note 98.

¹⁰³ S.C. Res. 1593, *supra* note 6; see S.C. Press Release, *supra* note 6.

Prosecutor, or when the Prosecutor initiates an investigation *proprio motu*.¹⁰⁴ Even in situations where the Security Council acts to refer a situation, the ICC is designed to complement, rather than supplement, national jurisdiction. As such, it under Article 17 of the Rome Statute, the ICC must not hear a case when:

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;

The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;

The case is not of sufficient gravity to justify further action by the Court.¹⁰⁵

When the ICC is able to take a case, the crimes for which it has jurisdiction include genocide, crimes against humanity, war crimes, and provisionally, the crime of aggression.¹⁰⁶ A person convicted of one of these crimes may be sentenced to a term for years, not to exceed thirty years except when the “extreme gravity of the crime and the individual circumstances of the convicted person” justify a term of life imprisonment.¹⁰⁷ The death penalty is not contemplated by the Rome Statute.¹⁰⁸

In this case, the Security Council, having satisfied itself that Sudan was not acting to investigate or prosecute war crimes in Darfur, referred the Darfur situation for prosecution to the ICC. Sudan is obligated to cooperate fully in the investigation and prosecution of war crimes with the ICC. Sudan

¹⁰⁴ Rome Statute, *supra* note 8, art. 13.

¹⁰⁵ *Id.* art. 17.

¹⁰⁶ *Id.* art. 5 (a)–(d). The crime of aggression was recently addressed during the 2010 Kampala Review Conference. Pending the adoption of a resolution by at least thirty States Parties, as well as a two-thirds majority decision to authorize jurisdiction, the crime of aggression will be a prosecutable offense. William A. Schabas, *The Result: Prosecuting Aggression at the International Criminal Court*, THE ICC REVIEW CONFERENCE: KAMPALA 2010 (June 12, 2010, 9:17 AM), <http://iccreviewconference.blogspot.com/2010/06/result-prosecuting-aggression-at.html> (last visited Jan. 20, 2011).

¹⁰⁷ Rome Statute, *supra* note 8, art. 77(1).

¹⁰⁸ *See generally id.*

is a state party to the International Covenant on Civil and Political Rights (ICCPR), having acceded to that instrument on March 18, 1986.¹⁰⁹ Article 2 of the ICCPR states:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.¹¹⁰

Those rights which Sudan therefore must protect include the right to life and the right to liberty and security of person.¹¹¹ The ICCPR specifically prohibits “[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.”¹¹² It also requires that, “[i]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.”¹¹³

Respecting trial guarantees, Article 14 of the ICCPR provides: “All persons shall be equal before the courts and tribunals. . . . [E]veryone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”¹¹⁴ In criminal trials, innocence must be presumed, and the defendant is entitled to the following minimum guarantees:

- (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
- (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

¹⁰⁹ International Covenant on Civil and Political Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess. Supp. No. 16, U.N. Doc. A/6316, at 49 (Mar. 23, 1976), *reprinted in* 999 U.N.T.S. 171 [hereinafter ICCPR]; *see also International Covenant on Civil and Political Rights*, UN TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (last visited Feb. 20, 2011).

¹¹⁰ ICCPR, *supra* note 109, art. 2(1).

¹¹¹ *Id.* arts. 6(1), 9(1). Notably, this article is derogable in a time of public emergency that “threatens the life of the nation,” as long as the member state has appropriately informed the other States Parties via the Secretary General of the United Nations. *Id.* arts. 4(1), 4(3).

¹¹² *Id.* art. 20(2).

¹¹³ *Id.* art. 27.

¹¹⁴ *Id.* art. 14(1).

- (c) To be tried without undue delay;
- (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
- (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
- (g) Not to be compelled to testify against himself or to confess guilt.¹¹⁵

Article 14(5) also requires that convicted persons have the right to appeal.¹¹⁶ Sudan acceded to the Convention on the Prevention and Punishment of the Crime of Genocide on October 13, 2003.¹¹⁷ All parties to the Convention “confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law they undertake to prevent and punish.”¹¹⁸ Genocide is defined as:

Any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, such as:

Killing members of the group;

Causing serious bodily or mental harm to members of the group;

Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

Imposing measures intended to prevent births within the group.

¹¹⁵ *Id.* art. 14(3)(a)–(g).

¹¹⁶ *Id.* art. 14(5). Sudan has neither signed nor ratified the two Optional Protocols to the ICCPR; thus provisions in those treaties are not considered here; see Human Rights Treaties—Sudan, *supra* note 98.

¹¹⁷ ICCPR, *supra* note 109, art. 14(5).

¹¹⁸ Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, art. I.

Forcibly transferring children of the group to another group.¹¹⁹

The Convention forbids not only the act of genocide, but also conspiracy to act, incitement to act, or complicity in genocide.¹²⁰

Sudan, as a member state, is required under Article V of the Convention to “provide effective penalties for persons guilty of genocide.”¹²¹ Pursuant to Article VI, persons charged with genocide or other enumerated offenses must “be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction.”¹²² Should genocide charges be confirmed against President al-Bashir or any other accused, therefore, Sudan has an obligation under this Convention either to prosecute the accused or to surrender him for trial before the international tribunal.

Sudan agreed to “take all feasible measures” to ensure that children under fifteen do not participate in hostilities when it ratified the Convention on the Rights of the Child in 1990.¹²³ In the same Convention, it obligated itself to take “all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of . . . armed conflict.”¹²⁴ In 2005, Sudan also ratified the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts, which raises the acceptable age of combatants in armed forces to eighteen years of age.¹²⁵

International norms have increasingly criminalized sexual and gender-based violence. While Sudan has not signed the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),¹²⁶ it is a party to the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, which

¹¹⁹ *Id.* art. II.

¹²⁰ *Id.* art. III.

¹²¹ *Id.* art. V.

¹²² *Id.* art. VI.

¹²³ Convention on the Rights of the Child, G.A. Res. 44/25, Annex, art. 38, U.N. GAOR, 44th Sess. Supp. No. 49, U.N. Doc. A/44/49, at 167 (1989), *entered into force* Sept. 2, 1990.

¹²⁴ *Id.* arts. 38–39.

¹²⁵ See Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts, G.A. Res. 54/263, Annex I, U.N. GAOR, 54th Sess. Supp. No. 49, U.N. Doc. A/54/49, Vol. III (May 25, 2000), *entered into force* Feb. 12, 2002.

¹²⁶ See Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13, <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&msgid=IV-8&chapter=4&lang=en> (last visited Dec. 10, 2010).

protects women from being sold or traded into marriage.¹²⁷ Further, any trials that proceed under the International Criminal Court will be governed by the Rome Statute and other applicable laws as stipulated in Article 21 of the Rome Statute. It allows for the prosecution of rape and several other forms of sexual violence as war crimes and crimes against humanity, and it is well recognized that sex crimes may constitute genocide as well.¹²⁸ Additionally, the jurisprudence of the International Criminal Tribunals for Rwanda (ICTR) and Yugoslavia (ICTY) has developed to include rape as a crime against humanity¹²⁹ and as a component of the crimes of genocide¹³⁰ and direct and public incitement to commit genocide.¹³¹ Rape has also been held to be a violation of the laws of war,¹³² a form of torture under both crimes against humanity¹³³ and the laws of war,¹³⁴ particularly as outrages upon personal dignity¹³⁵ or as cruel treatment under Common Article 3 of the Geneva Conventions.¹³⁶ Sexual violence has also been held to constitute enslavement,¹³⁷ persecution,¹³⁸ or inhuman acts¹³⁹ under crimes against humanity.

Also of particular concern to Darfur is the law related to internally displaced peoples. According to the UN High Commissioner on Refugees, as of 2008, Sudan already had one of the three largest populations of internally displaced peoples in the world.¹⁴⁰ However, because of the inherently domestic nature of the phenomenon, there is no binding international law that directs how internally displaced people should be

¹²⁷ Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, art. 1(c), 226 U.N.T.S. 3, *entered into force* Apr. 30, 1957.

¹²⁸ Rome Statute, *supra* note 8, arts. 7–8.

¹²⁹ See Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment (Sept. 2, 1998).

¹³⁰ See Prosecutor v. Muhimana, Case No. ICTR-95-1B-T, Judgment (Apr. 25, 2005).

¹³¹ See Prosecutor v. Nahimana, Baraygiza & Ngeze, Case No. ICTR-99-52-T, Judgment (Dec. 3, 2003).

¹³² See Prosecutor v. Kunarac, Kovac & Vukovic, Case No. IT-96-23-T & IT-96-23/1-T, Trial Chamber Judgment (Feb. 22, 2000).

¹³³ See Prosecutor v. Kvočka et al., Case No. IT-98-30/&-T, Judgment (Nov. 2, 2001).

¹³⁴ See Prosecutor v. Delić et al., Case No. IT-96-21-T, Judgment (Nov. 16, 1998).

¹³⁵ See Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment (July 21, 2000).

¹³⁶ See Prosecutor v. Tadić, Case No. IT-94-1-T, Judgment (May 7, 1997).

¹³⁷ See Prosecutor v. Kunarac, Kovac & Vukovic, Case No. IT-96-23-T & IT-96-23/1-T, Trial Chamber Judgment (Feb. 22, 2000).

¹³⁸ See Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment (Aug. 2, 2001).

¹³⁹ See Prosecutor v. Brima, Kamara, Kanu, Case No. SCSL-04-16-A, Appeal Chamber Decision (Feb. 22, 2008).

¹⁴⁰ *Internally Displaced People*, UNHCR, <http://www.unhcr.org/pages/49c3646c146.html> (last visited July 6, 2010).

treated. Nonetheless, the UN has produced a set of guiding principles on internal displacement that should be considered in transitional justice efforts in Sudan.¹⁴¹ In addition to affirming principles such as the inherent right to life, liberty, security, and freedom of movement, the guiding principles emphasize that internally displaced people “shall enjoy, in full equality, the same rights and freedoms under international and domestic law as do other persons in their country” and discrimination against them based on their displaced status is prohibited.¹⁴²

Further, states are “under a particular obligation to protect against the displacement of indigenous peoples, minorities, peasants, pastoralists and other groups with a special dependency on and attachment to their lands.”¹⁴³ Displaced children are also particularly mentioned for protection, and should not be recruited, required or permitted to take part in hostilities.¹⁴⁴ Of particular importance, “competent authorities” are obligated to “establish conditions, as well as provide the means, which allow internally displaced persons to return voluntarily, in safety and with dignity, to their homes or places of habitual residence, or to resettle voluntarily in another part of the country. Such authorities shall endeavor to facilitate the reintegration of returned or resettled internally displaced persons.”¹⁴⁵ These principles should be considered as Darfur transitions from conflict to post-conflict.

Also of note in areas of international human rights law, Sudan acceded to the International Convention on the Elimination of All forms of Racial Discrimination (CERD) in 1977.¹⁴⁶ CERD requires that States Parties “undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee . . . the right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution.”¹⁴⁷ In 2009,¹⁴⁸ Sudan also acceded to the International Convention on the Protection and Promotion of the Rights

¹⁴¹ Representative to the Secretary-General, *Report of the Representative of the Secretary-General, Mr. Francis M. Deng, delivered to the Commission on Human Rights*, U.N. Doc. E/CN.4/1998/53/Add.2 (Feb. 11, 1998).

¹⁴² U.N. Office for the Coordination of Humanitarian Affairs (OCHA), *Guiding Principles on Internal Displacement*, OCHA/IDP/2004/1 (1998), Principles 1(1), 10, 12.

¹⁴³ *Id.* Principle 9.

¹⁴⁴ *Id.* Principle 13.

¹⁴⁵ *Id.* Principle 28.

¹⁴⁶ International Convention on the Elimination of All Forms of Racial Discrimination, Jan. 4, 1969, 660 U.N.T.S. 196.

¹⁴⁷ *Id.* art. 5(b).

¹⁴⁸ *Sudan ratifies the UN Convention*, ADD INT'L, Apr. 2009, www.add.org.uk/newsStory.asp?ID=10100.

and Dignity of Persons with Disabilities.¹⁴⁹ The Convention mandates that States Parties take “all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict,” in accordance with their international legal obligations.”¹⁵⁰ While Sudan has signed the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) in 1986, it has not acceded to the Convention.¹⁵¹

Additionally, Sudan is also a member of the Organization of the Islamic Conference (OIC)¹⁵² and the Arab League.¹⁵³ Each international organization has adopted a less protective human rights instrument than those already described; the OIC adopted the Cairo Declaration on Human Rights in Islam¹⁵⁴ and the Arab League adopted the Arab Charter on Human Rights.¹⁵⁵ Neither instrument is particularly useful for enforcing human rights violations; the Cairo Declaration is intended to serve as an aspirational guide to member states,¹⁵⁶ and because many of the member states of the OIC are members of multiple regional organizations, the Arab Charter on Human Rights has not typically been used as a venue for enforcing human rights.¹⁵⁷

¹⁴⁹ International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, G.A. Res. 61/106, Annex I, U.N. GAOR, 61st Sess. Supp. No. 49, U.N. Doc. A/61/49, at 65 (2006), *entered into force* May 3, 2008.

¹⁵⁰ *Id.*

¹⁵¹ Human Rights Treaties—Sudan, *supra* note 98.

¹⁵² *OIC Member States*, ORG. OF THE ISLAMIC CONF., www.oic-oci.org/member_states.asp (last visited July 5, 2010).

¹⁵³ LEAGUE OF ARAB STATES, <http://www.arableagueonline.org/las/index.jsp> (last visited July 6, 2010).

¹⁵⁴ World Conference on Human Rights, Apr. 19 – May 7, 1993, *Cairo Declaration on Human Rights in Islam*, U.N. Doc. A/CONF.157/PC/62/Add.18 (June 9, 1993).

¹⁵⁵ Arab Charter on Human Rights, adopted by the League of Arab States, *reprinted in* 18 HUM. RTS. L.J. 151 (1997). Note that Sudan has not ratified the latest version of the Arab Charter on Human Rights, which entered into force in March, 2008. See Mervat Rishmawi, *The Arab Charter on Human Rights and the League of Arab States: An Update*, 10 HUM. RTS. L. REV. 169 (2010).

¹⁵⁶ World Conference on Human Rights, Apr. 19 – May 7, 1993, *Cairo Declaration on Human Rights in Islam*, U.N. Doc. A/CONF.157/PC/62/Add.18, pmb1. (June 9, 1993).

¹⁵⁷ Kamran Hashemi, *Muslim States, Regional Human Rights Systems and the Organization of the Islamic Conference*, 52 GERMAN YEARBOOK INT’L L. 75, 104 (2009).

B. Regional Law

Sudan ratified the African Charter on Human and Peoples' Rights in 1986.¹⁵⁸ The Charter, which assures the protection of human rights throughout the continent, embodies a range of principles. Of primary importance, the Charter espouses that human beings are inviolable and entitled to both respect for their lives and the integrity of their persons.¹⁵⁹ The Charter also guarantees certain rights, such as the right to respect of each individual's dignity, the right to liberty and security of person, the right to existence, and the right to property.¹⁶⁰ Article 3 of the Charter establishes the right to equality before the law,¹⁶¹ and Article 7 sets forth minimum fair-trial requirements, as follows:

Every individual shall have the right to have his cause heard.
This comprises,

The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;

The right to be presumed innocent until proved guilty by a competent court or tribunal;

The right to defense, including the right to be defended by counsel of his choice;

The right to be tried within a reasonable time by an impartial court or tribunal.

No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed.

¹⁵⁸ African Charter on Human and Peoples' Rights art. 4, June 27, 1981, 21 I.L.M. 58, available at <http://www.africa-union.org/root/au/Documents/Treaties/Text/Banjul%20Charter.pdf> [hereinafter African Charter]; see African Union, *List of Countries Which Have Signed, Ratified/Acceded to the African Charter on Human and People's Rights*, Feb. 4, 2010, available at <http://www.africa-union.org/root/au/Documents/Treaties/List/African%20Charter%20on%20Human%20and%20Peoples%20Rights.pdf> (indicating that Sudan became a full state party to this Charter on March 11, 1986).

¹⁵⁹ African Charter, *supra* note 158, art. 4.

¹⁶⁰ *Id.* arts. 5, 6, 14, 20.

¹⁶¹ *Id.* art. 3.

Punishment is personal and can be imposed only on the offender.¹⁶²

States parties to the Charter further “have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the . . . Charter.”¹⁶³ Having assumed these obligations when it joined the Charter’s treaty regime, Sudan must respect these provisions as it implements measures for transitional justice in Darfur.

C. National, Local, and Sub-national Law

Sudan has legal safeguards in place for national criminal prosecutions at various levels. Nevertheless, under the current legal framework, it is questionable whether the international crimes committed in Darfur will be prosecuted effectively.¹⁶⁴ Sudan’s criminal justice system suffers from a number of shortcomings in various substantive and procedural aspects. Of particular relevance, Sudanese criminal law does not adequately proscribe some of the international crimes committed in Darfur.¹⁶⁵ It moreover fails to recognize command responsibility¹⁶⁶ and state officials are protected from prosecution by personal immunity.¹⁶⁷

The Special Criminal Court for the Events of Darfur (SCCED) – the special court earlier discussed in section II B – was established for the stated purpose of trying persons accused of participating in atrocities in Darfur. The Chief Justice of Sudan’s Supreme Court chooses the judges of this national court.¹⁶⁸ The court has jurisdiction over first, acts constituting crimes under the Sudan Criminal Act and any other penal acts; second, information submitted to the court by the committee that the Minister of Justice formed to investigate alleged offenses set out in a fact-finding committee’s report; and third, any other information under any other law, in accordance with a decision made by the Chief Justice. Trials in the special

¹⁶² *Id.* art. 7(1)–(2).

¹⁶³ *Id.* art. 26.

¹⁶⁴ REDRESS & KCHRED, *Criminal Law and Human Rights in Sudan: A Baseline Study*, Mar. 2008, http://www.redress.org/downloads/publications/BASELINE_STUDY_FINALMar08.pdf.

¹⁶⁵ LACK OF CONVICTION, *supra* note 39, at 15.

¹⁶⁶ *Id.* at 16.

¹⁶⁷ *Id.* at 17.

¹⁶⁸ All facts set forth in this paragraph are from The Judiciary, Republic of Sudan, Establishment of the Criminal Court in Darfur—Alfashir, June 7, 2005, <http://www.sudanjudiciary.org/newse/news.php?id=8>.

court are public, and the accused has a right to counsel. Sudan's Criminal Procedure Act of 1991 and the Evidence Act of 1994 govern the conduct of proceedings and sentencing. Available sentences under the Criminal Procedure Act of 1991 include "physical punishment (such as lashings), compensation, (for homicide or injury) and death,"¹⁶⁹ and are often incompatible with international law. Judgments are appealable to the Courts of Appeal and the Supreme Court.¹⁷⁰ Thus far, there have been no cases to reach this level of litigation.¹⁷¹

In adjudicating charges only against persons alleged to have committed crimes in connection with the conflict in Darfur, the special court applies the general Sudanese criminal law. This criminal Act, however, which is highly influenced by Islamic jurisprudence, falls significantly short from providing an adequate substantive framework for delivering justice in Darfur.¹⁷² Of particular relevance are the laws concerning loss of life and sexual assault.

Sudanese criminal law proscribes murder.¹⁷³ The criminal code also prohibits sexual assault, but treats rape and fornication in the same way, as *zina*. Thus, a woman who says she has been raped but cannot prove lack of consent may herself be charged with the offense of *zina*.¹⁷⁴ The standard of proof for each crime is different. Fornication is a *hudud* crime, with a sentence or punishment set by divine decree, requiring four impartial witnesses to prove it.¹⁷⁵ In contrast, rape is a *ta'zir* crime, which requires two witnesses. However, this distinction appears to make little difference.¹⁷⁶ Reportedly, "there are many court cases in which a woman fails to prove that she has been the victim of rape and the appearance of her pregnancy causes her to be convicted of fornication, thus compounding her actual and legal

¹⁶⁹ Sharanjeet Parmar, *An Overview of the Sudanese Legal System and Legal Research*, <http://www.nyulawglobal.org/globalex/sudan.htm> (2007).

¹⁷⁰ *Id.*

¹⁷¹ E-mail from Mohamed A. Elnu'man, Sudanese Legal Scholar (Feb. 15, 2011, 02:47 EST) (on file with author).

¹⁷² *Id.*

¹⁷³ International Justice Desk, *Four Sudan Islamists to Hang for Murder of US Diplomat*, RADIO NEDERLAND WERELDOMPOEP, Oct. 10, 2009, <http://www.mnw.nl/int-justice/article/four-sudan-islamists-hang-murder-us-diplomat>.

¹⁷⁴ MAUDE FOURNIER, A COMPREHENSIVE OVERVIEW OF SUDAN'S LEGAL FRAMEWORK IN LIGHT OF THE DARFUR CRISIS 7 (Pearson Peacekeeping Center 2008), www.peaceoperations.org/wp-content/uploads/2010/02/OP3_Fournier.pdf.

¹⁷⁵ Raja Abdullah Al-Zubayr, *The Crimes of Fornication and Rape in Sudanese Criminal Code*, SUDANILE, Sept. 26, 2010, http://www.sudanile.com/index.php?option=com_content&view=article&id=19047:2010-09-26-11-01-29&catid=34:2008-05-19-17-14-27&Itemid=55 (translation on file with author).

¹⁷⁶ *Id.*

woes.”¹⁷⁷ These “legal woes” are very serious. The penalty for unmarried women convicted of *zina* is enduring one hundred lashes; married women are put to death by stoning.¹⁷⁸ The Sudanese Ministry of Justice has attempted to clarify the confusion between the two crimes in criminal code opinions, but these clarifications are non-binding, and civil society has resultantly called for amendments to the law concerning rape.¹⁷⁹

To address flaws in the Sudanese justice system, the Sudanese government amended the 1991 Penal Code to incorporate some international crimes, such as war crimes and crimes against humanity.¹⁸⁰ However, this politically motivated amendment has proved futile because the Sudanese Constitution prevents retroactive implementation of laws.¹⁸¹

Further impeding the stated purpose of the special court, or any Sudanese court, is the fact that Sudanese law grants a wide range of individual immunity from prosecution, which can be circumvented only with permission of the executive bodies. Persons with immunity include members of the military, security services, police, and border guards.¹⁸² The Popular Defense Forces also incorporates many members of the *janjaweed*, so that militia members also may avoid prosecution.¹⁸³ This legal structure severely impairs prospects for meaningful accountability for atrocities in Darfur.

A component of Sudan’s legal structure is the Bill of Rights contained in the 2005 Interim National Constitution; Article 35 guarantees all persons a “right to litigation.”¹⁸⁴ Explicitly incorporated into the Interim National Constitution are “all rights and freedoms enshrined in international human rights treaties, covenants and instruments ratified by the Republic of the Sudan.”¹⁸⁵ Additional requirements include codes covering criminal

¹⁷⁷ *Id.*

¹⁷⁸ Refugees International, *Laws without Justice: An Assessment of Sudanese Laws Affecting Survivors of Rape*, June 2007, available at <http://www.unhcr.org/refworld/docid/47a6eb870.html> (last visited Feb. 8, 2010).

¹⁷⁹ *Id.*

¹⁸⁰ Jean-Francois Darcq, *Sudan to incorporate war crimes into penal code per Arab request: official*, SUDAN TRIBUNE, Mar. 15, 2009, <http://www.sudantribune.com/Sudan-to-incorporate-war-crimes,30525>.

¹⁸¹ *Id.*; see also Alex de Waal, *The AU Panel and the Justice Challenge (3)*, AFRICAN ARGUMENTS, July 14, 2009, <http://africanarguments.org/2009/07/14/the-au-panel-and-the-justice-challenge-iii/>.

¹⁸² MAUDE FOURNIER, A COMPREHENSIVE OVERVIEW OF SUDAN’S LEGAL FRAMEWORK IN LIGHT OF THE DARFUR CRISIS 7 (Pearson Peacekeeping Center 2008), www.peaceoperations.org/wp-content/uploads/2010/02/OP3_Fournier.pdf.

¹⁸³ Refugees International, *supra* note 178.

¹⁸⁴ SUDAN (INTERIM) CONST. art. 35, 2005, available at http://www.sudan-embassy.de/c_Sudan.pdf (last visited Aug. 30, 2009).

¹⁸⁵ *Id.* art. 27(3).

procedure and evidence. As discussed in section II B, the special court has proven ineffective; reinforcement of the capacity of national courts operating under the Interim National Constitution thus will be essential if there is to be any domestic prosecutions of perpetrators of atrocity.

D. Law on Truth Commissions

Truth and reconciliation commissions increasingly are used as post-conflict mechanisms for transitional justice. Yet law underpinning the creation or governing implementation of truth commissions is scant. Some scholars advance the idea that there is a right to truth, making the truth commission a necessary component to a peace and reconciliation plan.¹⁸⁶ Cited in the global context is the 1948 Universal Declaration of Human Rights, which states that:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.¹⁸⁷

Establishment of truth commissions serves this right to “seek, receive and impart information,” according to Frank LaRue, Executive Director of the Guatemala-based Center for Legal Action on Human Rights, and Richard Carver, Associate Professor at England’s Oxford Brookes University.¹⁸⁸ They have pointed as well to *Velásquez Rodríguez*, the 1988 judgment in which the Inter-American Court of Human Rights concluded that a state has a duty both to investigate the fate of the disappeared and to disclose the resulting information to relatives.¹⁸⁹ LaRue and Carver have cited the Draft Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity, published by the UN Sub-Commission for Prevention of Discrimination and Protection of Minorities, as further evidence of an emerging “right to know.”¹⁹⁰

¹⁸⁶ PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: FACING THE CHALLENGE OF TRUTH COMMISSIONS 176 (2001).

¹⁸⁷ Universal Declaration of Human Rights, art. 19, G.A. Res. 217 (III) A, U.N. Doc. A/810, at 71 (Dec. 10, 1948).

¹⁸⁸ Priscilla B. Hayner, *Fifteen Truth Commissions—1974 to 1994: A Comparative Study*, 16 HUM. RTS. Q. 597, 609 (Nov. 1994).

¹⁸⁹ Case of *Velásquez Rodríguez*, Inter-Am. Ct. H.R. (ser. C) No. 4 (1988).

¹⁹⁰ U.N. Econ. & Soc. Council, Subcomm on Prevention of Discrimination & Prot. of Minorities, *The Administration of Justice and the Human Rights of Detainees*, Annex II at 10, U.N. Doc. E/CN.4/Sub.2/1996/18 (1996). This set of principles is not final. The draft provides for an inalienable right to the truth:

None of the sources to which LaRue and Carver point constitute international law binding on Sudan. However, the norm those sources embody is part of regional and international bodies of law to which Sudan has consented. Echoing the Universal Declaration is the African Charter on Human and Peoples' Rights, which states: "Every individual shall have the right to receive information. Every individual shall have the right to express and disseminate his opinions within the law."¹⁹¹ To similar effect, the International Covenant on Civil and Political Rights provides:

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.¹⁹²

Therefore, the formation of a legitimate truth commission related to the crisis in Darfur would not necessarily run afoul of any applicable international law.

IV. AFRICAN CASE STUDIES

In addition to bearing in mind the law that governs the Sudanese approach to transitional justice, Sudan should consider the experiences of other countries, in particular those from its region that have had similar rebuilding experiences. Lessons drawn from the following case studies, arranged in chronological order, may be helpful to Sudanese civil society as it considers a plan for peace and reconciliation in Sudan.

A. Liberia

Liberia suffered two civil wars in two decades. The first war took place from approximately 1989 to 1997; the second, from approximately

Every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes. Full and effective exercise of the right to the truth provides a vital safeguard against the recurrences of violations. The draft also provides for the duty to preserve memory, the victims' right to know, and guarantees to give effect to the right to know.

¹⁹¹ African Charter, *supra* note 158, art. 9.

¹⁹² ICCPR, *supra* note 109, art. 19(2).

2001 to 2003.¹⁹³ The conflicts left an estimated 200,000 persons dead, created at least 250,000 new refugees, and displaced approximately 350,000 persons.¹⁹⁴ In a reconciliatory effort, Liberia created a Truth and Reconciliation Commission (TRC), though unlike many other post-conflict nations, a court has not been created specifically to seek retributive justice.

The conflict in Liberia, characterized by “massacres, enslavement, sexual violence, mutilation, the use of children in armed conflict, and enforced disappearances,” seemed never-ending.¹⁹⁵ Between 1990 and 1997, the Economic Community of West African States (ECOWAS) sponsored thirteen peace conferences in Liberia. Finally, in 2003, the Comprehensive Peace Agreement had a lasting effect.¹⁹⁶ This was due in part to the truly comprehensive nature of the Agreement; it included not only a ceasefire,¹⁹⁷ a joint “stabilization force” sponsored by the United Nations, the African Union, and ECOWAS,¹⁹⁸ and reform of the Liberian armed forces, national police, and other security services,¹⁹⁹ but also various human rights measures. These included the release of political prisoners and prisoners of war²⁰⁰ and the establishment of the National Commission on Human Rights and a Truth and Reconciliation Commission.²⁰¹ Those at the negotiating table agreed to a Truth and Reconciliation Commission because they “believed that they had negotiated reconciliation in place of criminal accountability.”²⁰²

The Independent National Commission on Human Rights (INCHR), was envisioned by the Agreement, and two years later, in 2005, implemented by national law under the Independent National Commission

¹⁹³ Rena L. Scott, *Moving from Impunity to Accountability in Post-War Liberia: Possibilities, Cautions, and Challenges*, 33 INT’L J.L. INFO. 345, 347 (2005).

¹⁹⁴ *Id.*

¹⁹⁵ *Liberia*, INT’L CTR. FOR TRANSITIONAL JUST., <http://www.ictj.org/en/where/region1/589.html> (last visited July 6, 2010).

¹⁹⁶ Scott, *supra* note 193, at 377; Comprehensive Peace Agreement between the Government of Liberia and the Liberians United for Reconciliation and Democracy and the Movement for Democracy in Liberia and Political Parties (Aug. 18, 2003), <https://www.trcofliberia.org/scholarly-resources/documents/liberia-comprehensive-peace-agreement/view> [hereinafter Comprehensive Peace Agreement].

¹⁹⁷ Comprehensive Peace Agreement, *supra* note 196, arts. II–III.

¹⁹⁸ *Id.* art. IV.

¹⁹⁹ *Id.* arts. VII–VIII.

²⁰⁰ *Id.* arts. IX–XI.

²⁰¹ *Id.* arts. XII, XIII.

²⁰² PAUL JAMES-ALLEN, AARON WEAH & LIZZIE GOODFRIEND, BEYOND THE TRUTH AND RECONCILIATION COMMISSION: TRANSITIONAL JUSTICE OPTIONS IN LIBERIA 10 (The International Center for Transitional Justice 2010), available at <http://www.ictj.org/en/news/pubs/index.html>.

for Human Rights Act.²⁰³ The mandate of the INCHR is to monitor and report on human rights violations in Liberia, and to review and act upon the recommendations of the Truth Commission. After repeated calls for the INCHR's creation from civil society, the Commission was confirmed in 2010 and ready to start work.²⁰⁴ As of October 2009, all seven members of the Commission had been confirmed and arrangements were being made for their commissioning.

The Liberian Truth Commission, also contemplated by the Peace Agreement, was intended as a forum to "address issues of impunity, as well as an opportunity for both the victims and perpetrators of human rights violations to share their experiences, in order to get a clear picture of the past to facilitate genuine healing and reconciliation."²⁰⁵ The mandate of the Truth Commission became official two years later, in 2005.²⁰⁶ By statute, the legislature specifically tasked the Commission with investigating "gross human rights violations and violations of international humanitarian law as well as abuses that occurred, including massacres, sexual violations, murder, extra-judicial killings and economic crimes, such as the exploitation of natural or public resources to perpetuate armed conflicts, during the period between January 1979 and October 14, 2003."²⁰⁷ The Commission was also directed to determine the motives and identities of those responsible for atrocity.²⁰⁸ Because the mandate of the Commission specifically contemplated that the Commissioners would make recommendations to the head of state about the need to hold prosecutions in certain cases, a specific war crimes court was not established in Liberia.²⁰⁹

The Truth and Reconciliation Commission held hearings in urban and rural Liberia, as well as the United States, in order to collect the experiences of the diaspora community.²¹⁰ Civil society groups were included as much as

²⁰³ HUMAN RIGHTS WATCH, LIBERIA: PRESIDENT SHOULD ACT ON RIGHTS COMMISSION (May 19, 2010), <http://www.hrw.org/en/news/2010/05/19/liberia-president-should-act-rights-commission>.

²⁰⁴ *Liberia: President Sirleaf Meets Commissioners of Independent National Commission on Human Rights*, ALL AFRICA, Oct. 19, 2010, <http://allafrica.com/stories/201010200826.html> (last visited Feb. 24, 2011).

²⁰⁵ Comprehensive Peace Agreement, *supra* note 196, art. XIII(1).

²⁰⁶ National Transitional Legislative Assembly, An Act to Establish the Truth and Reconciliation Commission (TRC) of Liberia (May 12, 2005), <https://www.trcofliberia.org/scholarly-resources/documents/an-act-establishing-the-truth-and-reconciliation-commission-trc-of-liberia>.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ See National Transitional Legislative Assembly, TRC Mandate, § 26(j)(iv), at art. VII (May 12, 2005), available at trcofliberia.org/about/trc-mandate.

²¹⁰ JAMES-ALLEN ET AL., *supra* note 202, at 8.

possible in this process; before the Commission even began its work, it conducted extensive education campaigns and held consultation sessions to outline the role of civil society during the process.²¹¹

The Truth Commission fulfilled its mandate and released a final report in June, 2009.²¹² The report provides a historical analysis of the conflict in Liberia, and makes findings relating to “the root causes of the conflict, the impact of the conflict on women, children and the generality of the Liberian society.”²¹³ The report included lists of the deceased, and made recommendations on a range of public interest issues such as public integrity, corruption, human rights, economic empowerment, good governance, national identity, and reparation, amongst others intended to resolve past conflicts as part of a national progression towards lasting peace and reconciliation.²¹⁴

The Truth Commission also catalogued and divided the atrocities committed into categories: gross human rights violations, violations of international human rights law, and egregious violations of domestic law.²¹⁵ It included a list of alleged perpetrators recommended for prosecution. The list recommended that 116 persons, dubbed the “most notorious,” should be tried by an Extraordinary Criminal Court, while fifty-eight persons should be prosecuted at the national level.²¹⁶ The Commission also recommended that forty-nine people be sentenced publicly for having supported various warring factions, that forty-five face prosecution for economic crimes, and that further investigation was needed in forty-five cases.²¹⁷ Of those named for prosecution was sitting-President Ellen Johnson Sirleaf, due to her early support of former Liberian President Charles Taylor.²¹⁸

²¹¹ Anna Triponel & Stephen Pearson, *What Do You Think Should Happen? Public Participation in Transitional Justice*, 22 PACE INT’L L. REV. 103, 130 (2010).

²¹² See Press Release, Truth and Reconciliation Commission of Liberia, The Truth and Reconciliation Commission of Liberia (TRC) Have Released the Publication of its Final Reports after Several Weeks of Editing and Technical Work Leading to Its Publication (Dec. 11, 2009), <https://www.trcofliberia.org/news-1/press-releases/the-truth-and-reconciliation-commission-of-liberia-trc-have-release-the-publication-of-its-final-reports-after-several-weeks-of-editing-and-technical-work-leading-to-its-publication-the-report-which-is-an-edited-version-of-the-201ctrc-final-report> [hereinafter 12/11/09 Liberia Press Release].

²¹³ Press Release, Truth and Reconciliation Commission of Liberia, Liberia’s TRC Presents Final Report (June 29, 2009), <https://www.trcofliberia.org/news-1/press-releases/liberia2019s-trc-presents-final-report> [hereinafter 6/29/09 Liberia Press Release].

²¹⁴ 12/11/09 Liberia Press Release, *supra* note 212.

²¹⁵ 6/29/09 Liberia Press Release, *supra* note 213.

²¹⁶ 12/11/09 Liberia Press Release, *supra* note 212.

²¹⁷ *Id.*

²¹⁸ JAMES-ALLEN ET AL., *supra* note 202, at 10; Glenna Gordon, *In Liberia, Sirleaf’s Past Sullies Her Clean Image*, TIME, July 3, 2009, available at <http://www.time.com/time/world/article/0,8599,1908635,00.html>.

In addition to these retributive justice measures, the Truth and Reconciliation Commission also suggested that approximately 7,000 others responsible for atrocity undergo a grassroots peace-building mechanism that it called the Palava Hut Program.²¹⁹ Like many traditional African dispute resolution systems, the Palava Hut is, according to a 2006 law review article, “a community-owned place in every village where community members and elders gather to resolve disputes in the community.”²²⁰ Out of a total of 103,019 alleged perpetrators, the truth commission recommended prosecution for under one-fifth of 1 percent, while 6.7 percent were recommended for the Palava Hut Program.²²¹

None of the recommendations of Liberia’s truth commission have been implemented²²² because the proposal for prosecutions proved extremely controversial. Immediately following its release, two of the eight Commissioners publicly distanced themselves from the report. One of them, Pearl Brown Bull, released the statement: “I cannot concur with my fellow commissioners that Prosecution in a Court of Competent Jurisdiction and other forms of Public sanction will foster genuine reconciliation and combat impunity to promote justice, peace and security.”²²³ Additionally, a group of the leadership from the various factions involved in the conflict, many of which were named for prosecution, held a press conference denouncing the Commission’s recommendations and warning of their continued organization.²²⁴ These leaders were particularly surprised because having been at the CPA talks, they “believed that they had negotiated reconciliation in place of criminal accountability.”²²⁵

Some elements of civil society expressed vague displeasure with the report. For example, the Liberia Council of Churches issued a release stating: “We believe that there are some good things in this report we wholeheartedly endorse. And yet, there are some much more difficult to

²¹⁹ 12/11/09 Liberia Press Release, *supra* note 212.

²²⁰ Linda Mealey-Lohmann & Eduardo Wolle, *Pockets of Innovation in Minnesota’s Alternative Dispute Resolution Journey*, 33 WM. MITCHELL L. REV. 441, 484 n.136 (2006).

²²¹ 12/11/09 Liberia Press Release, *supra* note 212.

²²² HUMAN RIGHTS WATCH, LIBERIA, EVENTS OF 2009, <http://www.hrw.org/en/world-report-2010/liberia> (last visited July 6, 2010).

²²³ JAMES-ALLEN ET AL., *supra* note 202, at 10.

²²⁴ *Id.* (“The group comprised the leadership of former warring factions and signatories to the CPA; Thomas Yaya-Nimely and Kai Farley (Movement for Democracy in Liberia); Louis Brown, Roland Duo, Edwin Snowe, Jackson Doe, and Saah Gbolie (ex-Government of Liberia/National Patriotic Front of Liberia); George Dweh (Liberians United for Reconciliation and Democracy), and Prince Johnson (Independent National Patriotic Front of Liberia). Having fought against each other for years during Liberia’s conflict, many were surprised to see these actors presenting a united front against the TRC report.”).

²²⁵ *Id.*

accept.”²²⁶ Nonetheless, a coalition of thirty-six local civil society organizations has come out in “strong support” of the report.²²⁷ And despite being named in the Report, President Sirleaf told the *Liberian Daily Observer* that “her ‘biggest challenge for 2010 is how to find the right strategy’ for the smooth implementation of the final and edited report of the . . . TRC.”²²⁸ Sirleaf also indicated that the UN system has given support to the Liberian government by pledging to send a team of international experts in conflict resolution management to “take a critical look at the TRC final report for possible implementation.”²²⁹ However, despite criticism, no progress has been made.²³⁰

Security remains a problem in Liberia where the conflict has left a legacy of violence. Violent crime is rampant, including armed robbery, and disputes are common between youths and former combatants over layoffs, employment and land disputes.²³¹ Increased sexual violence is also seen as a product of the war, and while the incidence of rape has dropped following the conflict, a 2007 International Rescue Committee survey found that about 12 percent of girls aged 17 and under acknowledged having been sexually abused in some way in the previous 18 months.²³²

B. Sierra Leone

Civil war broke out in Sierra Leone in 1991. A decade later, tens of thousands of persons were dead and millions were displaced. The conflict was marked by its “systematic use of mutilation, abduction, sexual violence, and murder of civilians.”²³³ In the wake of atrocity, Sierra Leone

²²⁶ *Id.* at 11.

²²⁷ *Id.*

²²⁸ *TRC Final Report: ‘My Biggest Challenge for 2010,’* DAILY OBSERVER, Jan. 4, 2010, available at <http://www.liberianobserver.com/node/3782>.

²²⁹ *Id.*

²³⁰ James Butty, *Conference Urges Full Implementation of Liberia’s Truth Commission Report*, VOA NEWS.COM, Nov. 1, 2010, <http://www.voanews.com/english/news/africa/Butty-Liberia-TRC-Symposium-Gbaba-01november10-106429883.html> (the Liberian diaspora community held a conference calling for the TRC Report’s implementation).

²³¹ HUMAN RIGHTS WATCH, LIBERIA, EVENTS OF 2009, <http://www.hrw.org/en/world-report-2010/liberia> (last visited July 6, 2010).

²³² Nicholas D. Kristof, *After Wars, Mass Rapes Persist*, N.Y. TIMES, May 20, 2009, available at <http://www.nytimes.com/2009/05/21/opinion/21kristof.html> (last visited Feb. 20, 2011).

²³³ HUMAN RIGHTS WATCH, BRINGING JUSTICE: THE SPECIAL COURT FOR THE SIERRA LEONE 3 (Sept. 7, 2004), <http://www.hrw.org/en/node/11983/section/2> (last visited Feb. 20, 2011).

implemented a truth commission²³⁴ to facilitate healing, and later the Special Court for Sierra Leone,²³⁵ an ad hoc, national-international tribunal to secure retributive justice against persons bearing the most responsibility for human rights violations. The interaction of these simultaneously functioning bodies offers insights respecting post-conflict justice.

The 1999 Lomé Accord²³⁶ officially ended the civil war between Sierra Leone's government, the Revolutionary United Front (RUF), and other rebel factions. The agreement provided a blanket amnesty to all that had been involved in hostilities,²³⁷ and provided for the establishment of a truth and reconciliation commission.²³⁸ The Commission was established "to address impunity, break the cycle of violence, provide a forum for both victims and perpetrators of human rights violations to tell their story, get a clear picture of the past in order to facilitate genuine healing and reconciliation."²³⁹ The combination of a blanket amnesty and the creation of the Truth Commission indicated that the report it produced was not intended to be used for prosecutions.

The Commission as ultimately created was broken into two units: the Information Management Unit, which handled investigation and research, and the Legal and Reconciliation Unit, which addressed reconciliation activities.²⁴⁰ After considerable delay, it began work in late 2002,²⁴¹ and carried out its inquiry in three phases: statement taking, hearings, and report

²³⁴ The Truth Commission was called for in 1999, and established by law in 2000. The Truth Commission released its report in 2004. See U.S. INST. OF PEACE, TRUTH COMMISSION: SIERRA LEONE (Aug. 2004), <http://www.usip.org/publications/truth-commission-sierra-leone> (last visited Feb. 20, 2011) [hereinafter USIP TRUTH COMMISSION].

²³⁵ The Special Court for Sierra Leone was implemented via the Special Court Ratification Act in 2002. See Special Court Agreement, 2002 (Ratification) Act (Mar. 7, 2002), available at <http://www.sc-sl.org/MOREINFO/tabid/75/Default.aspx>.

²³⁶ The Lomé Peace Accord was signed in Lomé, Togo on July 7, 1999 between the President of Sierra Leone, Ahmad Tejan Kabbah and Revolutionary United Front Leader Foday Sankoh. See Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (Lomé Accord Peace Agreement), art. IX, July 7, 1999, available at <http://www.sierra-leone.org/lomeaccord.html> (last visited Feb. 20, 2011) [hereinafter Lomé Accord].

²³⁷ *Id.* art. IX. See generally Diane Marie Amann, *Message As Medium in Sierra Leone*, 7 ILSA J. INT'L & COMP. L. 237 (2001) (criticizing this amnesty).

²³⁸ Lomé Accord, *supra* note 236, art. XXVI.

²³⁹ *Id.*

²⁴⁰ 1 Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission, Introduction, 2004, available at <http://www.sierra-leone.org/TRCDocuments.html> (these reconciliation activities included travelling to the various districts in the country and encouraging dialogue sessions).

²⁴¹ Press Release, International Center for Transitional Justice, Sierra Leone Truth Commission Final Report Released (Oct. 5, 2004), <http://www.ictj.org/en/news/press/release/465.html> (last visited Feb. 20, 2011).

writing.²⁴² The Commission was careful to consider the responsibility of those on all sides of the conflict; it ultimately took more than 7,000 statements and held countrywide victim and thematic hearings.²⁴³ William A. Schabas, Director of the Irish Centre for Human Rights in Galway and a member of the Sierra Leone Truth and Reconciliation Commission, wrote in 2006 that the Commission “rejected” what he termed a “‘just war’ approach to the conflict. Even if a right and wrong side in the conflict would be identified—something the Commission did not even consider—the TRC’s mandate was to address violations and abuses, whatever the identity of the perpetrator.”²⁴⁴

Ultimately finding responsibility in all factions caused by “years of bad governance, endemic corruption and the denial of basic human rights,”²⁴⁵ the Commission issued a three volume report in 2004 with recommendations on reform in Sierra Leone.²⁴⁶ The report found that the war was largely civil in nature, and that all factions targeted civilians. It also found that while most victims were adult males, women and children were subjected to particularly brutal human rights violations. The most common violations included forced displacements, abductions, arbitrary detentions, and killings.²⁴⁷ These findings mostly concerned the internal causes and effects of the conflict, which some scholars have commented is positive, because “an analysis focusing on external causes would have both exonerated Sierra Leoneans from responsibility and at the same time left them helpless to change things.”²⁴⁸

The Truth Commission faced a particular challenge in collecting information about sexual violence during the conflict. The Commissioners discovered that collecting testimony was difficult because “women and girls confront social taboos against speaking publicly about rape and other sexual violence. They are stigmatized in their own communities when they admit

²⁴² Witness to Truth, *supra* note 240. The commission concluded its work two years later, in 2004. See USIP Truth Commission, *supra* note 234.

²⁴³ Press Release, Sierra Leone Truth Commission Final Report Released, *supra* note 241.

²⁴⁴ William A. Schabas, *The Sierra Leone Truth and Reconciliation Commission, in TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY: BEYOND TRUTH VERSUS JUSTICE* 24, 28 (Naomi Roht-Arriaza & Javier Mariezcurrena eds., 2006) [hereinafter Schabas, *Truth Commission*].

²⁴⁵ Witness to Truth, *supra* note 240, ¶ 11.

²⁴⁶ Press Release, Sierra Leone Truth Commission Final Report Released, *supra* note 241.

²⁴⁷ 2 Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission, Findings, ¶ 75–78, 2004, available at <http://www.sierra-leone.org/Other-Conflict/TRCVolume2.pdf>.

²⁴⁸ Schabas, *Truth Commission*, *supra* note 244, at 28.

they have been sexually abused.”²⁴⁹ Coordinated through local civil society organizations, the UN Development Fund for Women (UNIFEM) provided advice, training and other support both to the Commissioners and their staff, as well as the victims themselves.²⁵⁰ Resultantly, the Commission was able to carefully track atrocities carried out against women, in particular rape, sexual slavery, forced pregnancy, and disembowelment of pregnant women.²⁵¹ The Truth Commission concluded that both the Revolutionary United Front (RUF) and the Armed Forces Revolutionary Council (AFRC) employed strategies that deliberately targeted women and girls.²⁵²

To address problems of stigmatization and to promote healing, the Commission called upon civil society to accept survivors of rape and sexual violence back into their communities.²⁵³ It also called upon the government to provide reintegration services and counseling, and to make structural changes such as easing the reporting system for women suffering sexual and domestic violence, and modification of laws that discriminate against women.²⁵⁴ Some of these changes, particularly legislation ensuring the equality of women, have been achieved.²⁵⁵

At first the Truth Commission was supposed to be the sole post-conflict resolution mechanism in Sierra Leone, a fact that explained the Lomé Accord’s blanket grant of amnesty.²⁵⁶ But resurgence in the conflict

²⁴⁹ Nirit Ben-Ari and Ernest Harsch, *Sexual Violence, an ‘Invisible War Crime’*, 18 *Africa Renewal* 1 (Jan. 2005), available at <http://www.un.org/ecosocdev/geninfo/afrec/vol18no4/184sierraleone.htm>.

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ Suliman Baldo, *United Nations Peacebuilding Commission, Sierra Leone: A Way Forward*, INT’L CTR. FOR TRANSITIONAL JUST. (June 3, 2008), <http://www.ictj.org/en/news/features/1729.html>. Three laws, known collectively as “The Gender Bills” were enacted in June of 2007. The first is the Domestic Violence Act, which criminalized domestic violence in the form of physical, psychological, or verbal abuse. The Registration of Customary Marriages and Divorce Act, the second of the Gender Bills, sets the minimum age for marriage at eighteen and requires the consent of both parties. The Act also allows women to own property, and to seek spousal and child support from husbands that fail to support the family. Finally, the Devolution of Estates Act mandates that property of deceased men go to their wives, rather than to the deceased’s parents and brothers. It also bans the practice of “wife inheritance” which forced widows, as property of their husbands, into marrying their brother-in-laws after their husband’s death. See *Bold womens [sic] rights legislation in Sierra Leone puts women’s votes in the spotlight*, MEDIA GLOBAL, July 6, 2007, <http://www.mediaglobal.org/article/2007-07-06/bold-womens-rights-legislation-in-sierra-leone-puts-womens-votes-in-the-spotlight>.

²⁵⁶ William A. Schabas, *A Synergistic Relationship: The Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone*, in TRUTH COMMISSIONS

prompted Sierra Leone also to seek criminal justice avenues for accountability.²⁵⁷ To do this, Sierra Leone's then President Ahmed Tejan Kabbah sought the aid of the United Nations to establish an international criminal tribunal, explaining Sierra Leone's incapacity to handle the matter of justice entirely independently:

With regard to the magnitude and extent of the crimes committed, Sierra Leone does not have the resources or expertise to conduct trials for such crimes. This is one of the consequences of the civil conflict, which has destroyed the infrastructure, including the legal and judicial infrastructure, of this country. Also, there are gaps in Sierra Leonean criminal law as it does not encompass such heinous crimes as those against humanity and some of the gross human rights abuses committed by the RUF. It is my view, therefore, that, unless a court such as that now requested is established here to administer international justice and humanitarian law, it will not be possible to do justice to the people of Sierra Leone or to the United Nations peacekeepers who fell victim to hostage-taking.²⁵⁸

The Security Council acted through 2000 Resolution 1315, instructing UN Secretary-General Kofi Annan to negotiate an agreement with Sierra Leone's government to provide for a special court. The Resolution proclaimed that amnesty granted under the Lomé Accord "shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law."²⁵⁹

Following negotiations in January 2002, Sierra Leone and the United Nations entered into an agreement establishing the Special Court for Sierra Leone.²⁶⁰ The Agreement provided for a court, consisting of a Trial Chamber and an Appeals Chamber, with no fewer than eight and no more than eleven judges.²⁶¹ The UN was given the right to appoint the majority of judges, with Sierra Leone appointing the remainder.²⁶² Similarly, other appointments were divided; the UN would appoint a Prosecutor, while Sierra

AND COURTS: THE TENSION BETWEEN CRIMINAL JUSTICE AND THE SEARCH FOR TRUTH 3 (William A. Schabas & Shane Darcy eds., 2004) [hereinafter Schabas, *Relationship*].

²⁵⁷ *Id.* at 3–4.

²⁵⁸ U.N. Permanent Representative from Sierra Leone, Letter dated 9 August 2000 from the Permanent Representative of Sierra Leone addressed to the President of the Security Council, U.N. Doc. S/2000/786 (Aug. 9, 2000).

²⁵⁹ S.C. Res. 1315, pmb., U.N. Doc. S/Res/1315, at 1 (2000) [hereinafter S.C. Res. 1315]; see Schabas, *Relationship*, *supra* note 256, at 16–17.

²⁶⁰ Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (Jan. 16, 2002), available at <http://www.sc-sl.org/DOCUMENTS/tabid/176/Default.aspx>.

²⁶¹ *Id.* art. 2.

²⁶² *Id.*

Leone would appoint a Deputy Prosecutor.²⁶³ The parties also agreed that the Special Court should sit in Sierra Leone.²⁶⁴ However, it made no provision for the Court's interaction with the Truth Commission.

As eventually ratified, the Statute of the Special Court for Sierra Leone had jurisdiction over persons who bear the greatest responsibility for violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment and implementation of the peace process in Sierra Leone.²⁶⁵

The international crimes which are specifically enumerated include murder, extermination, enslavement, deportation, imprisonment, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, and any other form of sexual violence, persecution on political, racial, ethnic or religious grounds, and other inhumane acts.²⁶⁶ Violations of Common Article 3 of the Geneva Conventions, as well as serious violations of humanitarian law are also contemplated by the statute.²⁶⁷ Despite the inclusion of jurisdiction over domestic crimes, during the life of the Court, no one has been prosecuted under domestic law.

The Statute of the Court provided that the rules of Procedure and Evidence that would be followed were those that were in effect at the International Criminal Tribunal for Rwanda (ICTR).²⁶⁸ It also provided many trial guarantees to the accused, including the right to a fair and public hearing, a presumption of innocence, counsel of the accused's choosing, and the right of confrontation.²⁶⁹ The Statute does not allow for the death penalty, or even life sentences; all sentencing was to be for a term for years, with guidance taken from sentencing practices in the ICTR and the national courts of Sierra Leone.²⁷⁰

In July 2002, the Court officially began operating with the help of donations from the international community to meet budgetary requirements.²⁷¹ The following year, the Court issued indictments for

²⁶³ *Id.* art. 3.

²⁶⁴ *Id.* art. 10.

²⁶⁵ *Id.* art. 1.

²⁶⁶ *Id.* art. 2.

²⁶⁷ *Id.* arts. 3–4.

²⁶⁸ *Id.* art. 14.

²⁶⁹ *Id.* art. 17.

²⁷⁰ *Id.* art. 19.

²⁷¹ *The Special Court Funding Mechanism*, SPECIAL CT. SIERRA LEONE, <http://www.sc-sl.org/> (last visited Feb. 8, 2010).

thirteen individuals, representing a cross-section of the warring factions.²⁷² Trials began in mid-2004.²⁷³

Eight of the indicted have been convicted and will be serving their sentence outside of Sierra Leone. Their sentences range from fifteen to fifty years in prison. Moinana Fofana and Allieu Kondewa,²⁷⁴ for example, both alleged leaders of the former Civil Defence Forces (CDF), were sentenced to fifteen and twenty years respectively. Indicted with them was Sam Hinga Norman,²⁷⁵ who died while seeking medical treatment in Dakar before a verdict had been reached.²⁷⁶ Five leaders of the Revolutionary United Front were also indicted together; however, the indictments against both Sam Bockarie and Foday Saybana Sankoh²⁷⁷ were dropped because they died before trial.²⁷⁸ The remaining three, Issa Hassan Sesay, Morris Kallon, and Augustine Gbao²⁷⁹ were sentenced to 52, 45, and 25 years respectively.

²⁷² Schabas, *Relationship*, *supra* note 256, at 20–21.

²⁷³ *Id.*

²⁷⁴ Fofana was the National Director of War of the Civil Defense Forces (CDF) and Kondewa was the High Priest of the CDF. Together, Norman, Fofana and Kondewa were the top leaders of the CDF. Fofana and Kondewa took directions from and were directly answerable to Norman. They took part in policy, planning and operational decisions of the CDF. *Prosecutor v. Fofana and Kondewa*, Case No. SCSL-04-14-A, Judgment, ¶ 16(ii) (May 28, 2008).

²⁷⁵ Sam Hinga Norman was the National Coordinator of the Civil Defense Forces (CDF). Norman was allegedly responsible for coordinating the activities of the CDF in supporting the military operations of the Economic Community of West African States Monitoring Group (ECOMOG) to reinstate President Kabbah's government. He was also allegedly responsible for obtaining assistance and logistics from ECOMOG in Liberia. *Id.* § B (1)(b)(8).

²⁷⁶ *Prosecutor v. Fofana and Kondewa (CDF Case)*, SPECIAL CT. SIERRA LEONE, <http://www.sc-sl.org/CASES/ProsecutorvsFofanaandKondewaCDFCase/tabid/104/Default.aspx> (last visited July 6, 2010).

²⁷⁷ Sam Bockarie was the Battlefield Commander for the Revolutionary United Front. He was indicted on charges of crimes against humanity, violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II, and other serious violations of international humanitarian law. He was killed in Liberia in 2003. *See Prosecutor v. Sam Bockarie*, SPECIAL CT. SIERRA LEONE, <http://www.sc-sl.org/CASES/SamBockarie/tabid/189/Default.aspx> (last visited Dec. 5, 2010). Foday Saybana Sankoh was the leader of the Revolutionary United Front. He was indicted for crimes against humanity, violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II, and other serious violations of international humanitarian law. He died in custody in 2003. *See Prosecutor v. Foday Saybana Sankoh*, SPECIAL CT. SIERRA LEONE, <http://www.sc-sl.org/CASES/FodaySankoh/tabid/187/Default.aspx> (last visited Dec. 5, 2010).

²⁷⁸ *Prosecutor v. Sesay, Kallon & Gbao (RUF case)*, SPECIAL CT. SIERRA LEONE, <http://www.sc-sl.org/CASES/ProsecutorvsSesayKallonandGbaoRUFCase/tabid/105/Default.aspx> (last visited July 6, 2010).

²⁷⁹ Issa Hassan Sesay is the alleged Interim Leader of the Revolutionary United Front (RUF) of Sierra Leone. Morris Kallon, a.k.a. Bilai Karim, is alleged to have been a former commander of the Revolutionary United Front of Sierra Leone. Augustine Gbao, a.k.a.

Finally, three members of the Armed Forces Revolutionary Council (AFRC), Alex Tamba Brima, Ibrahim Bazzy Kamara, and Santigie Borbor Kanu²⁸⁰ were sentenced to 50, 45, and 50 years respectively.²⁸¹ One of the indicted, Johnny Paul Koroma,²⁸² former leader of the AFRC, remains at large.²⁸³ The trial of Charles Ghankay Taylor,²⁸⁴ the former President of Liberia who is alleged to have fueled the conflict in Sierra Leone, is underway at The Hague, where it was transferred for security reasons.²⁸⁵

Despite the groundbreaking work of both the Truth Commission and the Special Court, the relationship between them was problematic because it

Augustine Bao, is alleged to have been a senior officer and commander of the Revolutionary United Front of Sierra Leone. All three men were indicted on charges of crimes against humanity, Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, and other serious violations of international humanitarian law. *See RUF Summary of the Charges*, SPECIAL CT. SIERRA LEONE, <http://www.sc-sl.org/CASES/RUFCase/RUFSummaryoftheCharges/tabid/185/Default.aspx> (last visited Dec. 5, 2010).

²⁸⁰ Brima, Kamara, and Kanu were the three most senior commanders of the AFRC and members of the AFRC Senior Council. Brima was the overall commander of the AFRC force. Kamara was the deputy commander. Kanu was the chief of staff. *See supra* Executive Summary lines 11–20. They were charged and convicted of crimes against humanity, serious violations of international humanitarian law and of Article 3, Common to the 1949 Geneva Conventions, and Protocol II. *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara & Santigie Borbor Kanu*, Case No. SCSL-2004-16-A, Transcript of Summary of Judgment, 5–6 (Feb. 22, 2008), available at <http://www.sc-sl.org/LinkClick.aspx?fileticket=eqdB1%2fmMYU%3d&tabid=173>.

²⁸¹ *Prosecutor v. Brima, Kamara & Kanu (AFRC case)*, SPECIAL CT. SIERRA LEONE, <http://www.sc-sl.org/CASES/ProsecutorvsBrimaKamaraandKanuAFRCCase/tabid/106/Default.aspx> (last visited July 6, 2010).

²⁸² Koroma, leader of the Armed Forces Revolutionary Council was indicted on counts of war crimes and crimes against humanity. *See Prosecutor v. Johnny Paul Koroma*, SPECIAL CT. SIERRA LEONE, <http://www.sc-sl.org/CASES/JohnnyPaulKoroma/tabid/188/Default.aspx> (last visited Dec. 5, 2010).

²⁸³ SPECIAL CT. SIERRA LEONE, SIXTH ANNUAL REPORT OF THE PRESIDENT OF THE SPECIAL COURT FOR SIERRA LEONE 52 (2009), <http://www.sc-sl.org/LinkClick.aspx?fileticket=%2fu13lqaO5D0%3d&tabid=176>; *Prosecutor v. Johnny Paul Koroma*, SPECIAL CT. SIERRA LEONE, <http://www.sc-sl.org/CASES/JohnnyPaulKoroma/tabid/188/Default.aspx> (last visited July 6, 2010).

²⁸⁴ The former president of Liberia, Charles Taylor was indicted for crimes against humanity, violations of Article 3 common to the Geneva Conventions and of Additional Protocol II, and other serious violations of international law. The charges against him include terrorizing the civilian population and imposing collective punishments, unlawful killings, sexual violations, physical violence, the use of child soldiers, abductions and forced labor, and looting. *See Prosecutor v. Charles Ghankay Taylor: Summary of the Charges*, SPECIAL CT. SIERRA LEONE, <http://www.sc-sl.org/CASES/ProsecutorvsCharlesTaylor/tabid/107/Default.aspx> (last visited Dec. 5, 2010).

²⁸⁵ SIXTH ANNUAL REPORT, *supra* note 258 at 6; *Prosecutor v. Charles Ghankay Taylor*, SPECIAL CT. SIERRA LEONE, <http://www.sc-sl.org/CASES/ProsecutorvsCharlesTaylor/tabid/107/Default.aspx> (last visited July 6, 2010).

had been unplanned. When created, according to Schabas, the Special Court for Sierra Leone was envisioned as an institution complementary to the Truth Commission, given that the two served mutually reinforcing purposes.²⁸⁶ There was not to be a hierarchical relationship between them. By the time both were fully functional in July 2002, Schabas added, “they worked for most of the 18 months without major incident, and with a public profile of cordiality. Both repeatedly explained to the people of Sierra Leone that there was no cooperation between the two bodies, but that they respected the role of the other institution and appreciated its contribution to postconflict justice.”²⁸⁷

Despite this apparent harmony, “the TRC initially resisted the idea of establishing the Special Court,” UN Legal Officer Sigall Horowitz has written. “Such resistance was partially based on the TRC’s . . . opposition to the notion that the Lomé Agreement’s amnesty provision is inapplicable to international crimes.”²⁸⁸ Schabas explained further that the Truth and Reconciliation Commission “took the position that information given to it in confidence would remain confidential.”²⁸⁹ Although public truth-telling lay at the core of the Commission’s mandate, such confidentiality was seen as the only solution to the potential that witnesses might not come forward if they feared subsequent prosecution by the Special Court. Schabas has written that the first Prosecutor of the Special Court, David M. Crane, endeavored to alleviate anxieties around information-sharing by stating repeatedly that “he intended to prepare his cases using his own resources” and that “he had no interest in using TRC materials.”²⁹⁰

Indeed in practice, these concerns turned out to have little foundation. By mid-2003, Schabas explained, many individuals had come forward to testify:

Belying most predictions, they did not appear at all concerned about the threat of prosecution by the Special Court. Perhaps they had already understood that the Special Court was only concerned with ‘big fish’, and realized their own level of responsibility was more modest or secondary. But even some of the ‘big fish’ who had been indicted by the Special Court indicated to the TRC that they would be interesting in testifying.

²⁸⁶ Schabas, *Relationship*, *supra* note 256, at 4.

²⁸⁷ *Id.* at 4–5.

²⁸⁸ Sigall Horowitz, *Transitional Criminal Justice in Sierra Leone*, in *TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY: BEYOND TRUTH VERSUS JUSTICE* 43, 55 (Naomi Roht-Arriaza & Javier Mariezcurrena eds., 2006).

²⁸⁹ Schabas, *Relationship*, *supra* note 256, at 29.

²⁹⁰ *Id.*

This was in complete opposition of what anybody had expected.²⁹¹

Surprisingly, in spite of individuals' willingness to testify before the TRC, the Special Court opposed such appearances. This dispute came to a head in August 2003, when three persons indicted by the Special Court asked to testify publicly before the Truth and Reconciliation Commission.

In October 2003 one of the three, who had been a minister in the Sierra Leone government, filed an application for a hearing before the Presiding Judge of the Trial Chamber.²⁹² The prosecution registered its opposition. The application was denied on the reasoning that the truth commission had prejudiced the matter when it wrote in its application that the accused had "played a central role" in the conflict; the statement was found to violate of the presumption of innocence owed to the accused.²⁹³ The judge asserted that to allow the accused to appear publicly would be a spectacle: the proceedings would take place in the same room as the trial, but instead of judges and lawyers following carefully crafted evidentiary and procedural rules, the accused would appear before a Bishop with press and victims looking on.²⁹⁴ The judge wrote:

The event will have the appearance of a trial, at least the appearance of a sort of trial familiar from centuries past . . . The spectacle of the TRC sitting in court may set up a public expectation that it will indeed pass judgment on indictees thus confronted and questioned, whose guilt or innocence it is the special duty of the Special Court to determine. . . . If it is the case that local TRC's and international courts are to work together in efforts to produce post-conflict justice in other theaters of war in the future, I do not believe that granting this application for public testimony would be a helpful precedent.²⁹⁵

On appeal to the President of the Appeals Chamber, a meeting with the Truth and Reconciliation Commission was authorized, but a public hearing was foreclosed. The accused former government minister declined to cooperate with the Commission on a non-public basis, and the Commission never met with him or heard what he had to say.²⁹⁶

²⁹¹ *Id.*

²⁹² *Id.* at 46.

²⁹³ *Id.* at 46.

²⁹⁴ Prosecutor v. Sam Hinga Norman, Case No. SCSL-2003-08-PT, Decision on Appeal by the Truth and Reconciliation Commission for Sierra Leone (Oct. 30, 2003).

²⁹⁵ *Id.*

²⁹⁶ Schabas, *Relationship*, *supra* note 256, at 48.

On reflection, the Truth and Reconciliation said of its relationship with the Special Court:

The Sierra Leonean case has brought into focus the different roles of truth and reconciliation commissions and international tribunals and the potential pitfalls that may arise when they operate simultaneously. While the relationship between the Commission and the Special Court was mostly cordial, it did falter following the refusal of the Special Court to permit the Commission to hold public hearings with the detainees held in its custody. In the view of the Commission, this decision of the Special Court did not sufficiently take into account the respective roles of the two bodies.²⁹⁷

Thus Sierra Leone struggled in the relationship between the Commission and the Court.²⁹⁸

Following the Commission's report and the conviction of many leaders²⁹⁹ of the warring factions, Sierra Leone was left with mixed results. Weak political will to dredge up past atrocities again stalled the implementation of the Truth Commission's recommendations.³⁰⁰ However, some of its recommendations were eventually achieved, including: a Human Rights Commission created in 2006; critical legislation on gender equality, including bills on inheritance, child rights, matrimonial rights of women, and land access were passed in 2007; legislation on child rights in Sierra Leone came into force; and progress towards security sector reform and the management of mineral resources has been made.³⁰¹ However, it is questionable what kind of legacy the Truth Commission left for society; it should be noted that its website has been taken down and its report is only available in print form or on unaffiliated, non-governmental websites.

²⁹⁷ Witness to Truth, *supra* note 240, at 27.

²⁹⁸ As will be seen in the forthcoming case studies, some other transitional justice efforts have included a combination of truth commissions and prosecutions or civil actions, in particular the cases of Canada and Cambodia. Among them, however, Sierra Leone is unique in attempting both efforts as government-sponsored projects at the same time.

²⁹⁹ Eight have been convicted to date. See *About*, SPECIAL CT. SIERRA LEONE, <http://www.sc-sl.org/ABOUT/tabid/70/Default.aspx> (last visited Dec. 5, 2010).

³⁰⁰ Schabas, *Truth Commission*, *supra* note 244, at 28. The National Commission for Social Action was established to implement the Truth Commission's recommendations. Still underway are projects pertaining to educational development, health care, and some aspects of reparations. See *Truth Commission: Sierra Leone*, U.S. INST. PEACE, <http://www.usip.org/publications/truth-commission-sierra-leone> (last visited Dec. 5, 2010).

³⁰¹ Baldo, *supra* note 255.

The Special Court, although still in progress with the Taylor trial in The Hague, completed its work in the Sierra Leone in 2009.³⁰² It also did not leave people feeling completely vindicated. The death of leaders of the Civil Defence Forces and Revolutionary United Front before they could stand trial was disappointing to many.³⁰³ Some segments of civil society, particularly those that had been injured during the conflict, felt that “the many millions of dollars that ha[d] been spent on bringing about . . . justice could have been better spent.”³⁰⁴ They called for spending on reconstruction and development measures.³⁰⁵ Also, similar to in Sierra Leone, there is great discomfort with the high standard of living in the prisons, or the “Hague Hilton,” where Charles Taylor awaits trial.³⁰⁶ There was also disappointment that the tribunal did not serve as a deterrent for future warlords in Africa.³⁰⁷ Sierra Leone’s model for transitional justice, the side-by-side ad hoc tribunal and truth commission, while not without flaws, is another potential transitional justice model for Darfur.

C. Rwanda

The campaign of extermination directed against Tutsis and moderate Hutus in Rwanda claimed between 800,000 and one million persons in approximately a hundred days in 1994.³⁰⁸ The international community responded by creating the International Criminal Tribunal for Rwanda (ICTR) to try those most responsible for the atrocities. Rwanda also employed its national court system and a local justice system, *gacaca*, to effectuate justice. Rwanda did not establish a truth and reconciliation commission, though it did participate in two international inquiries into atrocity.

Ethnic tensions between the majority Hutus and minority Tutsis have existed since the nation’s colonial period, and violence gripped Rwanda even

³⁰² *Cases*, SPECIAL CT. SIERRA LEONE, <http://www.sc-sl.org/CASES/tabid/71/Default.aspx> (last visited Dec. 5, 2010).

³⁰³ *Did Sierra Leone Get War Crimes Justice?*, BBC NEWS, Nov. 6, 2009, <http://news.bbc.co.uk/2/hi/africa/8345618.stm> (last visited Feb. 20, 2011).

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ Doreen Carvajal, *Accused of War Crimes, and Living with Perks*, N.Y. TIMES, June 3, 2010, <http://www.nytimes.com/2010/06/04/world/europe/04iht-hague.html?ref=liberia> (last visited Feb. 20, 2011).

³⁰⁷ *Did Sierra Leone Get War Crimes Justice?*, BBC NEWS, *supra* note 303.

³⁰⁸ LYN S. GRAYBILL, TRUTH AND RECONCILIATION IN SOUTH AFRICA: MIRACLE OR MODEL? 166 (2002); *Handbook for Journalists*, INT’L CRIM. TRIBUNAL RWANDA, <http://www.unictr.org/tabid/68/default.aspx> (last visited Feb. 20, 2011).

before the genocide.³⁰⁹ Riots in 1959 killed 20,000 Tutsis.³¹⁰ In the early 1990s, Tutsi refugees in Uganda formed the Rwandan Patriotic Front (RPF); their goal was “to overthrow [then-President] Habyarimana and secure their right to return to their homeland.”³¹¹ After several violent attacks, followed by peace talks in 1993, Habyarimana’s plane was shot down in 1994, setting off the slaughter.³¹² Political leaders and administrators, military and militia alike directed and encouraged killings “to further their . . . goal: the destruction of the Tutsi as a group.”³¹³ The conflict was particularly marked by sexual violence; “thousands of women were individually raped, gang-raped, raped with objects such as sharpened sticks or gun barrels, held in sexual slavery (either collectively or through forced ‘marriage’) or sexually mutilated.”³¹⁴

As early as 1992 a truth commission had been contemplated to address the escalation of violence. The Arusha Accords, a peace agreement negotiated during 1992–1993—between the factions, called for a commission to investigate atrocities.³¹⁵ Nothing came of this, so civil society groups, in particular Rwandan human rights organizations, worked together to invite international human rights groups to undertake an inquiry.³¹⁶

Although the Rwandan government acceded to the truth commission, Priscilla B. Hayner wrote in her 2001 comparative study of truth commissions, “it was clear that the president and armed forces resented these investigations, and some witnesses were targeted for attack in what may have been a retaliation for the cooperation with the commission.”³¹⁷

The commission nonetheless completed its investigation, issuing a report in 1993. The report had little effect; the horrendous genocide occurred one year later. Internationally, however, the report caused Belgium to cease providing support to the Rwandan government.³¹⁸

Following the genocide, the Rwandan government sought the help of the international community, requesting monetary assistance and the

³⁰⁹ *Rwanda: How the genocide happened*, BBC NEWS, Dec. 18, 2008, <http://news.bbc.co.uk/2/hi/1288230.stm> (last visited Feb. 20, 2011).

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² *Id.*

³¹³ HUMAN RIGHTS WATCH, SHATTERED LIVES: SEXUAL VIOLENCE DURING THE RWANDAN GENOCIDE AND ITS AFTERMATH, Introduction (Sept. 1996), *available at* <http://www.hrw.org/reports/1996/Rwanda.htm> (last visited Feb. 20, 2011).

³¹⁴ *Id.*

³¹⁵ *Hayner, supra* note 188, at 630.

³¹⁶ HAYNER, *supra* note 186, at 19-20.

³¹⁷ *Id.*

³¹⁸ *Id.*

creation of an international tribunal to try war criminals.³¹⁹ The Security Council responded, acting under Chapter VII of the UN Charter, and created the International Criminal Tribunal for Rwanda (ICTR) in 1994.³²⁰ Rwanda desired an internationally-convened tribunal “to allay suspicions of vengeance and summary justice, and above all, to lay hands on criminals who had found refuge abroad. It might be added that one of Rwanda’s objectives in drawing the international community’s attention to the issue of repression was to gain the support necessary for the functioning of its own criminal justice system.”³²¹

The stated purpose of the ICTR was to “contribute to the process of national reconciliation in Rwanda and to the restoration and maintenance of peace,” by prosecuting persons responsible for genocide and other serious violations of humanitarian law between January 1 and December 31, 1994.³²² Despite requesting that the court be created, Rwanda, which sat on the Security Council during this period, voted against its formation. In particular, Rwanda was opposed to the following proposed aspects of the court: that the jurisdiction of the tribunal started in January 1994 when violence had first broken out in October 1, 1990; that the tribunal did not have the authority to impose the death penalty; that the tribunal would sit outside of Rwanda; and that those convicted would not serve their sentences in Rwandan prisons.³²³ Notwithstanding its objection to the tribunal, once the ICTR was established, the Rwandan government acquiesced to the international community and cooperated with the tribunal.

As ultimately established, the ICTR has jurisdiction over crimes committed by Rwandans both in and outside of the state’s territory, as well as non-Rwandan citizens that committed crimes in Rwanda.³²⁴ The Court is limited to hearing cases that involve violations of international law, in particular: genocide, crimes against humanity, and violations of Article 3 common to the Geneva Conventions and Additional Protocol II.³²⁵ The

³¹⁹ U.N. Permanent Representative of Rwanda, Letter dated Sept. 28, 1994 from the Permanent Representative of Rwanda to President of the Security Council, U.N. Doc. S/1994/1115 (Sept. 28, 1994).

³²⁰ Statute of the ICTR, S.C. Res. 955, S/RES/955 (Nov. 8, 1994), available at <http://www.unicttr.org/Portals/0/English/Legal/Resolutions/English/955e.pdf>.

³²¹ Olivier Dubois, *Rwanda’s national criminal courts and the International Tribunal*, 321 INT’L REV. RED CROSS 717, 717 (1997), available at <http://www.icrc.org/web/eng/siteeng0.nsf/html/57JNZA> (last visited Feb. 20, 2011).

³²² Statute of the ICTR, *supra* note 320, pmb., available at <http://www.unicttr.org/Portals/0/English/Legal/Resolutions/English/955e.pdf>.

³²³ Makua Mutua, *From Nuremberg to the Rwanda Tribunal: Justice or Retribution?*, 6 BUFF. HUM. RTS. L. REV. 78, 84–85 (2000).

³²⁴ Statute of the ICTR, *supra* note 320, arts. 1, 7.

³²⁵ *Id.* arts. 2-4.

crimes for which the court has jurisdiction must also have taken place between January 1 and December 31, 1994.³²⁶ While the ICTR does have primacy over national courts, its jurisdiction to prosecute is concurrent with, not exclusive of, national prosecutions.³²⁷ Thus, while the personal jurisdiction of the court, that is, the individuals the court is competent to prosecute, is broad, because it is limited to hearing violations of international law and because it has concurrent jurisdiction with the national courts, the number of people the ICTR may prosecute is dramatically lessened. Similarly, the temporal restrictions ensure that only those that committed crimes during the most acute time of violence may be prosecuted.

As of summer 2010, all but eleven persons sought by the ICTR had been apprehended.³²⁸ It has completed the first instance trials of fifty accused.³²⁹ Appellate proceedings have concluded in thirty-one cases; four additional appeals are expected to conclude during 2010, with fourteen more before 2013.³³⁰ Thus far, this has resulted in thirty-one convictions and eight acquittals.³³¹ Eight are pending, following the recent death of Joseph Nzirorera, the former Secretary General of the political party *Mouvement Républicain pour la Démocratie et le Développement* (MRND).³³² Just over twenty cases are in progress, and two individuals await trial.³³³ Eleven fugitives remain at large.³³⁴ Possible sentences under the statute of the court include imprisonment and the return of property and proceeds acquired by criminal conduct.³³⁵ Of the completed cases, actual sentences have ranged from six years to life imprisonment.³³⁶

³²⁶ *Id.* arts. 1, 7.

³²⁷ *Id.* art. 8. Therefore, national prosecutions may also take place, even at the same time, as those in the ICTR.

³²⁸ *Status of Cases*, INT'L CRIM. TRIBUNAL RWANDA, <http://www.unictr.org/Cases/StatusofCases/tabid/204/Default.aspx> (last visited Feb. 14, 2010).

³²⁹ President and Prosecutor of the ICTR, *Report on the completion strategy of the International Criminal Tribunal For Rwanda*, ¶ 3, delivered to the President of the Security Council, U.N. Doc. S/2010/259 (May 28, 2010).

³³⁰ *Id.*

³³¹ *Status of Cases*, *supra* note 328.

³³² *Genocide suspect dies in Arusha*, RADIO NETHERLANDS WORLDWIDE (July 2, 2010), <http://www.rnw.nl/international-justice/article/genocide-suspect-dies-arusha>. Nzirora was charged with conspiracy to commit genocide, public incitement to commit genocide, genocide, complicity in genocide, crimes against humanity (rape and extermination) and serious violations of Article 3 common to the Geneva Conventions and Additional Protocol II.

³³³ *Report on the completion strategy of the International Criminal Tribunal For Rwanda*, *supra* note 329, annex 1–3.

³³⁴ *Id.*

³³⁵ Statute of the ICTR, *supra* note 322, art. 23.

³³⁶ See *Completed Cases*, INT'L CRIM. TRIBUNAL FOR RWANDA, <http://liveunictr.altmansolutions.com/Cases/tabid/77/default.aspx?id=4&mnid=4> (last visited

While convictions in the ICTR have been made for genocide, incitement to commit genocide, crimes against humanity, war crimes, murder, and others,³³⁷ it should be noted that the court has made groundbreaking decisions concerning sexual violence. Due in large part to pressure exerted on the ICTR by women's organizations,³³⁸ the ICTR included rape as a crime against humanity.³³⁹ Rape was also held to be a component of both the crime of genocide³⁴⁰ and the crime of direct and public incitement to commit genocide.³⁴¹

The ICTR, despite its many successes,³⁴² has also faced serious criticism. Civil society objected to what it perceived was over-emphasis of the rights of the accused as opposed to victims and survivors.³⁴³ In part, this led to the naming of the detention facility where the accused awaited trial as the "Arusha Hilton."³⁴⁴ While it comported with international legal standards for detention, it was considered luxurious compared to the Rwandan

July 6, 2010) (except for one sentence for a term of months for contempt of court in the Nshogoza case).

³³⁷ HUMAN RIGHTS WATCH, GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY: A DIGEST OF THE CASE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (2010), available at <http://www.hrw.org/en/reports/2010/01/12/genocide-war-crimes-and-crimes-against-humanity>. Article 23(3) of the Statute of the ICTR which would allow the court to order the return of property acquired by criminal activity has not been invoked. See *International Criminal Tribunal For Rwanda*, E-NOTES.COM, <http://www.enotes.com/genocide-encyclopedia/international-criminal-tribunal-rwanda> (last visited Dec. 5, 2010).

³³⁸ Tina Rosenberg, Editorial, *New Punishment for an Ancient War Crime*, N.Y. TIMES, Apr. 5, 1998, <http://www.nytimes.com/1998/04/05/opinion/editorial-observer-new-punishment-for-an-ancient-war-crime.html?scp=7&sq=international%20criminal%20tribunal%20rwanda%20rape&st=cse> (last visited Feb. 20, 2011).

³³⁹ See *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment (Sept. 2, 1998).

³⁴⁰ See *Prosecution v. Muhimana*, Case No. ICTR-95-1B-T, Judgment (Apr. 25, 2005).

³⁴¹ See *Prosecutor v. Nahimana, Baraygwiza & Ngeze*, Case No. ICTR-99-52-T, Judgment (Dec. 3, 2003).

³⁴² Timothy Gallimore, *The Legacy of the International Criminal Tribunal for Rwanda (ICTR) and its Contributions to Reconciliation in Rwanda*, 14 NEW ENG. J. INT. & COMP. L. 239, 242 (2008); see also Patricia Viseur Sellers, *Symposium: Prosecuting Sexual and Gender-Based Crimes Before International/ized Criminal Courts: Gender Strategy is not a Luxury for International Courts*, 17 AM. U. J. GENDER SOC. POL'Y & L. 301, 314 (2009) ("The successes of the ICTY and the ICTR – meaning the arrest of suspects, the adjudication of crimes based on individual responsibility, and the delivery of jurisprudence that countered impunity including impunity for sex-based crimes – are great."); Roland Amoussouga, *Justice for Rwanda: ICTR Achievements and Challenges*, JURIST (Dec. 17, 2008), <http://jurist.law.pitt.edu/forumy/2008/12/justice-for-rwanda-ict-achievements.php>.

³⁴³ Roos Wagemakers, *A Pricey Pursuit of Justice* § 3.2.1 (July 2008) (unpublished masters thesis, University of Amsterdam) (citing KINGSLEY MOGHALU, RWANDA'S GENOCIDE: THE POLITICS OF GLOBAL JUSTICE 69 (2005)).

³⁴⁴ *Id.*

standard of living. In addition, the ICTR was criticized for being slow to take sexual crimes seriously.³⁴⁵ The court, at least at the outset, failed to provide female investigators or counseling services for rape victims.³⁴⁶ Witness safety was also a major concern, and several were killed before being able to testify.³⁴⁷

The ICTR is currently working to complete its mandate. As of the last completion strategy report delivered to the United Nations Security Council in June of 2010, there were thirteen remaining judgments to be delivered at the trial level.³⁴⁸ It is expected that these will be completed by the end of 2011. The goal of the tribunal is to complete all appeals by 2013.

Even after the creation of the ICTR, an estimated 90,000 other persons remained in national detention, awaiting prosecution for genocide-related crimes at that level.³⁴⁹ These individuals, often after lengthy delays, were prosecuted under Rwanda's 1996 Organic Law on the Organization of Prosecutions for Offenses Constituting the Crime of Genocide or Crimes Against Humanity Committed Since October 1, 1990.³⁵⁰ The 1996 law divided perpetrators into groups according to the gravity of the crimes committed, and fixed sentences for each category.³⁵¹ The system relied heavily on plea agreements—previously a mechanism alien to criminal justice in Rwanda—to move cases through the system rapidly.³⁵² The creation of this entirely separate, though national, system was necessary for the reason that Rwanda's judiciary effectively did not function in the aftermath of the genocide.³⁵³

At first these national trials were criticized because required procedures, such as representation for the indicted, were not followed; over time, however, prosecutions of persons accused of involvement in the Rwandan genocide improved.³⁵⁴ The penalties handed down by the tribunal were in any case harsh; while only the 1,946 individuals categorized as the organizers and planners of the genocide and crimes against humanity were

³⁴⁵ Rosenberg, *supra* note 338.

³⁴⁶ *Id.*

³⁴⁷ *Id.*

³⁴⁸ President of the ICTR, Address by Judge Dennis Byron on the Sixth Monthly Report on the Completion Strategy of the ICTR (Dec. 6, 2010), <http://www.unicttr.org/Portals/0/.ictr.un.org/tabid/155/Default.aspx?id=1143>.

³⁴⁹ Madeline H. Morris, *The Trials of Concurrent Jurisdiction: The Case of Rwanda*, 7 DUKE J. COMP. & INT'L L. 349, 357 (1997).

³⁵⁰ *Id.* at 358.

³⁵¹ *Id.*

³⁵² *Id.*

³⁵³ *Id.*

³⁵⁴ Dubois, *supra* note 321.

eligible for the death penalty, by 2003 media reports indicated that already 400 of them had been sentenced to death.³⁵⁵ However, Rwanda abolished the death penalty in 2007,³⁵⁶ so most convicts were given term for years sentences or in some cases, civil damages were assessed against them.³⁵⁷

The relationship between the national courts and the ICTR has often been strained. In 1992, for example, the Rwandan government failed to issue travel documents “in a timely manner” to allow key witnesses to testify before the ICTR.³⁵⁸ The action was seen as retaliation for the ICTR’s announcement that it would investigate Tutsi transgressions, particularly those committed by Tutsi rebels of which Rwanda’s president, Paul Kagame, was the leader.³⁵⁹ These kinds of political disputes were common, though never completely thwarted efforts of either system to conduct prosecutions. The ICTR has repeatedly tried to send lower level indicted cases back to the Rwanda domestic court system, but the judges have prevented this transfer, finding that the domestic courts do not meet international fair trial standards, including not having an independent judiciary.³⁶⁰

A third means of bringing perpetrators to justice in Rwanda has been the *gacaca* system. Rwanda began employing this system to prosecute more quickly the extraordinarily large number of accused.³⁶¹ What was once an informal dispute mechanism by which a council of elders convened to resolve local civil disputes,³⁶² the system was formalized by statute following the genocide.³⁶³

³⁵⁵ Melissa Cheung, *Rwanda: 100 Genocide Convictions*, CBS NEWS, Aug. 5, 2003, <http://www.cbsnews.com/stories/2003/08/04/world/main566613.shtml>; Dubois, *supra* note 321.

³⁵⁶ *Rwanda’s ban on executions helps bring genocide justice*, CNN, Jul. 27, 2007, <http://edition.cnn.com/2007/WORLD/africa/07/27/rwanda.execution.reut/index.html> (last visited Feb. 20, 2011).

³⁵⁷ Dubois, *supra* note 321.

³⁵⁸ Marc Lacey, *Tribunal Says Rwanda is Stalling Inquiry into 1994 Killings*, N.Y. TIMES, Sept. 7, 2002, <http://www.nytimes.com/2002/09/07/world/tribunal-says-rwanda-is-stalling-inquiry-into-1994-killings.html> (last visited Feb. 20, 2011).

³⁵⁹ *Id.*

³⁶⁰ See, e.g., Leslie Schulman, *ICTR Seeks Return of Genocide Cases to Rwanda Court After Death Penalty Abolition*, JURIST, June 12, 2007, <http://jurist.org/paperchase/2007/06/ict-seeks-return-of-genocide-case-to.php>.

³⁶¹ Jeevan Vasagar, *Grassroots justice*, THE GUARDIAN, Mar. 17, 2005, <http://www.guardian.co.uk/world/2005/mar/17/worlddispatch.rwanda> (last visited Feb. 20, 2011).

³⁶² Lyn S. Graybill, *Ten Years After, Rwanda Tries Reconciliation*, 103 CURRENT HISTORY 202, 204 (2004).

³⁶³ Linda E. Carter, *Justice and Reconciliation on Trial: Gacaca Proceedings in Rwanda*, 14 NEW ENG. J. INT’L & COMP. L. 41, 41 (2007).

Before the genocide, *gacaca* had been used since pre-colonial times as a means to resolve minor disputes arising among village inhabitants.³⁶⁴ *Gacaca* forums would meet as-needed, and were chaired by respected male community elders.³⁶⁵ Unless women were parties to the dispute, they would not participate at all.³⁶⁶ Punishment was not the goal of proceedings; rather, the elders would seek to find communal solutions using civil settlements.³⁶⁷ The most common disputes handled by traditional *gacaca* forums including land and property disputes over things such as land use, cattle, marriage, inheritance, loans, theft, and light bodily injury.³⁶⁸

This extremely informal system was replaced with a pilot version of the current one by the Rwandan Transitional Assembly in January of 2001, and was finalized by statute, the “Gacaca Law,” in 2004.³⁶⁹ The Gacaca Law establishes a hierarchical system of “Gacaca courts” in the country’s localities, which are supervised by the National Service.³⁷⁰ Those suspected of participating in the genocide are categorized according to the seriousness of the crimes committed. Gacaca courts have jurisdiction over the middle-low and low-level suspects (Categories 2 and 3) accused of homicide and other serious attacks causing death, attempted murder and injury, assault without the intention to kill, and offenses against property.³⁷¹

The public proceedings are presided over by nine “judges” elected in each locality.³⁷² Gacaca judges are not required to possess any legal qualifications; they are given about a week’s worth of training and serve in their posts on an unpaid basis.³⁷³ The tribunals are empowered to impose prison sentences for Category 2 offenders, but are limited to imposing civil damages for Category 3 defendants.³⁷⁴ Mark Drumbl, Professor of Law at Washington and Lee University School of Law, has pointed to flexibility in sentencing as one positive aspect of *gacaca*; the system, he wrote, allows sentences “including incarceration, . . . community service, tilling the fields

³⁶⁴ Maya Goldstein-Bolocan, *Rwandan Gacaca: An Experiment in Transitional Justice*, 2004 J. DISP. RESOL. 355, 376 (2005).

³⁶⁵ *Id.*

³⁶⁶ *Id.*

³⁶⁷ *Id.*

³⁶⁸ *Id.* at 377.

³⁶⁹ Goldstein-Bolocan, *supra* note 364, at 378. The current implementing legislation is housed in Organic Law No. 16/2004 of 19/6/2004 (Gacaca Law). The pilot program started with 751 of the nation’s current 9,010 Gacaca jurisdictions.

³⁷⁰ Goldstein-Bolocan, *supra* note 364, at 379.

³⁷¹ *Id.*

³⁷² *Id.*

³⁷³ Carter, *supra* note 363, at 45-46.

³⁷⁴ Goldstein-Bolocan, *supra* note 364, at 379 (sentence can be up to thirty years for Category 2 offenders).

of victims, donating produce or labor, and obliging other members of the perpetrator's family to help the aggrieved family."³⁷⁵ This range encourages community improvement as a component of the process of rendering justice.

Initially the reformed Gacaca courts won praise as a novel direction in transitional justice, one that combined a traditional dispute mechanism with more modern judicial practices; later, however, some practitioners came to view the tribunals as a tool of government repression.³⁷⁶ Among the latter is Christopher J. LeMon, an attorney posted to the ICTR in 2006, who contended in a 2007 article that unpaid judges were particularly susceptible to corruption, and that some were accused of having taken part in the genocide, effectively tarnishing the local reputation and public support for the courts.³⁷⁷ LeMon also pointed to threats of violence and actual violent attacks that some witnesses and Gacaca court officials have endured. In the second half of 2006 alone, at least forty Gacaca witnesses were the victims of murder or attempted murder. This violence, LeMon argued, effectively silenced crucial witnesses and impaired the functioning of the system.³⁷⁸ Public participation in the process has declined tremendously, he added, a fact that in his view gives rise to doubt whether *gacaca* can accomplish its goals of justice and reconciliation.³⁷⁹ In short, the use of a reformed traditional system of justice is not entirely unproblematic for it may lack the transparency and independence required of a criminal justice system.

In addition to traditional criminal justice methods and the local *gacaca* system is a mechanism that was established by the Organization for African Unity (OAU), forerunner to the African Union. This is the International Panel of Eminent Personalities to Investigate the 1994 Genocide in Rwanda and the Surrounding Events. Formed in 1998,³⁸⁰ the Panel completed a report in June 2000.³⁸¹ According to Hayner, the panel's research "was focused on the history and circumstances of the conflict in Rwanda that led up to the genocide of 1994 and the resulting impact of the violence, basing

³⁷⁵ Mark A. Drumbl, *The ICTR and Justice for Rwandan Women*, 12 NEW ENG. J. INT'L & COMP. L. 105, 109 (2005).

³⁷⁶ See also Kenneth Roth, Op-Ed, *Horror's Power*, L.A. TIMES, Apr. 11, 2009, http://www.latimes.com/news/opinion/la-oe-roth11-2009apr11_0,5732620.story. See generally Christopher J. Le Mon, *Rwanda's Troubled Gacaca Courts*, 14 HUM. RTS. BRIEF 16 (2007).

³⁷⁷ Le Mon, *supra* note 376, at 17.

³⁷⁸ *Id.* at 17-18.

³⁷⁹ *Id.* at 18.

³⁸⁰ HAYNER, *supra* note 186, at 20.

³⁸¹ INT'L PANEL OF EMINENT PERSONALITIES, RWANDA: THE PREVENTABLE GENOCIDE (2000), http://www.africa-union.org/official_documents/reports/report_rowanda_genocide.pdf [hereinafter RWANDA PANEL REPORT].

its conclusions in part on research papers commissioned from experts.”³⁸²
The Rwandan government cooperated with the inquiry.

In its nearly 300-page report, the panel concluded that the Rwandan genocide could have been prevented had the Security Council acted.³⁸³ Moreover, the report maintained that several countries, including the United States, France, and Belgium, as well as the Catholic Church, either acted or failed to act in such a way as to allow the genocide to occur.³⁸⁴ The panel charged the Rwandan Patriotic Front, which took power in Rwanda after the 1994 genocide, with having committed many human rights violations, and identified economic causes as one of the factors contributing to the violence.³⁸⁵ Notably, the panel’s report called for monetary reparations to be paid to victims.³⁸⁶ Although the report’s recommendations have not been directly implemented, the UN General Assembly has frequently referred to the report in calling for implementation of programs to support vulnerable groups in Rwanda.³⁸⁷

Rwanda is unique in its efforts to prosecute human rights violators internally, despite a nearly nonfunctioning judiciary in its early days. It also cooperated with layers of international inquiry; that is, with the creation of the ICTR and of two investigative bodies similar to truth commissions. Perhaps most distinct is Rwanda’s effort to include local dispute resolution in its plan for peace and reconciliation. Despite the multitude of problems *gacaca* entailed, the effort can provide a model for post-conflict justice.

V. GLOBAL CASE STUDIES

Africa is not alone in its search for viable transitional justice mechanisms. The following four examples from Europe, Asia and the Americas, as explored chronologically, offer slightly different perspectives on transitional justice that may be useful as a plan is created to seek justice and healing in Darfur.

³⁸² HAYNER, *supra* note 186, at 20.

³⁸³ RWANDA PANEL REPORT, *supra* note 381.

³⁸⁴ Press Release, International Panel of Eminent Personalities, Rwanda: the Preventable Genocide (July 7, 2000) <http://www.theperspective.org/rwanda.html>.

³⁸⁵ *Id.*

³⁸⁶ *Id.*

³⁸⁷ G.A. Res. 60/225, pmbl., U.N. Doc. A/RES/60/225 (Mar. 22, 2006); *see also* Draft G.A. Res. International Day of Reflection on the 1994 Genocide in Rwanda, pmbl., U.N. Doc. A/58/L.55 (Dec. 19, 2003).

A. Canada

As part of a policy to assimilate native populations in Canada, the government, in partnership with the Anglican, United, Presbyterian, and Catholic churches, administered a national system of boarding schools for Aboriginal children.³⁸⁸ To atone for the loss of culture and the abusive environment that children encountered in the schools, the government employed a number of transitional justice mechanisms. Of note, it issued a formal apology, formed a truth and reconciliation commission to promote healing, and in settling a massive class action lawsuit,³⁸⁹ instituted a comprehensive reparations plan.³⁹⁰ These actions represent a particularly comprehensive governmental effort to repair a difficult situation with an indigenous population.

First opened in 1874, the Indian Residential Schools operated for more than one hundred years, though they were at their height from the 1920s to the 1960s.³⁹¹ The schools were plagued by mismanagement, underfunding, and ultimately provided grossly inferior educational services.³⁹² Despite this, all Aboriginal children were required to attend the residential schools between the ages of seven and fifteen. Their experiences were marked by physical, psychological and emotional abuse. In particular, children were beaten for using Aboriginal languages, and other cultural practices were suppressed.³⁹³ Parental bonds were broken and children were not allowed to go home.³⁹⁴ Discipline was “swift and violent” and many children were sexually abused.³⁹⁵

Approximately 86,000 of the estimated 150,000 children that were placed in the schools now survive. Despite the presence of internal records

³⁸⁸ ROYAL COMM'N ON ABORIGINAL PEOPLES, LOOKING FORWARD LOOKING BACK, Ch. 10 (1991), *available at* http://www.collectionscanada.gc.ca/webarchives/20071124130216/http://www.ainc-inac.gc.ca/ch/rcap/sg/sgm10_e.html [hereinafter LOOKING FORWARD].

³⁸⁹ A class action lawsuit is “a lawsuit in which a single person or a small group of people represents the interests of a larger group.” BLACK'S LAW DICTIONARY 103 (2d Pocket ed. 2001). For information on the 2006 Canadian suit, see *infra*.

³⁹⁰ See discussion *infra*.

³⁹¹ *Canada: Background*, INT'L CTR. TRANSITIONAL JUSTICE, <http://ictj.org/our-work/regions-and-countries/canada> (last visited July 6, 2010).

³⁹² LOOKING FORWARD, *supra* note 388.

³⁹³ *Canada: Background*, *supra* note 391. For a detailed account of the neglect and abuse that occurred within the residential schools, see ROYAL COMM'N ON ABORIGINAL PEOPLES, REPORT OF THE ROYAL COMMISSION ON ABORIGINAL PEOPLES, *available at* http://www.collectionscanada.gc.ca/webarchives/20071211055821/http://www.ainc-inac.gc.ca/ch/rcap/sg/sg31_e.html.

³⁹⁴ *Canada: Background*, *supra* note 391.

³⁹⁵ *Id.*

of abuse, it was not until 1990 that reports of the suffering within the system were made public when Phil Fontaine, Grand Chief of the Manitoba Chiefs became the first Indian leader to publicly discuss his experiences in the residential schools system.³⁹⁶ During that year, Fontaine called for “recognition of the abuse, compensation and an apology for the inherent racism in the policy.”³⁹⁷ In the years since, Canada has engaged a variety of reconciliatory measures, including commissioning multiple inquiries into conditions within the Indian Residential Schools, announcing a formal apology, instituting a comprehensive reparations program, and launching a truth and reconciliation commission.

The Canadian federal government created the Royal Commission on Aboriginal Peoples in 1991.³⁹⁸ The Commission was tasked with investigating “the evolution of the relationship among aboriginal peoples (Indian, Inuit, and Métis), the Canadian government, and Canadian society as a whole.”³⁹⁹ The Commission was asked to “propose specific solutions, rooted in domestic and international experience, to the problems which have plagued those relationships and which confront aboriginal peoples today.”⁴⁰⁰ The Commission, comprised of professors, judges, activists, and chiefs completed their mandate in November 1996.⁴⁰¹ During the same year, the last federally run facility, the Gordon Residential School in Saskatchewan, closed.⁴⁰²

The multi-volume Commission report provided a detailed account of the systematic abuse present in the residential schools. It also reported the failings of the government to address the epidemic of social problems stemming from the residential schools system. In particular, the Commission noted that the government approach to legal issues, particularly the identification and prosecution of purported abusers, was

. . . diffuse. There was no consideration that the system itself constituted a ‘crime.’ Rather, the focus was placed on individual acts that violated

³⁹⁶ *Residential Schools—A Chronology*, ASSEMBLY OF FIRST NATIONS, <http://www.afn.ca/article.asp?id=2586> (last visited July 6, 2010) [hereinafter *AFN Chronology*].

³⁹⁷ *Id.*

³⁹⁸ Jennifer J. Llewellyn, *Dealing with the Legacy of Native Residential School Abuse in Canada: Litigation, ADR, and Restorative Justice*, 52 U. TORONTO L.J. 253, 300 n.24 (2002).

³⁹⁹ LOOKING FORWARD, *supra* note 388, at Appendix A.

⁴⁰⁰ *Id.*

⁴⁰¹ *Id.* at Appendix B; Minister of Indian Affairs & N. Dev., *Gathering Strength: Canada’s Aboriginal Action Plan*, 5(1) AUSTRALIAN INDIGENOUS LAW REP. 101, n.1 (2000), available at <http://www.austlii.edu.au/au/journals/AILR/2000/10.html>.

⁴⁰² *A timeline of residential schools, the Truth and Reconciliation Commission*, CBC NEWS, June 22, 2010, <http://www.cbc.ca/canada/story/2008/05/16/f-timeline-residential-schools.html> (last visited Feb. 20, 2011) [hereinafter CBC NEWS].

the *Criminal Code*. . . it would be the task of those who had been abused to take action.⁴⁰³

The Commission thus recommended the creation of a public inquiry to address the structural problem of the residential schools.⁴⁰⁴ The Commission recommended that the inquiry receive funding to conduct public hearings, research and analyze the effects of the residential schools, and to recommend remedial action to be taken by the government and churches, such as apologies, and monetary compensation in the form of reparations and treatment programs for individuals and their families.⁴⁰⁵

Two years later, the government began to take steps towards reconciliation. In January of 1998, the Minister of Indian Affairs and Northern Development published *Gathering Strength: Canada's Aboriginal Action Plan* in response to the Royal Commission Report.⁴⁰⁶ The plan failed to implement a public inquiry, though it did create the Aboriginal Healing Foundation, endowing it with a \$350 million budget to address the legacy of physical and sexual abuse in residential schools.⁴⁰⁷ Most notably, the plan contained the first direct apology on behalf of the Canadian government. "The Government of Canada today formally expresses to all Aboriginal people in Canada our profound regret for past actions of the federal government which have contributed to these difficult pages in the history of our relationship together."⁴⁰⁸

Despite the government's apology, more concrete redress for injuries suffered was needed, and "overwhelming numbers of abuse victims from the residential school system . . . turned to Canadian courts seeking redress."⁴⁰⁹ The first lawsuits were filed in 1991, and over time they began to overload the judiciary, in addition to threatening the financial stability of defendant church organizations because of the high volume of judgments.⁴¹⁰ Scholar Jennifer J. Llewellyn comments that the use of individual lawsuits as a means to seek redress for injuries caused by the residential school system is positive because "the legitimacy and authority of the mainstream judicial system in Canadian society," coupled with the public nature of legal proceedings helps to acknowledge and vindicate the human rights of the

⁴⁰³ LOOKING FORWARD, *supra* note 388, at 1.10.4.

⁴⁰⁴ *Id.* at 1.10.5.

⁴⁰⁵ *Id.*

⁴⁰⁶ *Gathering Strength*, *supra* note 401.

⁴⁰⁷ *Canada: Background*, *supra* note 391.

⁴⁰⁸ *Gathering Strength*, *supra* note 401.

⁴⁰⁹ Llewellyn, *supra* note 398 at 266.

⁴¹⁰ *AFN Chronology*, *supra* note 396.

victims.⁴¹¹ However, she also criticizes the appropriateness of such lawsuits not only because of the high costs and protracted time periods involved, but because civil litigation fails to heal the divide between the victims and perpetrators and in some cases can make relations between them worse.⁴¹²

In 2003, against a backdrop of overworked courts and the declaration of bankruptcy by the Anglican Diocese of Cariboo in British Columbia,⁴¹³ the government created the National Resolution Framework, an alternative dispute resolution (ADR) mechanism to help deal with the number of lawsuits being filed.⁴¹⁴ The Framework funneled willing individuals into private hearings before an independent adjudicator. The adjudicator would issue an award based on a set compensation award structure. Upon the decision of an award amount, individuals had the choice of accepting the award, appealing the decision or pursuing litigation.⁴¹⁵

The National Resolution Framework was also slow; after nearly two years of operation, by July 2005 only 147 claims had been settled, while 1,992 applications had been filed and were awaiting hearing or adjudication. It was also not alleviating the burden on the courts; during the same time period 12,455 tort claims had been filed and several class actions were pending.⁴¹⁶ The system was also criticized by the Assembly of First Nations (AFN) for a variety of reasons, particularly inequities in awards.⁴¹⁷ The AFN proposed a changed model for the dispute resolution process, defined by two prongs: first, fair and reasonable compensation; second, truth-telling, healing, and public education.⁴¹⁸ The basis of the compensation plan proposed by the AFN is that each survivor should be compensated a base lump sum for loss of language and culture. After that, additional sums can be added to the award for each additional year or part year of attendance at a school to account for emotional harms, physical and sexual abuse. All survivors would be treated equally, regardless of which school they

⁴¹¹ Llewellyn, *supra* note 398, at 266.

⁴¹² *Id.* at 268–69, 272.

⁴¹³ CBC NEWS, *supra* note 402.

⁴¹⁴ INDIAN RESIDENTIAL SCH. RESOLUTION CANADA, 2006-2007 DEPARTMENTAL PERFORMANCE REPORT 9-12 (2007), available at <http://www.tbs-sct.gc.ca/dpr-rmr/2006-2007/inst/ira/ira-eng.pdf>

⁴¹⁵ *Id.*

⁴¹⁶ *Canada: Background*, *supra* note 391.

⁴¹⁷ ASSEMBLY OF FIRST NATIONS, REPORT ON CANADA'S DISPUTE RESOLUTION PLAN TO COMPENSATE FOR ABUSES IN INDIAN RESIDENTIAL SCHOOLS 1-8 (2005), available at <http://www.afn.ca/article.asp?id=306>.

⁴¹⁸ *Id.*

attended, and no individual hearings would be necessary because the payments would be based on school records.⁴¹⁹

The ongoing problem of how to handle civil cases arising out of the residential schools program came to an end in 2006 with the Indian Residential School Settlement Agreement which resolved Canada's largest class action lawsuit. The agreement created a comprehensive reparations program that was negotiated under the leadership of Canadian Supreme Court Justice Frank Iacobucci.⁴²⁰ The \$2 billion⁴²¹ agreement entered into force on September 19, 2007.⁴²² The class action suit included all of the estimated 80,000 survivors of the residential schools, even if they had separate lawsuits pending.⁴²³ Much like the AFN proposal, the agreement provided for a Common Experience Payment of \$10,000 for the first school year, plus \$3,000 for each school year after that. An Independent Assessment Process replaced the government's National Resolution Framework. It created a point system that allowed victims to recover additional awards ranging from \$5,000 to \$275,000 for sexual or physical abuses suffered, or for other abuses that caused serious psychological effects.⁴²⁴ When victims are able to show their injuries resulted in a loss of income, the maximum award rises to \$430,000.⁴²⁵ As of May 31, 2010, a total of 16,311 claims have been filed, and the total compensation paid has reached \$615,545,234.⁴²⁶

In addition to funding a reparations program, the settlement agreement included a strong reconciliation component. It added \$125 million over a five year period to the Aboriginal Healing Foundation, created a \$20 million Commemoration Fund for national and community projects, and allocated \$60 million to research, document, and preserve the experience of the survivors and their families for future generations.⁴²⁷ Most importantly, the

⁴¹⁹ *Id.*

⁴²⁰ *Canada: Background, supra* note 391.

⁴²¹ *Id.*

⁴²² *Id.*

⁴²³ THE INDIAN RESIDENTIAL SCHOOLS SETTLEMENT HAS BEEN APPROVED., RESIDENTIAL SCHOOLS SETTLEMENT, http://www.residentialschoolsettlement.ca/detailed_notice.pdf (last visited Feb. 20, 2011) [hereinafter INDIAN SCHOOLS SETTLEMENT].

⁴²⁴ *Id.*

⁴²⁵ *Id.*

⁴²⁶ *Updates*, RESIDENTIAL SCHOOLS SETTLEMENT: OFFICIAL COURT NOTICE, June 16, 2010, <http://www.classactionservices.ca/irs/updates.htm> (last visited Feb. 20, 2011).

⁴²⁷ INDIAN SCHOOLS SETTLEMENT, *supra* note 423.

agreement also created a Truth and Reconciliation Commission (TRC) in June 2008 with a \$60 million budget.⁴²⁸

The agreement provided that the goals of the Commission are as follows:

Acknowledge Residential School experiences, impacts and consequences;

Provide a holistic, culturally appropriate and safe setting for former students, their families and communities as they come forward to the Commission;

Witness, support, promise and facilitate truth and reconciliation events at both the national and community levels;

Promote awareness and public education of Canadians about the IRS [Indian Residential Schools] system and its impacts;

Identify sources and create as complete an historical record as possible of the IRS system and legacy. The record shall be preserved and made accessible to the public for future study and use;

Produce and submit to the Parties to the Agreement a report including recommendations to the Government of Canada concerning the IRS system and experience including: the history, purpose, operation and supervision of the IRS system, the effect and consequences of IRS (including systematic harms, intergenerational consequences and the impact on human dignity) and the ongoing legacy of the residential schools;

Support commemoration of former Indian Residential School students and their families in accordance with the Commemoration Policy Directive (Schedule “X” of the Agreement).⁴²⁹

Unlike some other truth and reconciliation commissions, the Canadian TRC is specifically not permitted to serve any judicial role or support any prosecutions. This clear line between seeking truth and rendering justice is reflected in the TRC’s mandate. While the commission is authorized to “receive statements and documents from former students, their families, community and all other interested participants” and is required to archive

⁴²⁸ SCHEDULE “N:” MANDATE FOR THE TRUTH AND RECONCILIATION COMMISSION, www.residentialschoolsettlement.ca/settlement.html (last visited Feb. 20, 2011).

⁴²⁹ *Id.* at 1(a)–(g).

this information,⁴³⁰ it is prohibited from holding formal hearings, acting as a public inquiry, or conducting formal legal process.⁴³¹ More specifically, the commission is forbidden from making any findings or expressing any conclusion or recommendation, regarding the misconduct of any person, unless such findings or information has already been established through legal proceedings, by admission, or by public disclosure of the individual. Further the Commission shall not make any reference in any of its activities or in its report or recommendations to the possible civil or criminal liability of any person or organization, unless such findings or information about the individual or institution has already been established through legal proceedings.⁴³² Finally, commissioners “shall ensure that the conduct of the Commission and its activities do not jeopardize any legal proceeding.”⁴³³

The Commission officially began operation on June 1, 2008, but its substantive work was significantly delayed, however, after “infighting forced the resignation of the former chairman and commissioners” in 2009.⁴³⁴ The new chairman, Justice Murray Sinclair, “said he’ll have to work hard to restore the commission’s credibility . . . [because] people lost some faith in the commission.”⁴³⁵ He, along with two new commissioners, Marie Wilson and Chief Wilton Littlechild⁴³⁶ have forged ahead in gathering statements.⁴³⁷ The first national event of the TRC took place in Winnipeg between June 16 and 19, 2010.⁴³⁸ During those days, the commission heard from more than 3,000 people who survived abuse or were affected by residential schools.⁴³⁹ Commissioner Littlechild said in an interview immediately following the event that “The stories are very, very heartbreaking . . . At the same time, there is a lot of laughter and a lot of humour, because our people believe that

⁴³⁰ *Id.* at 2(a).

⁴³¹ *Id.* at 2(b)–(c).

⁴³² *Id.* at 2(f).

⁴³³ *Id.* at 2(k).

⁴³⁴ *Canada: Background*, *supra* note 391 (discussing the date the work began); *Truth and Reconciliation chair trying to restore hope*, CBC NEWS, Sept. 21, 2009, <http://www.cbc.ca/canada/manitoba/story/2009/09/21/mb-truth-reconciliation-sinclair-manitoba.html> (last visited Feb. 20, 2011) (discussing infighting).

⁴³⁵ *Truth and Reconciliation chair trying to restore hope*, CBC NEWS, *supra* note 434.

⁴³⁶ *Meet the Commissioners*, TRUTH & RECONCILIATION COMM’N CANADA, <http://www.trc.ca/websites/trcinstitution/index.php?p=5> (last visited Feb. 20, 2011).

⁴³⁷ *Statement Gathering*, TRUTH & RECONCILIATION COMM’N CANADA, <http://www.trc.ca/websites/trcinstitution/index.php?p=102> (last visited Feb. 20, 2011).

⁴³⁸ *Winnipeg National Event*, TRUTH & RECONCILIATION COMM’N CANADA <http://www.trenationalevents.ca/websites/trcevent2010/index.php?p=1> (last visited Feb. 20, 2011).

⁴³⁹ Andrea Sands, *Harbinger of truth sees hope for future*, EDMONTON JOURNAL, June 21, 2010, <http://www2.canada.com/story.html?id=3179971> (last visited Feb. 20, 2011).

humour is one of the great medicines that we have.”⁴⁴⁰ Over the next five years, the commission will hold seven similar national events.⁴⁴¹

In addition to its work within Canada, the TRC sees its work as part of a larger global picture. In April 2010, the TRC proposed to host an international Roundtable discussion on truth commissions to the Ninth Session of the United Nations Permanent Forum on Indigenous Issues.⁴⁴²

Justice Sinclair stated that with almost fifty countries around the world operating or planning to open truth commissions, “[t]his is an opportune time to have an international discussion on these processes so that we can share and learn about experiences of practices that work best.”⁴⁴³

B. Cambodia

The forces of the Communist Party of Kampuchea, known popularly as the Khmer Rouge, took power in Cambodia on April 17, 1975, after over a decade of armed conflict. The Khmer Rouge, led by Pol Pot, sought to establish a “socialist, fully independent, and socially and ethnically homogeneous Cambodia.”⁴⁴⁴ In pursuit of this “clean social system” the regime’s policies and actions resulted in the deaths of an estimated one-third

⁴⁴⁰ *Id.*

⁴⁴¹ *Id.*

⁴⁴² Press Release, Truth & Reconciliation Comm’n Canada, Truth and Reconciliation Commission of Canada addresses United Nations, Calls for International Roundtable on Truth Commissions (Apr. 27, 2010), available at <http://www.michelfirstnation.net/whats-new.html> (last visited Feb. 20, 2011).

⁴⁴³ *Id.*

⁴⁴⁴ Neha Jain, *Between the Scylla and Charybdis of Prosecution and Reconciliation: The Khmer Rouge Trials and the Promise of International Criminal Justice*, 20 DUKE J. COMP. & INT’L L. 247, 250 (2010); *Khmer Rouge*, N.Y. TIMES, Sept. 17, 2010, http://topics.nytimes.com/top/reference/timestopics/organizations/k/khmer_rouge/index.html (last visited Feb. 20, 2011) [hereinafter *Khmer Rouge*].

of the Cambodian population by 1979, in less than four years.⁴⁴⁵ The Khmer Rouge was driven from power by an invasion from Vietnam in 1979.⁴⁴⁶

After decades of impunity, in 2006 the government of Cambodia and the UN created the Extraordinary Chambers of the Courts of Cambodia (ECCC), an internationalized tribunal that left significant control in Cambodian hands. Though a truth commission was never established to investigate the crimes of the Khmer Rouge, the Documentation Center of Cambodia (DC-Cam) was created by civil society in 1994 to fill this gap.⁴⁴⁷

As described by a Group of Experts appointed by the United Nations in 1999 to evaluate the evidence of international crimes under the Khmer Rouge regime, atrocity in Cambodia during this period followed four major patterns of abuses: forced population movements; forced labor and inhumane living conditions; attacks on enemies of the revolution; and purges within the Communist Party of Kampuchea.⁴⁴⁸ The Khmer Rouge particularly targeted ethnic minorities, especially the Cham, a Muslim sect; ethnic Chinese; Vietnamese; teachers, students or other educated elements; and religious leaders and institutions.⁴⁴⁹ In addition, gender-based violence was common, as were forced marriages and other tactics designed to degrade the traditional Cambodian family structure.⁴⁵⁰ The best documented atrocity under the Khmer Rouge occurred at Tuol Sleng, a notorious prison in Phnom Penh, where almost 200,000 suspected enemies of the regime were tortured and killed. Only six of the 200,000 are known to have survived.⁴⁵¹ Despite all that is known about the atrocities that occurred during this time, “identification of the full range of participants and victims

⁴⁴⁵ U.N. Group of Experts on Cambodia, Rep., transmitted by letter dated Feb. 18, 1999 from the Secretary-General, established pursuant to resolution 52/135 (1998) concerning situation of human rights in Cambodia addressed to President of the General Assembly, ¶ 16, U.N. Doc. A/53/850, available at http://www.unakrt-online.org/04_documents.htm; Jaya Ramji, *Reclaiming Cambodian History: The Case for Truth Commission*, 24 FLETCHER F. WORLD AFF. 137, 137 (2000); see also *Background Note: Cambodia*, U.S. DEP’T OF STATE, <http://www.state.gov/r/pa/ei/bgn/2732.htm> (“Solid estimates of the numbers who died between 1975 and 1979 are not available, but it is likely that hundreds of thousands were brutally executed by the regime. Hundreds of thousands more died from forced labor, starvation, and disease – both under the Khmer Rouge and during the Vietnamese invasion in 1978. Estimates of the dead range from 1.7 million to 3 million, out of a 1975 population estimated at 7.3 million.”) (last visited Feb. 20, 2011).

⁴⁴⁶ *Khmer Rouge*, *supra* note 444.

⁴⁴⁷ *History and Description of DC-CAM*, DOCUMENTATION CTR. CAMBODIA, <http://www.dccam.org/About/History/Histories.htm> (last visited Feb. 20, 2011).

⁴⁴⁸ Report of Group of Experts, *supra* note 445, ¶ 18.

⁴⁴⁹ *Id.* ¶ 29.

⁴⁵⁰ Bridgette A. Toy-Cronin, *What is Forced Marriage? Towards a Definition of Forced Marriage as a Crime Against Humanity*, 19 COLUM. J. GENDER & L. 539, 549 (2010).

⁴⁵¹ Report of Group of Experts, *supra* note 445, ¶ 31.

in the terror seems impossible. Apart from the meticulous confessions kept in Tuol Sleng, either the Khmer Rouge did not compile detailed records of most of their actions or those records appear lost. The names of all the perpetrators and victims will never be known.”⁴⁵²

When the regime fell in 1979, transitional justice efforts were virtually nonexistent because of continued political instability and conflict. Shortly after taking power, the People’s Republic of Kampuchea, a government installed by Vietnam, conducted trials in absentia of Pol Pot and Ieng Sary.⁴⁵³ However, these were “show trials” that lacked basic due process and procedural safeguards.⁴⁵⁴ The People’s Republic faced a massive reconstruction task, as all of Cambodia’s institutions and infrastructure were destroyed and few intellectuals remained to rebuild. However, the People’s Republic sought no real accountability of Khmer Rouge leaders because these individuals remained organized and powerful along both sides of the Cambodian-Thai border.⁴⁵⁵ The Khmer Rouge also retained Cambodia’s seat in the United Nations during the 1980s, “owing to an effective anti-Viet Nam coalition led by China, the Association of South-East Asian Nations (ASEAN) and the United States,” despite increasing reports of the atrocity committed during their rein.”⁴⁵⁶

Following peace talks in Paris in July 1989, and the subsequent presence of the United Nations Transitional Authority in Cambodia (UNTAC) until September 1993,⁴⁵⁷ the Khmer Rouge stopped being an active fighting force. Foreign support dwindled and its soldiers returned to civilian life or joined the Cambodian armed forces.⁴⁵⁸ Formal amnesty was

⁴⁵² *Id.* ¶ 34.

⁴⁵³ Pol Pot was the political leader of the Khmer Rouge. *Khmer Rouge*, *supra* note 444. Ieng Sary was the foreign minister of the regime. Seth Mydans, *Khmer Rouge Leaders Indicted*, N.Y. TIMES, Sept. 16, 2010, http://www.nytimes.com/2010/09/16/world/asia/16cambodia.html?_r=1&ref=ieng_sary (last visited Feb. 20, 2011).

⁴⁵⁴ Report of Group of Experts, *supra* note 445, ¶ 43.

⁴⁵⁵ *Id.* ¶ 38.

⁴⁵⁶ *Id.*

⁴⁵⁷ Paris Conference on Cambodia: Agreements Elaborating the Framework for a Comprehensive Political Settlement of the Cambodia Conflict, Oct. 23, 1991, 31 I.L.M. 174 (reproduced from U.N. Doc. A/46/608, S/23177 (Oct. 30, 1991)), available at http://www.usip.org/files/file/resources/collections/peace_agreements/agree_comppol_10231991.pdf. The UNTAC mandate was to ensure implementation of the 1991 Agreements on the Comprehensive Political Settlement of the Cambodia Conflict. This included aspects relating to human rights, the organization and conduct of elections, military arrangements, civil administration, maintenance of law and order, repatriation and resettlement of refugees and displaced persons and rehabilitation of Cambodian infrastructure. *Completed Peacekeeping Operations: Cambodia*, UNITED NATIONS, <http://www.un.org/en/peacekeeping/missions/past/untac.htm> (last visited Feb. 20, 2011).

⁴⁵⁸ Report of Group of Experts, *supra* note 445, ¶ 43.

also provided to Ieng Sary in 1996, which covered his 1979 conviction. This had the effect of bringing him, and forces loyal to him, within the government.⁴⁵⁹ This strategy of incorporating the Khmer Rouge into the Royal Cambodian Armed Forces, without the use of formal amnesties, was used to stop the violence and bring insurgents within the government in the remaining Khmer Rouge controlled areas.⁴⁶⁰ In this way, the Khmer Rouge would have a lasting legacy in Cambodia.

Against this backdrop of over twenty years of impunity, accountability finally became a reality in Cambodia in 2003 when the Extraordinary Chambers of the Courts of Cambodia (ECCC) was created. The Court represents a novel arrangement between government of Cambodia and the United Nations to seek justice for atrocity, which was not easy to negotiate.

The creation of the ECCC was not a simple process. As early as 1994, the United States government began collecting data on the Cambodian genocide, with an eye to encourage the establishment of an international or national tribunal.⁴⁶¹ However, the matter was not taken up seriously in international fora until June of 1997 when the co-Prime Ministers of Cambodia wrote to then Secretary-General Kofi Annan requesting the United Nations' assistance in holding a trial for Khmer Rouge leadership.⁴⁶² However, an internal coup in 1997 during which the second prime minister Hun Sen ousted Prince Norodom Ranariddh, Cambodia's first prime minister, "derailed serious discussions between Cambodia and the United Nations."⁴⁶³

The following year (1998), Pol Pot, the political leader of the Khmer Rouge, died.⁴⁶⁴ Interest in accountability in Cambodia surged.⁴⁶⁵ The United Nations General Assembly requested the Secretary General to appoint "a group of experts to evaluate the existing evidence and propose further measures, as a means of bringing about national reconciliation, strengthening democracy and addressing the issue of individual accountability."⁴⁶⁶ The group of experts concluded that there was sufficient evidence to justify legal proceedings against Khmer Rouge leaders for crimes against humanity, genocide, war crimes, forced labor, torture, crimes

⁴⁵⁹ *Id.*

⁴⁶⁰ *Id.* ¶ 44–45.

⁴⁶¹ The Cambodian Genocide Justice Act §§ 571–574, 22 U.S.C. § 2656 (1994).

⁴⁶² *Chronology of Developments Relating to the KR Trial*, ROYAL GOVERNMENT OF CAMBODIA, www.ocm.gov.kh/chrono.htm (last visited Feb. 20, 2011).

⁴⁶³ David Scheffer, *The Extraordinary Chambers in the Courts of Cambodia*, in 2 INTERNATIONAL CRIMINAL LAW 221 (M. Cherif Bassiouni ed., 2008).

⁴⁶⁴ *See id.* at 222.

⁴⁶⁵ *See id.*

⁴⁶⁶ G.A. Res. 52/135, ¶ 16, U.N. Doc. A/RES/52/135 (Feb. 27, 1998).

against internationally protected persons, and crimes under Cambodian law.⁴⁶⁷

The Experts recommended the establishment of an ad hoc international tribunal, outside of Cambodia, to try those most responsible for the atrocity in Cambodia, including senior leaders of the Khmer Rouge.⁴⁶⁸ The Experts also recommended that Cambodia consider forming a truth commission.⁴⁶⁹ The experts noted that in the twenty years since the fall of the Khmer Rouge, no comprehensive polling had been undertaken that would indicate whether the people of Cambodia were interested in prosecution.⁴⁷⁰ However, the group found that during their visit there was an “unambiguous demand for trials” at all levels of government and in the group’s individual and anecdotal measure of public opinion.⁴⁷¹

Prime Minister Hun Sen rejected the Expert Report. In a letter to Secretary-General concerning the Report, the Cambodian government indicated that it would prefer reconciliation to justice:

We have never rejected the accountability of the Khmer Rouge leaders for the crimes of genocide in Cambodia. We just want, however, to caution that any decision to bring the Khmer Rouge leaders to justice must also take into full account Cambodia’s need for peace, national reconciliation, rehabilitation and economic development for poverty reduction. Therefore, if improperly or heedlessly conducted, the trials of the Khmer Rouge leaders would panic other former Khmer Rouge officers and rank and file, who have already surrendered, into turning back to the jungle and renewing the guerilla war in Cambodia.⁴⁷²

Despite the suggestion that seeking accountability would undermine stability in Cambodia, it became clear that Cambodia feared the international influence of the proposed court when in March of 1999 Cambodia

⁴⁶⁷ U.N. Secretary-General, *Situation of Human Rights in Cambodia: Rep. of the Secretary-General*, ¶ 38, U.N. Doc. A/54/353 (Sept. 20, 1999).

⁴⁶⁸ Report of Group of Experts, *supra* note 445, ¶ 219.

⁴⁶⁹ *Id.* ¶ 44–45.

⁴⁷⁰ *Id.* ¶ 94.

⁴⁷¹ *Id.* ¶ 93–94.

⁴⁷² U.N. Secretary-General, *Advisory Services and Technical Cooperation in the Field of Human Rights: Situation of Human Rights in Cambodia, Report of the Special Representative of the Secretary-General for Human Rights in Cambodia, Mr. Thomas Hammarberg, submitted in accordance with Commission resolution 1998/60, ¶ 9, U.N. Doc. E/CN.4/1999/101/Add.1* (1999).

announced its intention to try Khmer Rouge leaders in the national court system.⁴⁷³

Negotiations for an international court continued with little success. In 1999 Cambodia drafted a law composing the ECCC, but it was rejected by a UN delegation.⁴⁷⁴ Cambodia then passed the draft ECCC law in 2001, without making the changes required by the UN.⁴⁷⁵ The UN officially withdrew from talks in February 2002.⁴⁷⁶ Japan responded by coordinating a meeting of a number of interested states in an attempt to resume negotiations.⁴⁷⁷ The Secretary General indicated a willingness to resume talks, but only with a clear mandate from the General Assembly or the Security Council. Japan and France resultantly sponsored a resolution requesting “the Secretary-General to resume negotiations . . . to establish Extraordinary Chambers.”⁴⁷⁸ The following day, negotiations officially resumed.⁴⁷⁹

On June 6, 2003, a draft agreement was finally signed by the United Nations and the Royal Government of Cambodia that laid out the foundational elements of the court and clarified the relationship between Cambodia and the United Nations.⁴⁸⁰ This agreement, along with amendments to the 2001 Law on the Establishment of the Extraordinary Chambers to bring in into harmony with the Agreement, was ratified by the

⁴⁷³ *Id.* ¶ 12.

⁴⁷⁴ *Chronology & Negotiating History*, CAMBODIA TRIBUNAL MONITOR, <http://www.cambodiatribunal.org/tribunal-background/chronology-a-negotiating-history.html> (last visited Feb. 20, 2011).

⁴⁷⁵ David Scheffer, *The Extraordinary Chambers in the Courts of Cambodia*, in 2 INTERNATIONAL CRIMINAL LAW 234 (M. Cherif Bassiouni ed., 2008) (Reach Kram No. NS/RKM/0801/12, “the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea.”).

⁴⁷⁶ Seth Mydans, *UN Ends Cambodia Talks on Trials for Khmer Rouge*, N.Y. TIMES, Feb. 9, 2002, <http://www.nytimes.com/2002/02/09/world/un-ends-cambodia-talks-on-trials-for-khmer-rouge.html> (last visited Feb. 20, 2011).

⁴⁷⁷ *Chronology from 1997 to 2005*, CAMBODIA TRIBUNAL MONITOR, <http://www.eccc.gov.kh/english/backgroundECCC.aspx> (last visited July 6, 2010) [hereinafter *ECCC Chronology*].

⁴⁷⁸ Draft G.A. Res., U.N. Doc. A/C.3/57/L.70 (Nov. 13, 2002).

⁴⁷⁹ *ECCC Chronology*, *supra* note 477 (drop down menu to 2002).

⁴⁸⁰ Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea (June 2003), *available at* <http://www.eccc.gov.kh/english/agreement.list.aspx>.

Council of Ministers of Cambodia on August 6, 2004.⁴⁸¹ The Agreement was entered into force on April 29, 2005.⁴⁸²

As ultimately agreed upon, the ECCC has personal jurisdiction over “senior leaders of Democratic Kampuchea and those who were most responsible”⁴⁸³ for “the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia that were committed during the period from 17 April 1975 to 6 January 1979.”⁴⁸⁴ Specifically, the subject-matter jurisdiction of the Extraordinary Chambers “shall be the crime of genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, crimes against humanity as defined in the 1998 Rome Statute of the International Criminal Court, and grave breaches of the 1949 Geneva Conventions.”⁴⁸⁵ The court is also competent to charge suspects with: violations of the Cambodian 1956 Penal Code, including homicide, torture, and religious persecution; suspects most responsible for destruction of cultural property under the 1954 Hague Convention for Protection of Cultural Property in the Event of Armed Conflict; and crimes against international protected persons pursuant to the Vienna Convention of 1961 on Diplomatic Relations.⁴⁸⁶ The available penalties for those convicted by the ECCC include life imprisonment⁴⁸⁷ and confiscation of personal property, money, and real property acquired unlawfully or by criminal conduct.⁴⁸⁸ On the issue of amnesties, the Cambodian Government agreed not to grant pardons or amnesties; the one pardon that had already been granted to Ieng Sary in 1996 became reviewable by the ECCC under the agreement.⁴⁸⁹

The structure of the court as created reflects the tension between Cambodia’s desire to keep the courts internal and to utilize outside resources and experience. The court sits in Phnom Penh and is comprised of a Pre-Trial Chamber, a Trial Chamber, and a Supreme Court Chamber. Three Cambodian judges and two international judges sit in the Trial Chamber, while four Cambodian judges and three international judges serve in the Supreme Court Chamber.⁴⁹⁰ The appointment of international judges occurs

⁴⁸¹ ECCC *Chronology*, *supra* note 477 (drop down menu to 2004).

⁴⁸² *Id.* (drop down menu to 2005).

⁴⁸³ Agreement Between the UN and Cambodia, *supra* note 480, art. 2.

⁴⁸⁴ *Id.* art. 1.

⁴⁸⁵ *Id.* art. 9.

⁴⁸⁶ *Id.* arts. 3, 7, 8.

⁴⁸⁷ *Id.* art. 10.

⁴⁸⁸ *Id.* art. 39.

⁴⁸⁹ *Id.* art. 11.

⁴⁹⁰ *Id.* art. 3(2)(a)–(b).

through a process of nomination by the United Nations to be approved by the Cambodian Supreme Council of Magistracy.⁴⁹¹ The judges, in reaching decisions, are encouraged by the agreement to do so unanimously.⁴⁹² When impossible, a decision in the Trial Chamber requires the vote of at least four judges, and a decision in the Supreme Court Chamber requires the vote of at least five.⁴⁹³ Thus, there must be a spread of agreement across both international and Cambodian judges in order for the court to issue a decision.

Similarly, the ECCC has two investigating judges and two prosecutors: one of each must be international and one Cambodian.⁴⁹⁴ In the case of disagreement between the investigating judges or the prosecutors, the investigation or the prosecution shall proceed “unless... one of them requests within thirty days that the difference shall be settled in accordance with Article 7.”⁴⁹⁵ Article 7 provides that disputes are to be settled by a panel of five judges (three Cambodian and two international) in the Pre-Trial Chamber.⁴⁹⁶ A decision of the Pre-Trial Chamber requires four affirmative votes, and there is no appeal from its decisions.⁴⁹⁷ If the Pre-Trial Chamber is unable to reach a decision, the investigation or prosecution shall proceed.⁴⁹⁸

Other procedures of the ECCC are governed by Cambodian law. These procedures, pursuant to the Cambodia’s agreement with the UN, must comport with “international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR).”⁴⁹⁹ Thus, the accused are guaranteed the following rights: “to a fair and public hearing; to be presumed innocent until proved guilty; to engage a counsel of his or her choice; to have adequate time and facilities for the preparation of his or her defence; to have counsel provided if he or she does not have sufficient means to pay for it; and to examine or have examined the witnesses against him or her.”⁵⁰⁰

⁴⁹¹ *Id.* art. 3(5).

⁴⁹² *Id.* art. 4(1).

⁴⁹³ *Id.*

⁴⁹⁴ *Id.* arts. 5, 6(1).

⁴⁹⁵ *Id.* arts. 5(4), 6(4).

⁴⁹⁶ *Id.* art. 7(2).

⁴⁹⁷ *Id.* art. 7(4).

⁴⁹⁸ *Id.*

⁴⁹⁹ *Id.* art. 12(1)–(2). Cambodia acceded to the ICCPR in 1992. See *Chapter IV: Human Rights*, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (last visited Dec. 5, 2010) (list of ICCPR signatory countries).

⁵⁰⁰ Agreement Between the UN and Cambodia, *supra* note 480, art. 13(1).

Prosecutions have been officially underway since July 18, 2007 when the Co-Prosecutors filed their introductory submission.⁵⁰¹ It named five individuals that would be investigated for murder, torture, forcible transfer, unlawful detention, forced labor and religious, political and ethnic persecution.⁵⁰² The submission was split into two cases: Case File 001, which covers those crimes pertaining to Security Center S-21 with one accused; and Case File 002, relating to the remainder of the crimes charged, with all five of the accused charged.⁵⁰³ All five were arrested, charged, and are represented by counsel.⁵⁰⁴

Case File 001, the official indictment of Kaing Guek Eav (otherwise known as Duch), was issued on August 8, 2008.⁵⁰⁵ He was indicted and sent to trial for crimes against humanity, grave breaches of the Geneva Conventions of 1949, as well as homicide and torture pursuant to the 1956 Penal Code.⁵⁰⁶ The alleged crimes occurred while Duch was Deputy Secretary and Secretary of S-21, the prison known as Tuol Sleng. His trial ran from February 2009 to mid-September of the same year.⁵⁰⁷ He was found guilty of war crimes and crimes against humanity and sentenced to thirty-five years in prison,⁵⁰⁸ but this sentence was shortened to 19 years because of time already served.⁵⁰⁹ This could be further reduced for good behavior.⁵¹⁰ The prospect that he may walk free one day left many Cambodians angry and unsettled.⁵¹¹ In November 2010, Duch appealed his conviction.⁵¹² Case File 002, though investigated partially in parallel with Case File 001, due to resource constraints, was not completely investigated

⁵⁰¹ Press Release, ECCC, Co-Prosecutors file first Introductory Submission with the Co-Investigating Judges (July 18, 2007), http://www.eccc.gov.kh/english/news.view.aspx?doc_id=40 (last visited, Feb. 20, 2011).

⁵⁰² *Id.*

⁵⁰³ ECCC, APPROVED BUDGET FOR 2010–2011 5 (2010), available at http://www.eccc.gov.kh/sites/default/files/2010-2011_Budget_Document.pdf.

⁵⁰⁴ *Id.* at S.10.

⁵⁰⁵ *Id.* at S.12.

⁵⁰⁶ *Case Information Sheet*, ECCC, <http://www.eccc.gov.kh/english/caseInfo001.aspx> (follow “Case Information Sheet” hyperlink) (last visited July 6, 2010).

⁵⁰⁷ ECCC, APPROVED BUDGET, *supra* note 503, at S.12.

⁵⁰⁸ *Times Topics: People: Kaing Geuk Eav*, N.Y. TIMES, July 26, 2010, http://topics.nytimes.com/top/reference/timestopics/people/k/kaing_geuk_eav/index.html (last visited Feb. 20, 2011).

⁵⁰⁹ *Id.*

⁵¹⁰ *Id.*

⁵¹¹ Robert Carmichael, *Khmer Rouge Leader’s Sentence Gets Mixed Reaction*, GLOBALSECURITY.ORG, July 28, 2010, available at <http://www.globalsecurity.org/military/library/news/2010/07/mil-100728-voa03.htm> (last visited Feb. 20, 2011).

⁵¹² *Lawyers for Khmer Rouge jailer appeal his conviction*, CTV NEWS, Nov. 22, 2010, <http://www.ctv.ca/CTVNews/World/20101122/khmer-rouge-kaing-guek-eav-appeal-101122>.

until January 14, 2010.⁵¹³ The closing order for the case is expected in September 2010.⁵¹⁴ The trial will begin thereafter.

A dispute is also currently underway as to whether two new case files, 003 and 004 should be pursued further. In December 2008, the International Co-Prosecutor filed a Statement of Disagreement between the Co-Prosecutors over whether to open two new judicial investigations.⁵¹⁵ The Pre-Trial Chamber was unable to obtain a vote of four of the five judges, so the International Co-Prosecutor filed two new Introductory Submissions against five suspects on September 7, 2009.⁵¹⁶ In early June, 2010, the media began reporting that the investigating judges were also in disagreement about how to proceed with the new cases. The Co-investigating Judges issued a press release stating that “there is a disagreement between the[m] . . . related to the timing of the investigations. Accordingly, for the investigations planned in Case File 003 and 004 until the end of this year [2010], the international investigating judge will proceed . . . [pursuant to court rules].”⁵¹⁷ Subsequent news reports about the situation quote UN court spokesman Lars Olsen as saying that “investigators will not yet focus on specific individuals, but rather try to establish ‘whether or not the crimes described in the submissions from the prosecutors took place at certain locations.’”⁵¹⁸ The future of these additional cases thus remains uncertain, but it is projected that the ECCC will continue until 2015.⁵¹⁹

The structure of the ECCC was criticized at the outset because by virtue of being under Cambodian control and based on the Cambodian legal system, the tribunal inherits many of the serious defects that currently plague the Cambodian justice system. The principal problems stem from the fact that Cambodia’s judicial system is beset by rampant corruption and is rarely free from political influence – especially from the ruling CPP [Cambodia

⁵¹³ ECCC, APPROVED BUDGET, *supra* note 503; Press Release, ECCC, Conclusion of Judicial Investigation in Case 002 (Sept. 19, 2007), http://www.eccc.gov.kh/english/press_release.list.aspx?attribute=&selector=&page=2.

⁵¹⁴ Sebastian Strangio, *KRT judges divided on next cases*, PHNOM PENH POST, June 10, 2010, <http://www.phnompenhpost.com/index.php/2010061039638/National-news/krt-judges-divided-on-next-cases.html> (last visited Feb. 20, 2011).

⁵¹⁵ Press Release, ECCC, Statement of the Co-Prosecutors (Dec. 8, 2008), http://www.eccc.gov.kh/english/press_release.list.aspx?attribute=&selector=&page=7 (last visited Feb. 20, 2011).

⁵¹⁶ Press Release, ECCC, Statement of the Acting International Co-Prosecutor: Submission of Two New Introductory Submissions (Sept. 8, 2009), http://www.eccc.gov.kh/english/press_release.list.aspx?attribute=&selector=&page=3 (last visited Feb. 20, 2011).

⁵¹⁷ Press Release, ECCC, Statement from the Co-Investigating Judges (June 9, 2010), http://www.eccc.gov.kh/english/press_release.list.aspx.

⁵¹⁸ Strangio, *supra* note 514.

⁵¹⁹ ECCC, APPROVED BUDGET, *supra* note 503, at S.1–S.4.

People's Party] party, which has many ties to the former Khmer Rouge government and potentially has a lot to lose from disclosures that may be made in the course of trials.⁵²⁰

The litany of problems ascribed to the Cambodian legal system include: inexperienced judges and attorneys, corruption and political interference, an inadequate legal framework for conducting criminal trials, substandard evidentiary rules, poor investigative procedures, and inadequate procedural protections for defendant's rights.⁵²¹ These concerns were not allayed by "serious allegations of mandatory kickbacks by Cambodian staff to government officials in exchange for their positions" before the trials even began.⁵²² Resultantly, a civil society group "reported the lack of trust in Cambodia's authorities as one of the major constraints to achieving justice at the ECCC."⁵²³ Despite these scandals and criticism, the ECCC proceeded in its mission. Some of these tensions between the international desire to prosecute and the local lack of initiative to do so are illustrated by the current conflict between first the co-Prosecutors and then the co-Investigating Judges.⁵²⁴ However, the system envisioned by the UN and Cambodia to negotiate such disputes is currently being tested; it remains to be seen if it will work. The Open Society Justice Initiative has had full time international and Cambodian court monitors following fair trial issues since the ECCC's inception and has also provided a great deal of support to local NGOs to follow and participate in the court.⁵²⁵

Despite the incredible sluggishness with which negotiations and ultimately prosecutions have advanced, civil society has had tremendous opportunity to be involved in the Cambodian transitional justice model. To begin, the ECCC contemplates that victims may participate directly as civil parties in the proceedings.⁵²⁶ It is in this way that victims may seek

⁵²⁰ Scott Worden, *An Anatomy of the Extraordinary Chambers*, in BRINGING THE KHMER ROUGE TO JUSTICE: PROSECUTING MASS VIOLENCE BEFORE THE CAMBODIAN COURTS 188 (Jaya Ramji & Beth Van Schaack eds., 2005).

⁵²¹ *Id.* at 188–200.

⁵²² *World Report 2008: Cambodia, Events of 2007*, HUMAN RIGHTS WATCH, <http://www.hrw.org/englishwr2k8/docs/2008/01/31/cambod17603.htm> (last visited Feb. 20, 2011).

⁵²³ Kate Yesberg, *Accessing Justice through Victim Participation in the Khmer Rouge Tribunal*, 40 VICT. U. WELLINGTON L. REV. 555, 555 (2009).

⁵²⁴ See Neha Jain, *Between the Scylla and Charybdis of Prosecution and Reconciliation: The Khmer Rouge Trials and the Promise of International Criminal Justice*, 20 DUKE J. COMP. & INT'L L. 247 (2010).

⁵²⁵ See generally reports located at http://www.soros.org/initiatives/justice/focus/international_justice.

⁵²⁶ ECCC, INTERNAL RULES (Rev. 5) Rule 23 (2010), www.eccc.gov.kh/english/internal_rules.aspx.

reparations. Until February of 2010, victims were allowed to file a Civil Party application to join individually and be represented by an attorney of their choice.⁵²⁷ However, this was recently changed because as of February 9, 2010, approximately 4,000 Civil Party applications were received by the Victims Unit.⁵²⁸

The ECCC released a statement explaining the change: “It is clear that existing legal provisions in Cambodian criminal procedure are not designed to deal with individualized participation by victims on this scale. The number of Civil Party applicants, combined with the complexity, size, and other unique features of the ECCC proceedings, made the recent 2010 shift to a new system for the representation of victims necessary. The new scheme is intended to balance the rights of all parties, to safeguard the ability of the ECCC to achieve its mandate while maintaining Civil Party participation, and to enhance the quality of Civil Party representation.”⁵²⁹

Under the new system, civil parties may form groups at the pre-trial stage, but will comprise a single, consolidated group, represented by Civil Party Lead Co-Lawyers in the trial stage.⁵³⁰ Civil parties are not awarded individual damages; rather, the Chambers may award only “collective and moral reparations,” such as:

An order to publish the judgment in any appropriate news or other media at the convicted person’s expense; An order to fund any non-profit activity or service that is intended for the benefit of the Victims; or Other appropriate and comparable forms of reparation.⁵³¹

While the new rules do not apply to Case 001 as it had been nearly completed at the time of their adoption, it will likely be a meaningful venue for victim participation, and a viable way to fund support programs for them in Case 002 and any others that may proceed.

Other public outreach and organizing in Cambodia has largely come from civil society organizations, rather than the government. While the ECCC prints materials with information about its activities, even when they bear pictorial representations, the low literacy rate in rural Cambodia casts

⁵²⁷ ECCC, INTERNAL RULES (Rev. 5) Rule 23(2), 23(7) (2010), www.eccc.gov.kh/english/internal_rules.aspx.

⁵²⁸ Press Release, ECCC, 7th Plenary Session of ECCC concludes (Feb. 9, 2010), http://www.eccc.gov.kh/english/news.view.aspx?doc_id=336 (last visited Feb. 20, 2011).

⁵²⁹ *Id.*

⁵³⁰ ECCC, INTERNAL RULES (Rev. 5) Rule 23(4)–(5) (2010), www.eccc.gov.kh/english/internal_rules.aspx.

⁵³¹ ECCC, INTERNAL RULES (Rev. 5) Rule 23 quinquies (2010), www.eccc.gov.kh/english/internal_rules.aspx.

their effectiveness into doubt.⁵³² Furthermore, this does not serve the reconciliatory function that a truth commission would.

The leader in this regard is the DC-Cam. The organization was founded after the United States Congress passed the Cambodian Genocide Justice Act in April, 1994. As part of the Act, the Office of Cambodian Genocide Investigations was established within the U.S. State Department. This office funded grants to Yale University's Cambodian Genocide Program "to conduct research, training, and documentation on the Khmer Rouge regime." The Program was academic in nature and not designed to do legal research. In January of 1995 the Program opened a field office in Phnom Penh. This field office, under the leadership of a Khmer Rouge "killing field" survivor, Mr. Youk Chhang, became an independent research institute on January 1, 1997.⁵³³

DC-Cam is a not-for-profit, independent, and nonpartisan institute. It is operated entirely by Cambodians with support from scholars and experts from around the world. The organization's objective is two-fold: first, memory, to record and preserve the history of the Khmer Rouge for future generations; and second, justice, to compile and organize information that can serve as potential evidence in a legal accounting for the crimes of the Khmer Rouge. DC-Cam has assembled extensive bibliographic, biographic, photographic and geographic databases of information related to Khmer Rouge abuses. These databases are open to the public, and much is available on their website.⁵³⁴ The organization also participated in a forensics exhumation project to uncover the ways in which people were killed and abused by the Khmer Rouge.⁵³⁵

In addition to creating a collection of information, DC-Cam offers a range of programs that support transitional justice in Cambodia. Working with the Transcultural Psychosocial Organization, DC-Cam offered trauma counseling for both victims and perpetrators of the Khmer Rouge, with a special focus on torture.⁵³⁶ Beginning in 2004, DC-Cam launched a genocide education program to bring information about the genocide to the school

⁵³² *Poster Series*, ECCC, old.eccc.gov.kh/english/publications.poster.aspx (last visited July 6, 2010); see Kate Yesberg, *Accessing Justice through Victim Participation in the Khmer Rouge Tribunal*, 40 VICT. U. WELLINGTON L. REV. 555, 563 (2009).

⁵³³ All information in this paragraph from: *History and Description of DC-Cam, Our History*, DC-CAM, <http://www.dccam.org/About/History/Histories.htm> (last visited July 6, 2010).

⁵³⁴ *Id.*

⁵³⁵ *Forensics, 2003-Present*, DC-CAM, http://www.dccam.org/Projects/Forensic_Study/Forensics.htm (last visited July 6, 2010).

⁵³⁶ *Victims of Torture, 2003-2009*, DC-CAM, http://www.dccam.org/Projects/VOT/Victims_Torture.htm (last visited July 6, 2010).

curriculums, where it was notably absent. They have now trained teachers and conducted educational campaigns and the project is in an evaluation stage.⁵³⁷ They have also worked to do legal trainings and observations at the ECCC, including an initiative that brought people from rural areas to watch the proceedings.

DC-Cam is thus working alongside the ECCC to fill a void by ensuring that the story of the atrocity is not lost and that the needs of victims are being met. This, as well as Cambodia's uniquely structured court offer two novel approaches to handling transitional justice, even in the least favorable conditions.

C. Peru

Between 1980 and 2000, Peru experienced an internal armed conflict that resulted in the deaths of 69,280 people.⁵³⁸ Peru employed a truth commission to investigate the atrocity committed during the long conflict. While Peru engaged with the international community, in particular the Inter-American Court of Human Rights (IA Court), it ultimately employed its national court system to prosecute those most responsible for the violence.

The first wave of violence in Peru was perpetrated by armed insurgent groups, in particular the Communist group known as "Shining Path," and the Tupac Amaru Revolutionary Movement.⁵³⁹ The Shining Path was most responsible for the violence during this period. Led by Abimael Guzman, a former philosophy professor at San Cristóbal of Huamanga University, the group's primary objective was to destroy existing Peruvian political institutions and to replace them with a communist peasant revolutionary regime.⁵⁴⁰ The Tupac Amaru Revolutionary Movement (MRTA) was named after the 18th century indigenous rebel that fought the Spanish colonialists.⁵⁴¹ Under the leadership of Victor Polay, MRTA desired an

⁵³⁷ *Genocide Education, 2004-Present*, DC-CAM, http://www.dccam.org/Projects/Genocide/Genocide_Education.htm (last visited July 6, 2010).

⁵³⁸ TRUTH & RECONCILIATION COMM'N, FINAL REPORT: GENERAL CONCLUSIONS, § I (1)-(2), <http://www.cverdad.org.pe/ingles/ifinal/conclusiones.php> (last visited July 6, 2010) [hereinafter TRC, GENERAL CONCLUSIONS].

⁵³⁹ Eduardo González Cueva, *The Peruvian Truth and Reconciliation Commission and the Challenge of Impunity*, in TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY: BEYOND TRUTH VERSUS JUSTICE 70 (Naomi Roht-Arriaza & Javier Mariezcurrena eds., 2006).

⁵⁴⁰ Wayne Lucero, *The Rise and Fall of Shining Path*, COUNCIL ON HEMISPHERIC AFFAIRS, May 6, 2008, <http://www.coha.org/the-rise-and-fall-of-shining-path/>.

⁵⁴¹ *In the Spotlight: Tupac Amaru Revolutionary Movement (MRTA)*, CENTER FOR DEFENSE INFORMATION, Nov. 18, 2003, <http://www.cdi.org/program/document.cfm?>

overthrow of the Peruvian government modeled after the Cuban revolution.⁵⁴²

Ironically, the rural and indigenous populations were disproportionately affected by the conflict. Of those killed, 79 percent of victims lived in rural areas and 73 percent spoke Quechua or other native languages as their mother tongue.⁵⁴³ The magnitude of this can be understood when compared to 1993 nationwide census; it reported only 29 percent of the population lived in rural areas and only 16 percent of Peruvians' first language was a Quechua or other native language.⁵⁴⁴ The violence was marked by assassinations, kidnapping, forced disappearance, tortures, unfair detentions, serious crimes and violations to human rights.⁵⁴⁵

The response of the government, with democratically elected Alberto Fujimori at the helm, was to "trample on civil liberties" and civil society acquiesced and came "to tolerate massive abuses by the security forces."⁵⁴⁶ However, this only "escalated the conflict and eventually put most of the country under a prolonged state of emergency."⁵⁴⁷ In 1992, Fujimori led an *autogolpe*, or a presidential *coup d'etat*, that suspended the constitution, shut down the congress and the judiciary.⁵⁴⁸ This also began a second wave of violence, following a pattern of "selective crimes . . . typical of authoritarian governments."⁵⁴⁹ In September of that year, after "fierce fighting" between Shining Path and the Peruvian government, Guzman was captured, and then president Fujimori reportedly "displayed him in an outdoor cage" as a symbol of victory.⁵⁵⁰

After the Fujimori regime issued blanket amnesty to security forces personnel in 1995, refused to comply with judgments of the Inter-American Court, and eventually withdrew from the jurisdiction of the Court in 1999, widespread opposition mounted against him.⁵⁵¹ Facing this pressure, and

documentid=1859&

⁵⁴² *Id.*

⁵⁴³ TRC, GENERAL CONCLUSIONS, *supra* note 513, at § I (5)-(6).

⁵⁴⁴ *Id.*

⁵⁴⁵ TRUTH & RECONCILIATION COMM'N, FINAL REPORT: BACKGROUND, <http://www.cverdad.org.pe/ingles/lacomision/nlabor/antecedentes.php> (last visited July 6, 2010).

⁵⁴⁶ Eduardo González Cueva, *The Contribution of the Peruvian Truth and Reconciliation Commission to Prosecutions*, in TRUTH COMMISSIONS AND COURTS: THE TENSION BETWEEN CRIMINAL JUSTICE AND THE SEARCH FOR TRUTH 55 (William A. Schabas & Shane Darcy eds., 2005).

⁵⁴⁷ *Id.*

⁵⁴⁸ *Id.*

⁵⁴⁹ *Id.* at 56.

⁵⁵⁰ Lucero, *supra* note 540.

⁵⁵¹ Cueva, *supra* note 546, at 72-73.

amid scandal caused by the release of videos documenting high-level corruption, the regime collapsed in September 2000.⁵⁵² Fujimori fled to Japan, the country from which his parents had immigrated, and faxed in his resignation.⁵⁵³ There, he would claim Japanese citizenship, in an attempt to shield himself from the possibility of extradition.⁵⁵⁴ The authoritarian regime fell entirely apart; many government leaders escaped while those remaining were arrested.⁵⁵⁵ Both the Shining Path and MRTA also declined by this time.⁵⁵⁶

Under these seemingly ideal circumstances, a provisional government was installed that nearly immediately reformed human rights policy, re-joined the IA Court, and took steps to join the International Criminal Court.⁵⁵⁷ The leader of the provisional government, Valentín Paniagua issued Supreme Decree N°065-2001-PCM, which created a truth commission.⁵⁵⁸ It was ratified and completed on September 4, 2001.⁵⁵⁹

The Truth and Reconciliation Commission (TRC) established in 2001 was tasked with uncovering and clarifying the process, facts, and responsibilities of and for the violence and human rights violations that occurred between May 1980 and November 2000.⁵⁶⁰ The TRC was designed to serve a supporting role to the judiciary though it was not intended to be a justice-rendering organization itself; it was charged with “contributing to the administration of justice . . . so that it can clarify the crimes and violations to human rights committed both by terrorist organizations and State agents.”⁵⁶¹

The subject matter of the TRC’s inquiry was to include murder, kidnapping, enforced disappearance of persons, torture and other serious

⁵⁵² *Id.* at 73–74.

⁵⁵³ *Alberto K. Fujimori*, N.Y. TIMES, Apr. 8, 2009, http://topics.nytimes.com/top/reference/timestopics/people/f/alberto_k_fujimori/index.html (last visited Feb. 20, 2011).

⁵⁵⁴ Cueva, *supra* note 546, at 73–74.

⁵⁵⁵ *Id.* at 74.

⁵⁵⁶ *Id.* The Shining Path essentially collapsed after its leader, Abimael Guzmán, was captured and imprisoned in 1992, though some violence continued. Similarly, after their attack on the residence of the Japanese Ambassador in Peru in 1997, nearly all the MRTA militants were killed and their operations declined. Kathryn Gregory, *Shining Path, Tupac Amaru (Peru, leftists)*, COUNCIL ON FOREIGN REL. (Aug. 27, 2009), http://www.cfr.org/publication/9276/shining_path_tupac_amaru_peru_leftists.html (last visited Feb. 20, 2011).

⁵⁵⁷ Cueva, *supra* note 546, at 57.

⁵⁵⁸ *Supreme Decree of Peru, No. 065-2001-PCM*, available at <http://www.cverdad.org.pe/ingles/lacomision/nlabor/decsup01.php> (last visited June 4, 2001) (creating the Truth and Reconciliation Commission to investigate human rights violations in Peru from May 1980 to November 2000).

⁵⁵⁹ *Id.*

⁵⁶⁰ *Id.* art. 1.

⁵⁶¹ TRUTH & RECONCILIATION COMM’N, FINAL REPORT: OBJECTIVES, <http://www.cverdad.org.pe/ingles/lacomision/nlabor/objetivos.php> (last visited July 6, 2010).

injuries, and violations of collective rights against Andean and native communities of the state.⁵⁶² The “other serious injuries” would be interpreted by the TRC to include sexual crimes.⁵⁶³ The Commission was also specifically mandated to look at atrocity committed by state agents, members of terrorist or paramilitary organizations, and it would interpret its mandate to include acts committed by self-defense groups.⁵⁶⁴

With this mixed truth-seeking and fact-gathering mandate, the Commission was broken into various investigation units: the Legal team that focused on establishing patterns of human rights violations; the National Processes Team that worked on a historical reconstruction of the conflict; the In-Depth Studies Area that reconstructed the social and cultural contexts that produced the conflict; the Regional Histories Area that examined the history of the conflict from differing regional viewpoints; and the Reparations and Reconciliation Team, which analyzed the consequences of the conflict with an eye for planning reparations and reconciliation.⁵⁶⁵ After the first public hearings in 2002, and faced with clear public support and desire for prosecutions, a legal team was created to investigate specific cases.⁵⁶⁶ The new unit forwarded cases to the also newly created Special Investigations Unit that was tasked with investigating the list of potential cases. Because of the confidential nature of its work, it was designed to work outside the structure of the Commission.⁵⁶⁷ As there was no centralized research directive, there was significant overlap, and in some case inconsistencies between the various units. Thus, an Editorial Committee was formed to address these issues.⁵⁶⁸

The Commission, having received testimony at public hearings, collected documents, and even conducted exhumations, completed its work and released a report in 2003. The extensive report described brutal crimes and listed the names of nearly 34,000 dead.⁵⁶⁹ It documented 538 cases of rape during the conflict, concluding that sexual violence was used by the

⁵⁶² *Supreme Decree of Peru, No. 065-2001-PCM*, available at <http://www.cverdad.org.pe/ingles/lacomision/nlabor/decsup01.php> (last visited June 4, 2001) (creating the Truth and Reconciliation Commission to investigate human rights violations in Peru from May 1980 to November 2000).

⁵⁶³ Cueva, *supra* note 546, at 76.

⁵⁶⁴ *Id.*

⁵⁶⁵ *Id.* at 79–80.

⁵⁶⁶ *Id.* at 80.

⁵⁶⁷ *Id.* at 81.

⁵⁶⁸ *Id.* at 80.

⁵⁶⁹ Juan Forero, *Truth Commission Leaves Many Indians in Peru Unsatisfied*, N.Y. TIMES, Aug. 31, 2003, <http://www.nytimes.com/2003/08/31/world/truth-commission-leaves-many-indians-in-peru-unsatisfied.html> (last visited Feb. 20, 2011).

state as an anti-subversive strategy.⁵⁷⁰ It also named responsible parties, including non-governmental organizations, the armed and police forces, as well as self-defense committees.⁵⁷¹ It pointed to structural problems within the government that allowed, and perpetuated the conflict.⁵⁷²

It also specifically praised the work of various civil society associations, which “became an ethical point of reference on the national stage.”⁵⁷³ In the end, the commission developed a Comprehensive Plan for Reparations that once funded, would provide individual, collective, and symbolic reparations.⁵⁷⁴ It also called for justice:

The TRC believes that justice is an essential part of the reparation process. No path toward reconciliation will be passable if it is not accompanied by an effective exercise of justice in terms of reparation for the damages incurred by the victims, as well as the fair punishment of the perpetrators and, as a consequence, an end to impunity. An ethically healthy and politically viable country cannot be built on the foundations of impunity. Through the cases that it submits to the Public Ministry, the identification of 24,000 victims of the internal armed conflict and in general through the findings of its investigations, the TRC seeks to expand substantially the arguments supporting the demand for justice made by victims and their organizations, as well as by human rights organizations and citizens in general.⁵⁷⁵ Despite the comprehensive nature of the report, people were still left wanting answers because so many people had been forcibly disappeared.⁵⁷⁶

While the report did not produce immediate symbolic results, neither did its plan for action to take hold immediately. A full year later, Human Rights Watch reported that “Peru’s process in carrying out the recommendations of its truth commission... has been disappointingly slow.”⁵⁷⁷ It reported that “military courts insist on retaining jurisdiction over cases in which military personnel are implicated, a major obstacle to

⁵⁷⁰ Press Release, Association for Women’s Rights in Development, Peru: Victims of Military Rapists Wait for Justice 25 Years On (Apr. 2, 2010), <http://www.awid.org/eng/Issues-and-Analysis/Issues-and-Analysis/Peru-Victims-of-Military-Rapists-Wait-for-Justice-25-Years-On> (last visited Feb. 20, 2011).

⁵⁷¹ TRUTH & RECONCILIATION COMM’N, FINAL REPORT: GENERAL CONCLUSIONS, § II–III, <http://www.cverdad.org.pe/ingles/ifinal/conclusiones.php> (last visited July 6, 2010).

⁵⁷² *Id.* § IV.

⁵⁷³ *Id.* § V(D).

⁵⁷⁴ *Id.* § VII.

⁵⁷⁵ *Id.* § II.

⁵⁷⁶ Forero, *supra* note 569.

⁵⁷⁷ *Peru: Events of 2004*, HUM. RTS. WATCH, <http://www.hrw.org/en/world-report-2005/peru> (last visited Feb. 20, 2011) [hereinafter HRW, *Peru 2004*].

justice.”⁵⁷⁸ Thus, despite a 2001 ruling by the IA Court that the amnesty law that had been in effect was incompatible with the American Convention on Human Rights (American Convention)⁵⁷⁹ and the presentation by the Truth Commission to the State of forty-two criminal cases,⁵⁸⁰ it looked as though little progress was possible due to corruption and lack of transparency.⁵⁸¹

The situation improved with the arrest of Alberto Fujimori, who had left Japan for Chile.⁵⁸² He was extradited to Peru in 2007 and faced charges in multiple cases for his conduct, including murder for various killings during the conflict, ordering illegal searches, bribery of lawmakers and journalists, the illegal appropriation of public funds, and wiretapping.⁵⁸³ The Supreme Court convicted Fujimori of human rights abuses, including murder, aggravated kidnapping and battery, as well as crimes against humanity, and sentenced him, then age seventy, to twenty-five years in prison.⁵⁸⁴ While many applauded the conviction, Fujimori has a vocal following led by his daughter, Keiko Fujimori, a Congresswoman in Peru who is currently campaigning for the 2011 presidential election on a platform that begins with pardoning her father.⁵⁸⁵

By the end of 2009, thirteen members of the government death squad responsible for various notorious massacres had also been convicted.⁵⁸⁶ Despite this, other convictions were few; by December 2008, Human Rights Watch reported that of 218 trials being monitored, only eight had led to conviction, and 122 were on their eighth year of investigation.⁵⁸⁷ The ratio of acquittals to convictions was also rising, the National Criminal Court in 2008 acquitted twenty-nine agents and convicted only two.⁵⁸⁸

⁵⁷⁸ *Id.*

⁵⁷⁹ *Barrios Altos et al. v. Peru*, Judgment on the Merits, Inter-Am. Ct. H.R. (ser. E) No. 75 (Mar. 14, 2001), available at http://www.corteidh.or.cr/pais.cfm?id_Pais=8 (last visited Feb. 20, 2011).

⁵⁸⁰ *More on Alberto Fujimori*, FUJIMORI ON TRIAL, http://fujimoriontrial.org/?page_id=11 (last visited July 6, 2010).

⁵⁸¹ HRW, *Peru 2004*, *supra* note 577.

⁵⁸² *Id.*

⁵⁸³ Simon Romero, *Ex-President Stands Trial in Edgy Peru*, N.Y. TIMES, Dec. 9, 2007, <http://www.nytimes.com/2007/12/10/world/americas/10fujimori.html> (last visited Feb. 20, 2011).

⁵⁸⁴ *Id.*

⁵⁸⁵ Simon Romero, *Peru's Ex-President Convicted of Rights Abuses*, N.Y. TIMES, Apr. 8, 2009, <http://www.nytimes.com/2009/04/08/world/americas/08fujimori.html> (last visited Feb. 20, 2011).

⁵⁸⁶ *Peru: Events of 2009*, HUM. RTS. WATCH (Jan. 2010), <http://www.hrw.org/en/world-report-2010/peru> (last visited Feb. 20, 2011).

⁵⁸⁷ *Id.*

⁵⁸⁸ *Id.*

There is also indication that despite what seemed like a total destruction of the Shining Path, they may be back, though with a different goal. According to military and anti-drug analysts, the Shining Path has “re-invented itself as an illicit drug enterprise.”⁵⁸⁹ Evidently, “while still professing to be a Maoist insurgency at heart,” the group is increasingly smuggling drugs, extorting taxes from farmers, and operating cocaine laboratories in the Andes.⁵⁹⁰ In the last ten years, a reported sixty-five people, including civilians, police, and government soldiers have been killed in armed actions carried out two revived Shining Path contingents.⁵⁹¹ The violence is on the rise; in 2008 alone twenty-six people were killed. Shining Path has resultantly been listed by the U.S. government as a terrorist organization.⁵⁹² Thus, while Peru’s transitional justice efforts have been extensive, it appears that it has left open the door for less-political organized crime to develop.

D. Yugoslavia

The Balkan states, including Albania, Bosnia and Herzegovina, Croatia, Kosovo, Macedonia, Montenegro, and Serbia,⁵⁹³ have suffered political strife, conflict, and instability since before World War I.⁵⁹⁴ From 1918 to 1929, the states were unified as the Kingdom of Serbs, Croats and Slovenes, and after 1929 as Yugoslavia.⁵⁹⁵ This union was marked by internal unrest as Croatian and Macedonian nationalists sought independence.⁵⁹⁶

In 1941, Yugoslavia collapsed when it was invaded by Nazi forces.⁵⁹⁷ The territory was broken into two parts: Greater Croatia which included Croatia, Bosnia-Herzegovina, and Serbia; and Greater Albania.⁵⁹⁸ Internal

⁵⁸⁹ *Times Topics, Shining Path*, N.Y. TIMES, Mar. 18, 2009, http://topics.nytimes.com/top/reference/timestopics/organizations/s/shining_path/index.html (last visited Feb. 20, 2011).

⁵⁹⁰ *Id.*

⁵⁹¹ *Peru: Shining Path Leaders Back in the Dock*, GÁLDU: RESOURCE CTR. FOR THE RTS. OF INDIGENOUS PEOPLES (Oct. 2, 2005), <http://www.galdu.org/web/index.php?odas=675&giella1=eng> (last visited Feb. 20, 2011).

⁵⁹² Lucero, *supra* note 540.

⁵⁹³ *Balkans Region*, U.S. DEP’T OF STATE, <http://www.state.gov/p/eur/rt/balkans/> (last visited Feb. 20, 2011).

⁵⁹⁴ Tim Judah, *Yugoslavia: 1918-2003*, BBC: WORLD WARS IN-DEPTH, http://www.bbc.co.uk/history/worldwars/wwone/yugoslavia_01.shtml (last visited Feb. 17, 2011).

⁵⁹⁵ *Id.*

⁵⁹⁶ *Id.*

⁵⁹⁷ *Id.*

⁵⁹⁸ Carl Savich, *The Black Legion: A History of the 1st Ustasha Regiment*, SERBIANNA, <http://www.serbianna.com/columns/savich/049.shtml> (last visited Feb. 20, 2011).

conflict grew as a small, but extreme fascist group known as the Ustashes were put in power in Greater Croatia.⁵⁹⁹ They began a “campaign of terror and genocide” directed against the Serbs of Croatia and Bosnia.⁶⁰⁰ This gave rise to a communist resistance movement led by Josip Broz, or Tito, of mixed Slovene and Croat descent. Tito took power in 1945 and under a banner of “brotherhood and unity,” and he created the Federal People’s Republic of Yugoslavia which consisted of six republics: Bosnia-Herzegovina, Croatia, Macedonia, Montenegro, Serbia, and Slovenia.⁶⁰¹ Because Tito was “wary of Serbian domination and the backlash that it might cause,” the Federation was structured so that Montenegro and Macedonia were separate republics, and Kosovo and Vojvodina were considered autonomous regions within the Serbian Socialist Republic.⁶⁰²

While at first aligned with the Union of Soviet Socialist Republics, Yugoslavia split from the Union in 1948 and thus developed independently.⁶⁰³ For the following forty years, Tito ruled the country, and “the federation appeared to have solved the bitter national questions of the past, living standards were high, and unlike in other communist countries, citizens were free to travel to the west.” However, ethnic, religious, and political contentions “continued to simmer beneath the surface,” and demonstrations cropped up in Croatia and Kosovo.⁶⁰⁴

Tito’s death in 1980 marked the beginning of Yugoslavia’s decline. A collective presidency took power, but dissent brewed. The Serbian nationalist campaign of Slobodan Milošević garnered public support and Milošević became the President of Serbia in 1989.⁶⁰⁵ A year later, in 1990, the Yugoslav Communist Party collapsed. At the party congress, Slovenia initiated proposals to transform the League of Communists of Yugoslavia into a confederation. When this proposal was rejected, and the congress voted to end the one-party system, the Slovenian and Croatian delegations walked out of the Congress, thus marking the political end of federal Yugoslavia in 1990.⁶⁰⁶

⁵⁹⁹ Judah, *supra* note 594.

⁶⁰⁰ *Id.*; Savich, *supra* note 598.

⁶⁰¹ Judah, *supra* note 594.

⁶⁰² *Military: Tito’s Yugoslavia*, GLOBALSECURITY.ORG, *Global Security.org*, <http://www.globalsecurity.org/military/world/war/yugo-hist2.htm> (last visited Feb. 20, 2011).

⁶⁰³ *Id.*

⁶⁰⁴ *Id.*

⁶⁰⁵ Judah, *supra* note 594; *Milosevic’s Yugoslavia: Rise to Power*, BBC NEWS, http://news.bbc.co.uk/1/hi/english/static/in_depth/europe/2000/milosevic_yugoslavia/rise.stm (last visited Feb. 20, 2011).

⁶⁰⁶ PETER RADAN, *THE BREAK-UP OF YUGOSLAVIA AND INTERNATIONAL LAW* 154 (2002).

The prospect of civil war loomed; Milošević made clear that if Yugoslavia dissolved, Serbia would re-draw its boundaries to include the Serbs living in other republics, particularly Croatia.⁶⁰⁷ Political leaders during this period used nationalist rhetoric to erode a common Yugoslav identity and fuel fear and mistrust among the different ethnic groups in Yugoslavia. In 1991, Slovenia and Croatia began blaming Serbia of unjustly dominating Yugoslavia's government, military and finances. Serbia in turn accused the two republics of separatism.⁶⁰⁸ Croatia and Slovenia officially declared their secession from Yugoslavia on June 25, 1991, which soon spurred Bosnia and Herzegovina to do the same.⁶⁰⁹ By April 1992, Croatia, Macedonia, and Bosnia and Herzegovina had also declared independence from the Socialist Federal Republic of Yugoslavia. The remaining republics of Serbia and Montenegro declared themselves to be the Federal Republic of Yugoslavia on April 27, 1992.⁶¹⁰

As the republics broke away from the Yugoslavia, conflict erupted in Slovenia, Croatia, and Bosnia and Herzegovina. Later, from 1998 to 1999, conflict would grip Kosovo, and in 2001 Macedonia would suffer ethnically-motivated violence as well.⁶¹¹ In Slovenia, its declaration of independence from Yugoslavia triggered the "Ten-Days War." The Yugoslav People's Army intervened in a brief military conflict which ended in a victory for Slovenia when the army withdrew from the country.⁶¹² In contrast to this nearly bloodless conflict, the situations in Croatia, Bosnia and Herzegovina and Kosovo are characterized by widespread attacks against civilians, population expulsions, systematic rape and the use of detention in concentration camps.⁶¹³ It is currently estimated that over 250,000 were killed and one million displaced during the collapse of former Yugoslavia.⁶¹⁴

In Croatia, the ethnic Serb minority rejected the authority of the newly independent Croatian state and asserted the right to remain within

⁶⁰⁷ *Milosevic's Yugoslavia: Communism Crumbles*, BBC NEWS, http://news.bbc.co.uk/hi/english/static/in_depth/europe/2000/milosevic_yugoslavia/communism.stm (last visited Feb. 20, 2011).

⁶⁰⁸ *The Conflicts*, U.N. INT'L CRIM. TRIBUNAL FOR THE FORMER YUGOSLAVIA, <http://www.icty.org/sid/322> (last visited Feb. 20, 2011) [hereinafter ICTY, Conflicts].

⁶⁰⁹ RADAN, *supra* note 606 at 155–56.

⁶¹⁰ *What is the former Yugoslavia?*, U.N. INT'L CRIM. TRIBUNAL FOR THE FORMER YUGOSLAVIA, <http://www.icty.org/sid/321> (last visited Feb. 20, 2011).

⁶¹¹ *The former Yugoslavia*, INT'L CTR. FOR TRANSITIONAL JUST., <http://ictj.org/our-work/regions-and-countries/former-yugoslavia> (last visited Feb. 20, 2011).

⁶¹² ICTY, Conflicts, *supra* note 608.

⁶¹³ *Id.*

⁶¹⁴ *Crimes Against Humanity: International Justice Program: The International Criminal Tribunal for the Former Yugoslavia*, HUM. RTS. FIRST, http://www.humanrightsfirst.org/cah/ij/w_context/w_cont_02.aspx (last visited Nov. 13, 2010).

Yugoslavia. They organized, and with the help of the Yugoslav People's Army and Serbia, staged a rebellion, declaring nearly a third of Croatia's territory to be under their control as an independent Serb state. This coalition of Croatian Serbs, the Yugoslav People's Army and Serbia waged a violent campaign of ethnic cleansing, expelling non-Serbs, including Croats, from the coalition's claimed territory. The Croatian authorities launched two major offensives in 1995, which succeeded in regaining nearly all of their territory. Resultantly, thousands of Serbs fled to Bosnia and Herzegovina and Serbia. By the fall of 1995, the war in Croatia had effectively ended.⁶¹⁵

Similarly, when a majority of Bosnian citizens voted for independence in March of 1992, Bosnian Serbs, backed by the Yugoslav People's Army, rebelled. Utilizing their superior military power and a systematic campaign of persecution against non-Serbs, they declared all territories under their control, nearly sixty percent of the country at that point, as a Serb nation they called the Republika Srpska. Meanwhile, Bosnian Croats followed suit in declaring their own republic, backed by Croatia. These two factions, plus the seated government dominated by Bosnian Muslims, engaged in the deadliest of all the Baltic conflicts.⁶¹⁶

Between April 1992 and November 1995, conflict raged in the area. An estimated 100,000 were killed and more than two million people were forced to flee their homes. Thousands of Bosnian women were systematically raped, and detention centers for civilians were set up by all sides. The most atrocious attack during the conflict occurred in 1995 when Bosnian Serbs invaded the Bosnian town of Srebrenica, which had been declared a safe area by the United Nations. During the attack, more than 8,000 Bosnian Muslim males were executed by Serb forces, and the women and children driven from the town.⁶¹⁷

Kosovo also fell victim to violent conflict, though later than Croatia and Bosnia and Herzegovina. In 1998, the majority ethnic Albanian community and their Kosovo Liberation Army rebelled against Serbian rule. Slobodan Milošević, President of Serbia, sent military and police units to quell the insurgents. These Serb forces heavily targeted civilians, forcing Kosovo Albanians out by shelling villages. When peace talks failed in 1999, North Atlantic Treaty Organization (NATO) forces carried out air strikes against targets in Kosovo and Serbia. This caused an escalation in the violence by Serb forces against Kosovo Albanians. Finally, Milošević agreed to withdraw troops, and while 750,000 Albanian refugees returned to

⁶¹⁵ *Id.*

⁶¹⁶ ICTY, Conflicts, *supra* note 608.

⁶¹⁷ *Id.*

Kosovo, nearly 100,000 Serbs left in fear of reprisals.⁶¹⁸ The United Nations Security Council subsequently passed Resolution 1244 which created the Interim Administration Mission in Kosovo (UNMIK) to govern Kosovo while it transitioned to peace.⁶¹⁹ Kosovo declared its independence in 2008; Serbia challenged the validity of its unilateral declaration, but in 2010, the International Court of Justice issued an advisory opinion holding that Kosovo's declaration of independence did not violate international law.⁶²⁰

Finally, the Former Yugoslav Republic of Macedonia, despite initially separating from the Yugoslav Federation peacefully, suffered ethnic strife in 2001. In January of that year, the Albanian National Liberation Army, a militant group with goals of attaining autonomy for Albanian-populated areas of Macedonia, clashed with the state's military forces. This armed conflict continued until a peace deal was brokered later in 2001 and accompanied by a NATO monitoring force.⁶²¹

Disappointed expectations of the peace since the Cold War and daily media reports of the atrocities committed in the former Yugoslavia sparked a strong international response to the region's conflicts.⁶²² However, despite the efforts of multiple organizations, such as the UN Human Rights Commission, the Conference on Security and Co-operation in Europe, the European Community, and the International Conference on the former Yugoslavia, none were successful in ending the conflict, or even in reducing the violence in the former Yugoslavia.⁶²³

Prompted by the persistent situation, the United Nations Security Council intervened, taking four steps to work to end the conflict: "condemnation; publication; investigation; and, by establishing the tribunal, punishment."⁶²⁴ Through Resolution 764 in 1992, the Security Council condemned violations of international law and warned that perpetrators of such violations would be held individually responsible.⁶²⁵ The Security Council drew public attention to the conflict by requesting the help of other states in investigating and crafting solutions to the crisis.⁶²⁶ The Council

⁶¹⁸ *Id.*

⁶¹⁹ S.C. Res. 1244, U.N. Doc. S/RES/1244 (June 10, 1999).

⁶²⁰ Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 122 (July 22).

⁶²¹ ICTY, Conflicts, *supra* note 608.

⁶²² James C. O'Brien, *Current Development: The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia*, 87 AM. J. INT'L L. 639, 639 (1993).

⁶²³ *Id.* at 640.

⁶²⁴ *Id.*

⁶²⁵ S.C. Res. 764, U.N. Doc. S/RES/764 (July 13, 1992).

⁶²⁶ S.C. Res. 771, U.N. Doc. S/RES/771 (Aug. 13, 1992).

began its own investigation into violations of international humanitarian law by creating a commission of experts charged with this task.⁶²⁷

This commission delivered its conclusions in May 1994, determining that the violence unquestionably amounted to crimes against humanity, and that the evidence could likely prove that genocide was occurring in the region. In particular, the commission found that: 52,811 people had been killed or deported by June 1993 in Northwest Bosnia; that in the battle and siege of Sarajevo civilians had been deliberately targeted; and that rape and sexual assault were being used as a form of ethnic cleansing.⁶²⁸ Finally, in May 1993 the Security Council created a mechanism to seek accountability for these crimes: the International Criminal Tribunal for the former Yugoslavia (ICTY).⁶²⁹

The first international court established since the International Military Tribunals of Nuremberg and Tokyo, which had been established by the victors of the war,⁶³⁰ the Security Council mandated that the ICTY “bring to justice those responsible for serious violations of international humanitarian law committed in the former Yugoslavia since 1991 and thus contribute to the restoration and maintenance of peace in the region.”⁶³¹ The court has the power to prosecute persons responsible for serious violations of international humanitarian law, which include grave breaches of the 1949 Geneva Conventions, violations of the laws of war, genocide, and crimes against humanity.⁶³² The Statute of the Court also granted it concurrent jurisdiction with the national courts, that is, criminal justice may be sought in either venue. However, unlike most other international courts, the ICTY may claim primacy if the interest of international justice requires it.⁶³³

The ICTY is based in The Hague⁶³⁴ and consists of three basic components: the Office of the Prosecutor, Chambers, and the Registry.⁶³⁵

⁶²⁷ S.C. Res. 780, U.N. Doc. S/RES/780 (Oct. 6, 1992).

⁶²⁸ Final Report of the Commission of the Experts Established Pursuant to Security Council Resolution 780, in letter dated May 24, 1994 from the Secretary-General to the President of the Security Council, U.N. Doc. S/1994/674, Annex, at §4 (May 27, 1994).

⁶²⁹ S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993); S.C. Res. 808, U.N. Doc. S/RES/808 (Feb. 22, 1993).

⁶³⁰ Claudia Jorda, *The Major Hurdles and Accomplishments of the ICTY*, 2 J. INT’L CRIM. JUST. 572, 572–84 (2004).

⁶³¹ *About the ICTY: Mandate and Jurisdiction*, U.N. INT’L CRIM. TRIBUNAL FOR THE FORMER YUGOSLAVIA, <http://www.icty.org/sid/320> (last visited Feb. 20, 2011).

⁶³² Updated Statute of the International Criminal Tribunal for the former Yugoslavia arts. 2–5 (Sept. 2009), available at http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf [hereinafter Updated Statute ICTY].

⁶³³ *Id.* art. 7.

⁶³⁴ *Id.* art. 31.

⁶³⁵ *Id.* art. 11.

The Office of the Prosecutor is tasked with investigating all crimes and indicting suspects.⁶³⁶ The Chambers of the ICTY include three Trial Chambers and one Appeals Chamber.⁶³⁷ A total of sixteen permanent judges and twenty-seven *ad litem* judges elected by the UN General Assembly serve the court.⁶³⁸ At least one permanent judge is required to sit on the bench in every case.⁶³⁹ The Registry handles the administrative aspects of the tribunal such as security, personnel, and public relations.⁶⁴⁰

The ICTY held its first trial in the case of Duško Tadić in 1995.⁶⁴¹ Because this type of tribunal was largely unprecedented, the defendant challenged its validity, arguing that the Security Council lacked the authority to create a judicial organ.⁶⁴² This challenge was rejected on the grounds that the Security Council's determination that a threat to peace was occurring brought the question under Chapter VII of the United Nations Charter. The Security Council's chosen solution to the threat, the creation of the court, is therefore a non-justiciable matter.⁶⁴³ Despite this initial challenge, the ICTY has now indicted 161 persons, sixty-four of which have been sentenced.⁶⁴⁴

The impact of the ICTY on the development of international criminal law is profound. The ICTY first clarified that the rejection of customary

⁶³⁶ *Id.* art. 16.

⁶³⁷ *Id.* art. 11.

⁶³⁸ *Id.* art. 12. Ad litem judges are appointed by the UN Secretary-General at the request of the President of the Tribunal to sit on one or more specific trials, allowing for efficient use of resources in accordance with the court's changing caseload. *About the ICTY*, U.N. INT'L CRIM. TRIBUNAL FOR THE FORMER YUGOSLAVIA, <http://www.icty.org/sections/AbouttheICTY/Chambers> (last visited Feb. 20, 2011).

⁶³⁹ *Id.* art. 12.

⁶⁴⁰ *Id.* art. 17.

⁶⁴¹ Duško Tadić was president of the Local Board of the Serb Democratic Party in Kozarac. He was convicted of willful killing, torture or inhumane treatment, willfully causing great suffering or serious injury to body or health (grave breaches of the 1949 Geneva conventions). ICTY, CASE INFORMATION SHEET: DUŠKO TADIĆ, http://www.icty.org/x/cases/tadic/cis/en/cis_tadic_en.pdf.

⁶⁴² Prosecutor v. Tadić, Case No. IT-94-I-I, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 8, 24 (Oct. 2, 1995) (claiming that the Security Council did not have the power to create a judicial organ and therefore the ICTY had not been created by law).

⁶⁴³ *Id.* ¶¶ 18–24.

⁶⁴⁴ Updated Statute ICTY, *supra* note 632, art. 24 (Sept. 2009), available at http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf (“The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.” Actual penalties imposed by the tribunal have ranged from two to forty-six years of imprisonment, with one imposition of a life sentence. For a full list of the judgments and penalties against defendants in the ICTY), *see* Judgment List, <http://www.icty.org/sid/10095> (last visited Feb. 20, 2011).

notions of immunity for heads of state, or individual criminal liability, that began in Nuremberg was valuable international precedent.⁶⁴⁵ Article 7 of the ICTY Statute provides that a person who “planned instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation, or execution of a crime” shall be individually responsible for the crime.⁶⁴⁶ In fact, the indictment of Slobodan Milošević made history because it was the first time a head of state had been indicted by an international court.⁶⁴⁷ The ICTY has not limited the leaders which it prosecutes to heads of state, rather, “individuals in positions of authority, whether civilian or within military structures, may incur criminal responsibility under the doctrine of command responsibility on the basis of their *de facto* as well as *de jure* positions as superiors.”⁶⁴⁸ The ICTY has also recognized theories of accomplice and superior responsibility, which has moved international law towards recognizing group criminal responsibility.⁶⁴⁹

The ICTY broke new ground when it found criminal liability for genocide in situations falling short of a country-wide massacre.⁶⁵⁰ The Tadić judgment of the ICTY first did away with the state action doctrine and held that “entities exercising *de facto* control over a particular territory but without international recognition of formal status of a *de jure* state, or by a terrorist group of organization” could be held criminally responsible.⁶⁵¹ The tribunal has also brought attention to the use of sexual violence in armed conflict, defining rape as an offense in international law, and one that may meet the requirements of the crime of torture.⁶⁵² The tribunal has prosecuted rape as a crime against humanity, despite difficulties in proving a plan to carry out mass rape.⁶⁵³ It has also prosecuted the crime under both grave

⁶⁴⁵ Ruth Wedgwood, *Former Yugoslav President Slobodan Milosevic to be Tried in the Hague for Crimes Against Humanity and War Crimes Allegedly Committed in Kosovo*, ASIL INSIGHTS (July 2001), <http://www.asil.org/insigh76.cfm> (last visited Feb. 20, 2011).

⁶⁴⁶ Updated Statute ICTY, *supra* note 632, art. 7 (Sept. 2009), available at http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf.

⁶⁴⁷ Wedgwood, *supra* note 645.

⁶⁴⁸ Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic & Esad Landzo, Case No. IT-96-21-T, Judgment, ¶ 354 (Nov. 16, 1998).

⁶⁴⁹ STEVEN R. RATNER, JASON S. ABRAMS & JAMES L. BISCHOFF, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW 16–17 (3d ed. 2009).

⁶⁵⁰ *Id.* at 222.

⁶⁵¹ David Luban, *A Theory of Crimes Against Humanity*, 29 YALE J. INT’L L. 85, 96–97 (2004).

⁶⁵² RATNER, *supra* note 649, at 222.

⁶⁵³ Updated Statute ICTY, *supra* note 632, art. 5 (Sept. 2009), available at http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf.

breaches⁶⁵⁴ of the Geneva Convention and Violations of laws and customs of war.⁶⁵⁵ For example, in the case of Hazim Delić,⁶⁵⁶ tried with others in *Mucić et al.*,⁶⁵⁷ raping women during interrogations was held to be torture.⁶⁵⁸ The ICTY also obtained convictions for perpetrators of torture that utilized rape, despite not necessarily committing the sexual act themselves.⁶⁵⁹

Despite these advances in international law, the ICTY has been subjected to criticism, though much of it is beyond the scope of the Court's control. One of the stated purposes of the Tribunal was to deter war crimes, however the creation of the court failed to prevent the massacres at Srebrenica and Kosovo which occurred in 1995 and 1999, respectively.⁶⁶⁰ Although the Court eventually tried some of the perpetrators responsible for both incidents, this raises the question of the level of effectiveness of international criminal justice alone. In a study by University of California, Berkeley Professor of Law and Public Health Eric Stover, witnesses that had testified before the ICTY regarded "full justice" as something more than simply criminal justice. What they meant by justice included "the return of stolen property; locating and identifying the bodies of the missing; capturing and trying *all* war criminals . . . ; securing reparations and apologies; leading lives devoid of fear; securing meaningful jobs; providing their children with

⁶⁵⁴ Grave breaches of the Third and Fourth Geneva Conventions include the following acts if committed against a person protected by the convention: willful killing, torture or inhumane treatment, including biological experiments; willfully causing great suffering or serious injury to body or health; compelling someone to serve in the forces of a hostile power; and willfully depriving someone of the right to a fair trial. Also considered grave breaches of the Fourth Geneva Convention are the following: taking of hostages; extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly; and unlawful deportation, transfer, or confinement. *See* <http://www.icrc.org/eng/resources/documents/misc/5zmgf9.htm> (last visited Feb. 24, 2011).

⁶⁵⁵ Grave breaches of the Geneva Conventions are defined by the Statute of the ICTY, *see* Sean D. Murphy, *Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, 93 AM. J. INT'L L. 57, 89 (1999); Updated Statute ICTY, *supra* note 632, art. 2 (Sept. 2009), available at http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf.

⁶⁵⁶ Hazim Delić was the Deputy Commander of Čelebići prison-camp. He was convicted of willful killings, torture, willfully causing great suffering or serious injury, and inhuman treatment.

⁶⁵⁷ Prosecutor v. Zdravko Mucić, Hazim Delić, Esad Landžo & Zejnil Delalić, Case No. IT-96-21, Judgment (Nov. 16, 1998).

⁶⁵⁸ *Id.* ¶ 943.

⁶⁵⁹ For example, Anto Furundžija, a local commander of the "Jokers," a unit of the Croatian Defence Council in central Bosnia and Herzegovina, did nothing to stop his subordinates from raping a confined woman and continued to interrogate her following the acts committed upon her. *See* ICTY, CASE INFORMATION SHEET: ANTO FURUNDŽIJA, http://www.icty.org/x/cases/furundzija/cis/en/cis_furundzija.pdf.

⁶⁶⁰ Jorda, *supra* note 630, at 572–84.

good schools; and helping those traumatized by atrocities to recover.”⁶⁶¹ This is clearly outside the scope of an internationalized criminal tribunal, though some of the issues identified by witnesses could be addressed by a truth commission.

A national truth commission was initially established in March 2001 by Vojislav Koštunica, the last President of the Federal Republic of Yugoslavia.⁶⁶² The Truth and Reconciliation Commission for Serbia and Montenegro (also called the Yugoslav Truth and Reconciliation Commission) was tasked with researching the social, ethnic, and political conflicts between 1980 and 2000 which led to the war.⁶⁶³ The President appointed twelve men and three women to serve as commissioners.⁶⁶⁴ Four of them were named in order to increase ethnic diversity on the panel, but “the ideological, ethnic, and political homogeneity of the commissioners still prevented it from being seen as an impartial body.”⁶⁶⁵

Only two weeks after his appointment as commissioner, Vojin Dimitrijević,⁶⁶⁶ one of the appointed members of the commission, withdrew from the commission because the commission was composed almost entirely of citizens of the then-current Yugoslavia.⁶⁶⁷ Shortly thereafter, another commissioner resigned due to obligations at a government post, and another died.⁶⁶⁸ In 2003, the Truth Commission was disbanded due to a lack of agreement on essential aspects of the mandate, political will, funding, and civil society support. No report was ever issued.⁶⁶⁹

⁶⁶¹ Eric Stover, *Witnesses and the promise of justice in The Hague*, in MY NEIGHBOR, MY ENEMY: JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY 104, 115 (Eric Stover & Harvey M. Weinstein eds., 2004); see also ERIC STOVER, THE WITNESSES: WAR CRIMES AND THE PROMISE OF JUSTICE IN THE HAGUE (2005).

⁶⁶² *Truth Commission: Serbia and Montenegro*, U.S. INST. OF PEACE, <http://www.usip.org/publications/truth-commission-serbia-and-montenegro> (last visited Feb. 20, 2011) (this page contains a link to the Presidential Decree, although no English translation is available) (last visited Feb. 20, 2011).

⁶⁶³ *Id.*

⁶⁶⁴ *Id.*

⁶⁶⁵ *Id.*

⁶⁶⁶ Vojin Dimitrijević is currently the director of the Belgrade Center for Human Rights. See *Vojin Dimitrijević*, CTR. FOR ADVANCED EUROPEAN STUDIES & RESEARCH, <http://www.caesar.uns.ac.rs/eng/center/vDimitrijevic.htm> (last visited Feb. 20, 2011).

⁶⁶⁷ Vesna Peric Zimonjic, *Yugoslavia Launches Truth Commission*, THE INDEPENDENT, Apr. 19, 2001, <http://www.independent.co.uk/news/world/europe/yugoslavia-launches-truth-commission-681821.html> (last visited Feb. 20, 2011).

⁶⁶⁸ *Truth Commission: Serbia and Montenegro*, U.S. INST. OF PEACE, <http://www.usip.org/publications/truth-commission-serbia-and-montenegro> (last visited Feb. 20, 2011).

⁶⁶⁹ *Id.*

The Truth and Reconciliation Commission for Serbia and Montenegro faced many challenges, not least of which that it attempted to deal with a regional problem on the national level. Currently, there are several civil society groups from Serbia, Croatia as well as Bosnia and Herzegovina calling for a regional truth commission.⁶⁷⁰ According to Cecile Aptel, Senior Fellow at the International Center for Transitional Justice, such a commission would go a long way toward addressing the need for victims to obtain reparations and closure regarding past crimes—needs that have not been met by the International Criminal Tribunal for the former Yugoslavia.⁶⁷¹ This call for a truth commission comes as the ICTY transitions towards completion; it is expected that the majority of the appellate work will be finished in 2013.⁶⁷²

VI. ANALYSIS

This report has studied how seven countries, three in Africa and four from around the world, have approached post-conflict transitional justice. Each country presents a rich context from which to draw lessons to inform planning the model of transitional justice that best suits the situation in Darfur. While the specific methods employed by each country are distinct, all share two common principles: that impunity for those that commit atrocity, whether state or non-state actors, is unacceptable and that national reconciliation is imperative. Achieving either presents a great challenge due to remnants of power structures that caused the conflict; achieving both, particularly in tandem, is an extraordinary balancing act. For any transitional justice effort to succeed, the participation of civil society is badly needed to ensure that the needs of particular populations are met, such as women and girls, the elderly, indigenous populations, or others that suffered disproportionately during a conflict. Drawing on relevant international, regional, and national law, as well as on the lessons learned from each post-conflict experience, the Darfuri community can forge its own path to post-conflict peace and reconciliation.

The following discussion speaks to civil society, explaining the legal obligations applicable to reconstruction and reconciliation in the Sudan, and explaining some of the lessons to be learned from the foregoing case studies.

⁶⁷⁰ *Id.*; see, e.g., *Coalition for RECOM, ZARECOM*, <http://www.zarekom.org/english/video> (last visited Feb. 20, 2011).

⁶⁷¹ Simon Hooper, *Expert: Yugoslav War Crimes Victims Need 'Truth Commission'*, CNN (INT'L ED.), Oct. 26, 2009, <http://edition.cnn.com/2009/WORLD/europe/10/26/karadzic.trial.analysis/index.html> (last visited Feb. 20, 2011).

⁶⁷² *Completion Strategy*, U.N. INT'L CRIM. TRIBUNAL FOR THE FORMER YUGOSLAVIA, <http://www.icty.org/sid/10016> (last visited Feb. 21, 2011).

This section is designed to be an informational tool for Sudanese civil society as it explores the best transitional justice package for Darfur as peace and stability there are reached.

A. Prosecutions

Realistically, international courts can only handle a small handful of cases from each situation, so the international courts should indict and try only the highest level accused, while domestic courts should be responsible for trying mid-level individuals and the most notorious low-level physical perpetrators. But neither international nor domestic courts can try the typical thousands, or hundreds of thousands of perpetrators responsible for serious crimes when millions have been killed or wars ongoing for many years. Community-based mechanisms or truth commissions should be reserved for the many lower level perpetrators not prosecuted before fair and independent courts. Because prosecutions are already underway at both the international and national levels for crimes allegedly committed in Darfur, this analysis must begin there.

1. Legal Obligations

As discussed, Sudan is obligated to cooperate with the International Criminal Court.⁶⁷³ The International Criminal Court is designed to try individuals responsible for a narrow set of crimes: genocide, crimes against humanity, and war crimes. By virtue of this, it will prosecute only those bearing the highest responsibility for atrocity. As it has already indicted six people in relation to the Darfur situation, and the Office of the Prosecutor has not indicated otherwise, it may not indict anyone else.

Any additional prosecutions that may take place must proceed in accordance with Sudan's obligations under relevant international and regional treaties such as the International Covenant on Civil and Political Rights (ICCPR)⁶⁷⁴ and the African Charter.⁶⁷⁵ In particular, Sudan has obliged itself to maintain a competent, independent, and impartial judiciary. Moreover, any court that is convened to try those alleged of crimes in Darfur must especially provide all the safeguards essential to a fair trial that are detailed in these conventions.

As will be discussed further, the national courts of Sudan require extensive reform to ensure that these obligations are met. Sudan claims to have begun prosecutions on the national level for atrocities committed in

⁶⁷³ S.C. Res. 1593, *supra* note 6.

⁶⁷⁴ ICCPR, *supra* note 109.

⁶⁷⁵ African Charter, *supra* note 158.

Darfur. However, by all accounts, these prosecutions neither live up to Darfur's international legal obligations, nor are they prosecuting actual perpetrators. It is for this reason that the ICC is able to hear cases concerning Darfur at all; Sudan has failed to act in this regard.

2. Lessons Learned

In developing a plan for prosecutions that meets these obligations, the government of Sudan and civil society need to bear in mind that central to any approach to transitional justice is holding those most responsible for atrocity accountable. Rwanda responded to conflict, and Sierra Leone responded to a resurgence of conflict by immediately reaching out to the international community to create courts to prosecute high level perpetrators. Cambodia and Peru did as well, despite delays in their requests. While the international community intervened to create a tribunal in the former Yugoslavia, it has served a key role in the region and a turning point for accountability mechanisms worldwide. Canada may have opted for a civil rather than criminal method of accountability, but "justice" in the form of tort liability⁶⁷⁶ was available as soon as the courts could prosecute individual cases. Even in Liberia, where it is causing internal conflict, the Truth Commission and many elements of civil society are calling for the prosecution of perpetrators.

When justice is not achieved, such as in Sierra Leone or the former Yugoslavia where two of the highest level leaders died in custody, experience shows that society feels cheated.⁶⁷⁷ It was this same threat, that all of the leaders of the Khmer Rouge would die of old age before they were prosecuted, that pushed Cambodia to set up a tribunal for this purpose. A failure to punish leaders of organized groups causing conflicts also invites future violence, as seen in Sierra Leone where violence surged after the creation of a truth commission alone, and in Liberia, the only country considered where no trials are underway, but violent crime and sexual violence are on the rise. This is not to say that punishment does away with the possibility of more violence, as can be seen with the resurgence of the Shining Path in Peru, or the continued violence in the former Yugoslavia

⁶⁷⁶ Tort liability is "a civil wrong for which a remedy may be obtained, usually in the form of damages." BLACK'S LAW DICTIONARY 712-713 (2d Pocket ed. 2001). This is the law used to protect civil rights, in contrast to criminal law which is employed when an offense has been committed that is "a social harm that the law makes punishable." BLACK'S LAW DICTIONARY 161 (2d Pocket ed. 2001).

⁶⁷⁷ Charles Recknagel, *Regret Dominates Reaction to Milosevic's Death*, RADIO FREE EUROPE, Mar. 11, 2006, <http://www.rferl.org/content/article/1066612.html> (last visited Feb. 20, 2011).

after the creation of the International Criminal Tribunal for the former Yugoslavia (ICTY), but rather that prosecution holds symbolic deterrent, and, on occasion, effective value.

While none of those nations experienced the intervention of the International Criminal Court, which does not have jurisdiction over the crimes committed prior to July 1, 2002, Rwanda, Sierra Leone, Cambodia, and the former Yugoslavia all used internationalized courts to prosecute the highest level criminals in their countries. In each situation except for Yugoslavia, the country asked for assistance from the international community because they recognized that they lacked the capacity to carry out trials in their national courts for a host of reasons, including, for example, diminished resources, a lack of infrastructure, and the absence of trained personnel. The international community was certainly able to deliver in that regard; both the International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone, and the ICTY were reasonably efficient as they upheld the rule of law, and the Extraordinary Chambers in the Courts of Cambodia to a lesser extent, reflected by the more marginal role played by international resources in the structure of the court.

Despite requests for participation and negotiations in all cases, only Sierra Leone emerged content with the court that resulted; both Rwanda and Cambodia objected to the courts proposed by the international community. Both rejections reflect a tension between wanting the assistance from but fear of relinquishing control to the international community. In the end, Rwanda acquiesced to the totally international character of the court, while Cambodia held its ground and insisted upon maintaining control of the court. In terms of numbers of individuals processed through the court system in a timely manner, there is no question that the ICTR was a more efficient court. Sierra Leone represents an example of a positive middle ground; although the Special Court had a majority of international judges, it included representation from Sierra Leone as well and served its function well.

It is important to emphasize that as eventually established, all four internationalized courts were designed to prosecute the highest level perpetrators in their country. This is reflected in their jurisdictional mandates, which although they vary slightly, are limited in scope. While some were able to prosecute more than others, in general the capacity of each court was thus relatively small.

Prosecutions on a national level, in the cases considered by this report, were more problematic. Some countries, like Sierra Leone, simply did not hold national trials because their national systems were not up to the task. The Peruvian national courts successfully convicted fourteen high-level perpetrators nearly ten years after the conflict. This is in some ways a considerable feat, as it is the only example of a national court prosecuting approximately the same volume of high-level perpetrators as the

international courts. In Peru, this can be attributed to the valiant attempt at regime change following the conflict. However, Peru for now has failed to prosecute any others beyond those most responsible for the atrocity. Rwanda presents a useful contrasting model because the national courts there successfully prosecuted alleged midlevel perpetrators, despite some problems with the system. Its successes are due in no small part to the Rwandan judiciary's willingness to take cues from the international community. For example, it allowed the use of plea agreements for the first time in these trials. Moreover, the categorization approach of crimes also contributed to an efficient system. Canada provides perhaps the most comprehensive use of the national courts to prosecute those involved in the Residential Schools Program, though it is also the least relevant because the vast majority of victims accessed the courts civilly via class action, and they did so at a time when the courts were well established and functioning.

Finally, despite substantial problems, Rwanda also provides an example of sub-national prosecutions. There, traditional dispute mechanisms effectively brought tens of thousands of low-level perpetrators to justice in a community-based process. Though the *gacaca* system's fairness has been called into question, it seems that at least at the outset, it served a positive function, including removing defendants from pre-trial detention where they had served for many years. It remains to be seen if Liberia will take a similar approach with its Palava Hut program.

3. Recommendations

Sudan, drawing on the applicable law and these lessons, has considerable work to do in order to render justice for the atrocities committed in Darfur. First, the government of Sudan needs to meet its international legal obligations and work to apprehend and turn over those wanted by the International Criminal Court (ICC). While it is positive that appearances have been made in the currently pending cases of Abdallah Banda Abakanaer Nourain, and Saleh Mohammed Jerbo Jamus, those that are still at large, including Ahmad Harun, Ali Kushayb, and Omar al-Bashir need to be surrendered to the Court. It ought also to be acknowledged that cooperation with the International Criminal Court would benefit Sudan because the court possesses the technical expertise and resources to render justice in cases of high-level perpetrators, eliminating the burden on Sudan to do so on a national level.

Because it is unrealistic that the President of Sudan, Omar al-Bashir, will comport with Sudan's legal obligations in this regard when he is himself wanted by the ICC, other options for seeking justice must be explored. Besides, even as the ICC prosecutions continue, the indictment of six individuals is hardly proportionate retributive justice for the atrocity

committed in Darfur. Our case studies provide excellent context for this consideration, offering examples of international (Rwanda, Yugoslavia), hybrid national-international (Sierra Leone), purely national (Peru & Canada), and sub-national court systems (Rwanda) to prosecute atrocity. Some combination thereof could be appropriate due to the sheer number of participants in the Darfur conflict.

Because of an essentially non-functional judiciary and the lack of political will to seek meaningful retributive justice on the national level, the creation of an internationalized court for Darfur could be explored. This would to a great extent solve the problem of technical expertise and resources, and would ensure that any court created would comply with international obligations for the provision of fair trials. However, the situation in Darfur and the need for an international court presents a problem heretofore unaddressed by the hybrid or ad hoc tribunals, that is, the high volume of cases the court needs to hear. The international courts considered by this report have been designed to try only high-level perpetrators; in this case, the ICC is already serving that function. It is critical that a court established to serve Darfur can try both the high level perpetrators not indicted by the ICC, as well as the mid-level perpetrators. To do that, various procedural and technical matters should be addressed. For example, the subject matter jurisdiction⁶⁷⁸ would not need to exceed that of the examined models, but the traditional “most responsible” personal jurisdiction⁶⁷⁹ language would need to be broadened. Moreover, the Rwandan use of crime categorization and plea bargaining, as well as the Yugoslav method of combining the cases of multiple defendants should be considered as tactics to move cases more quickly. Similarly, the Cambodian grouping of Civil Parties, and analogy to the Canadian class action model, could be considered as a means to promptly seek redress on behalf of victims and to include them in the judicial process.

Other issues that will arise in creating a court include its location, and the national-international balance of investigators, prosecutors, and judges. These issues should be approached with an eye towards creating an expedient system. Thus, as was decided in Cambodia, for example, the court can sit locally in Darfur, for the ease of access of all interested parties. However, unlike the Extraordinary Chambers in the Courts of Cambodia, the

⁶⁷⁸ Subject matter jurisdiction is “jurisdiction over the nature of the case and the type of relief sought; the extent to which a court can rule on the conduct of persons or the status of things.” BLACK’S LAW DICTIONARY 385 (2d Pocket ed. 2001).

⁶⁷⁹ Personal jurisdiction, or in personam jurisdiction, is “a court’s power to bring a person into the adjudicative process; jurisdiction over a defendant’s personal rights, rather than merely over property interests.” BLACK’S LAW DICTIONARY 384 (2d Pocket ed. 2001).

use of co-investigators or co-prosecutors should be avoided as the disputes that have arisen have significantly slowed the progress of that court.

Political will within Sudan and at the international level will determine the feasibility of this kind of larger collaborative project. It is likely that the international community would cooperate, particularly as the African Union has already called for a hybrid tribunal for Darfur. However, Sudan is more likely to behave as Cambodia did in negotiations for an internationalized court, should it agree to one at all, because of the continued presence of the conflict's participants in government. Part of Cambodia's reluctance to prosecute perpetrators came from the perceived threat of instability that trials could cause, because many former Khmer Rouge party members were positioned in the new government. In Sudan, because the situation is not yet stable and the infrastructure of the conflict is still deeply entrenched in the political structure, as seen on a most basic level through the continued leadership of Omar al-Bashir, Sudan is unlikely to cooperate to the extent necessary with the international community to create a court that can achieve meaningful justice for Darfur. However, because Sudan ought to welcome the expertise, and the logistical and financial support that the international community can provide in order to move forward as efficiently and justly as possible, civil society could continue to work to mobilize the Sudanese government and the international community to work together.

Should Sudan fail to cooperate with the international community to create an internationalized court, Sudan has the basic infrastructure in place on the national level to prosecute those accused of committing atrocity in Darfur. The special courts for Darfur, absent an international alternative, could be brought into compliance with regional and international law and used to prosecute the accused of all levels of responsibility. This would include at a minimum a review of the Sudanese criminal code and the rules of ethics, procedure, and evidence. These must be harmonized with the international and regional conventions to which Sudan is a party, most notably the International Covenant on Civil and Political Rights and the African Charter. In particular, the criminal code will require reform to ensure that it has appropriate definitions of criminal activity to account for the grave crimes committed in Darfur. This is especially the case for the crime of rape and other crimes of violence directed at women.

Sudan might consider various strategies to bring its national courts into compliance with international law effectively. One option is to borrow procedural and other codes from already-functioning international courts, as the Special Court for Sierra Leone did by using the evidence code of the International Criminal Tribunal for Rwanda during its operations. As already mentioned, to increase efficiency, Sudan could consider categorizing crimes, allowing for plea bargains, and trying multiple defendants in combined cases as was done in Rwanda and the former Yugoslavia. Rule of law initiatives,

such as training judges and ensuring their impartiality will compliment legislative changes. These are some possibilities that could be used in Sudan to empower the courts to effectively try cases arising from the conflict in Darfur.

The greatest obstacle to these developments again appears to be the absence of political will to implement such reforms. Civil society can again play an important role. However, local civil society organizations should be provided with additional resources, technical support, capacity building and skills training in order to be fully empowered to challenge the status quo in Sudan. The introduction of rule of law initiatives as Darfur transitions to peace is imperative, regardless of whether prosecutions happen at the international level as well. Civil society can also assist the Sudanese government by drafting the amendments required in the areas of criminal law, evidence and procedure. As illustrated by many of the case studies in this report, while the government will have to actually implement any changes, civil society's efforts in this regard can play an important role in encouraging reform.

Finally, Sudan may consider implementing a sub-national justice system. While the *judiyya* system in its current form may not be a particularly good option, with structural changes and a new legislative mandate akin to the modifications made to the traditional *gacaca* system in Rwanda, *judiyya* is a possible means of trying low-level perpetrators of the Darfur conflict. The codification of a system based on *judiyya* must take into account the procedural and substantive requirements of national, regional, and international law that binds on Sudan. With this appropriate modification, a subnational system that is at least in theory organic to the region could prove to be an important mechanism to process the large number of low-level perpetrators.

B. Reconciliation

In addition to prosecuting perpetrators of atrocity, the people of Darfur, and the people of Sudan, need to move forward from the conflict. Particularly because a truth commission is not already underway in Sudan to uncover the causes of the Darfur conflict, important lessons can be learned from each country's pursuit of reconciliation and healing.

1. Legal Obligations

While at this time, there is no binding law espousing a right to truth or a right to reconciliation, Sudan ought to consider that it failed in its obligations to protect its citizenry against gross violations of international law that may amount to genocide, crimes against humanity, war crimes, torture, and others. Bearing in mind human rights law such as the

Convention on the Prevention and Punishment of the Crime of Genocide,⁶⁸⁰ the Convention on the Elimination of All Forms of Racial Discrimination (CERD),⁶⁸¹ the Convention on the Rights of the Child (CRC),⁶⁸² the Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities,⁶⁸³ the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),⁶⁸⁴ the CEDAW,⁶⁸⁵ and the guiding principles related to internationally displaced peoples,⁶⁸⁶ Sudan should act in the spirit of this body of law and provide some mechanism of healing to its people.

2. Lessons Learned

Four of the seven countries considered by this report, Sierra Leone, Liberia, Canada, and Peru, acknowledged the need for healing and created full truth and reconciliation commissions in the wake of their respective conflicts. However, the profound desire to know the truth following a conflict is best seen in the cases of Rwanda, Cambodia, and Yugoslavia where civil society's desire for truth overwhelmed government stagnation. In Rwanda, civil society successfully organized and encouraged the government to participate in two international inquiries, which served similar functions to a truth commission. In Cambodia, civil society created DC-Cam, an independent organization that has essentially been providing the services of a truth and reconciliation commission for over a decade. In Yugoslavia, this process is currently underway, with civil society groups mobilizing to create a regional truth commission.

A foundational place to start the process of reconciliation is apology by the government of Sudan. In Canada, each of the Church orders involved in administering the Indian Residential Schools, as well as the Federal Government, issued formal apologies to the students that were interned in

⁶⁸⁰ Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 118, art. I.

⁶⁸¹ International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 146.

⁶⁸² Convention on the Rights of the Child, *supra* note 123.

⁶⁸³ International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, *supra* note 149.

⁶⁸⁴ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, G.A. Res. 39/46, Annex, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51, at 197 (Dec. 10, 1984).

⁶⁸⁵ Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 34/180, U.N. Doc. A/RES/34/180 (Dec. 18, 1979).

⁶⁸⁶ *Internally Displaced People*, UNHCR, *supra* note 140.

the schools, and to their families and communities. The simple expression of regret helps to start the long process of reconciliation.

The mandates of the truth commissions considered by this report have been largely similar, reflecting two common desires across all kinds of conflicts. Of the four governmentally-mandated truth commissions⁶⁸⁷ considered by this report, all have a dual component of historical fact-finding or understanding and activist solution-seeking to addressing impunity. Similarly, in Cambodia, while DC-Cam's mission has expanded as it has taken on new outreach projects, at core, it is designed to research, document and educate.

The historical fact finding mission of a truth commission can be especially powerful to determine the causes of ethnic disagreements. Because Canada's Indian Residential Schools represented a much greater problem of relations between indigenous Canadians and those of foreign descent, the government took advantage of the moment to conduct an extensive inquiry into the relations between the federal government and the leadership of various indigenous groups, as well as the general social, cultural, and economic structures that informed the place of indigenous people in Canadian society. This inquiry has become the basis of reforms in Canada that will address many of the root causes of discrimination. The story-telling component has been equally meaningful to the indigenous populations, as seen through response to the first national event held there earlier this year.⁶⁸⁸

Another element of reconciliation employed by Canada is monetary reparations. Because of the clear setbacks indigenous children faced as a result of their placement in Residential Schools, monetary compensation for their trauma seems appropriate. Similarly, additional payments were made based on various kinds of abuse suffered. Though perhaps not conciliatory in an emotional way, the state should be commended for its efforts to put the children it harmed on their feet, financially at least.

3. Recommendations

The truth commissions⁶⁸⁹ considered by this report are more similar than they are different. Thus, it is not necessary to propose the "best" model for a truth commission, rather it must simply be stressed that some form of national reconciliation is necessary after the atrocities committed in Darfur.

⁶⁸⁷ The four countries are: Liberia, Sierra Leone, Canada, and Peru.

⁶⁸⁸ The Canadian TRC's first event was held in Winnipeg in June, 2010. For more details, see <http://www.trcnationalevents.ca/websites/trcevent2010/index.php?p=1> (last visited Feb. 20, 2011).

⁶⁸⁹ The four countries are: Liberia, Sierra Leone, Canada and Peru.

A formal apology would be a good place to start. Because of the racial, ethnic, and indigenous dimensions of the conflict in Darfur, Canada could be regarded as a model for seeking reconciliation. While perhaps obviously, Sudan is not in a position to make the kinds of monetary amends that would remedy inequalities,⁶⁹⁰ the need for adequate reparations needs to be addressed. A truth commission tasked with uncovering not just the causes of the conflict, but the underlying reasons for tensions, as was done in Canada, could serve as an excellent foundation to implement future reforms as Darfur transitions back to a peaceful region. A truth and reconciliation commission also provides people a venue to share their stories about the conflict, and to document the history of the conflict in Darfur.

Political will may be an obstacle to creating a truth commission to investigate the atrocities committed in Darfur. Civil society can make an immediate difference, even absent a government mandate for a truth commission. If Darfuris were so inclined, it would be possible to start a citizen-initiated truth commission, and even to reach out for international support of such a project. Given that the situation on the ground is still volatile, and there is a real fear of retaliation, establishing a truth commission in Darfur may not be possible until the ongoing violence has ceased. Therefore, it would be prudent to wait to establish a truth commission in Darfur until it is possible to guarantee protection for those willing to speak out. DC-Cam in Cambodia or the coalition of organizations in the former Yugoslavia provides a potentially useful example of the sort of civilly created truth-seeking organization that may be appropriate for Darfur in the future.

C. Interaction of Mechanisms

Then UN Secretary-General Kofi Annan stated in 2004: “where transitional justice is concerned, the best approach is usually not an ‘either/or’ choice between prosecutions and truth commissions. Instead, a nationally determined combination of mechanisms will generally work better.”⁶⁹¹ There is little doubt that both retributive justice and reconciliation are necessary in Darfur. The question is how the two paths to recovery can and should function together. The examples of the countries studied here demonstrate that there may be no perfect system, but that both courts and

⁶⁹⁰ Reparations, in the form of monetary compensation, have not been discounted in the peace and reconciliation dialogue, nor should they be at this point. Physicians for Human rights recommends considering monetary compensation for victims of the Darfur conflict. See *Guiding Principles on Reparation in Darfur*, PHYSICIANS FOR HUM. RTS. (Nov. 2007), <http://physiciansforhumanrights.org/sudan/updates/reparation-principles.pdf>.

⁶⁹¹ U.N. SCOR, 59th Sess., 5052d mtg. at 3, U.N. Doc. S/PV.5052 (Oct. 6, 2004).

truth commissions are necessary components of every plan for transitional justice, if not in practice, then in desire.

There is no question that politics will be a part of the fragile transitional justice equation in every circumstance. In Liberia, the warring factions agreed on creating a truth commission but not a court, thinking it would spare them prosecution. They were horrified when the Commission completed its mission quickly, and had sorted through the people involved in the conflict to make a list of names for prosecution. These same leaders are now challenging the report, and even resorting to threats of violence. Even in Canada, which possesses a seemingly stable political climate, all of the first Commissioners appointed to the Canadian Truth and Reconciliation Commission resigned after infighting consumed them. Similarly, in the former Yugoslavia the Truth Commission simply fell apart due to rivalries remaining from the still-fresh conflict.

One area that will generate conflict between mechanisms immediately is the topic of amnesty. As seen in some of the case studies considered by this Report, in practice, grants of amnesty made at the peace-brokering table have slowed the process of later prosecutions. For example, as previously described, in Sierra Leone, such amnesties were later worked around by the Security Council; in Peru, an Inter-American Court of Human Rights ruling voided prior grants of amnesty; and in the case of Cambodia, consideration of amnesties was simply postponed. While there has not been a significant challenge to the legality of overriding a prior grant of amnesty or of a pardon, these issues should be carefully considered when designing the interplay between a truth commission and the courts.

Similar concerns arise over information sharing between truth commissions and courts. The approach taken by Liberia, for example, in which the Truth Commission was clearly mandated to prepare for judicial action, might deter some testimony. DC-Cam, on the other hand, has collected extensive documentation and testimony without assurances that such information would not be used by prosecutors in the future. This does not seem to have deterred DC-Cam in the fulfillment of its goals to document the atrocity in Cambodia.

Other truth commissions have employed a total wall on information sharing, as in Sierra Leone. There, however, the mere concern over information sharing was enough to generate controversy, even though the Commission found that as a practical matter, people were not at all concerned about the threat of prosecution by the Special Court if they testified in the Truth Commission. While this is largely attributed to an understanding of the jurisdiction of the court, as many knew they would be safe from prosecution, the Commission heard from some “big fish” too, despite the risk of later prosecution. Similarly, in Peru, though the Truth Commission did pass information to the Special Investigations Unit, the

Unit was designed to operate totally separately from the remainder of the Commission so it could carry out investigations confidentially. The existence of this unit did not appear to chill testimony before the Commission.

As either the government of Sudan or civil society work to establish a truth-seeking body, some tension should be expected in its interaction with the existing courts, and any courts convened in the future. However, learning from the examples at hand, problems can be minimized if the relationship is well defined from the outset. Also, a defined procedure for dispute resolution between a commission and courts proved to be helpful in Sierra Leone, and should also be decided in advance.

Sierra Leone's approach to the interaction of its truth-seeking body and the courts was to create a virtual wall barring information sharing between two. As seen in that situation, the information wall had the positive effect of bringing many alleged perpetrators forward to speak with the truth commission. Conversely, the truth commission lost the ability to speak with many high-level perpetrators that were on trial at the courts. The balance of these aspects should be considered by Darfuris as they develop a plan to manage the interaction of any mechanisms created to seek reconciliation and justice in Sudan.

D. Other Considerations

The case studies present a host of other concerns that must be taken into account as a model for transitional justice is prepared for Darfur. A few of these major issues are: addressing sexual violence, witness safety, public perception, reconstruction, resettlement, reparations and the legacy of transitional justice after its work concludes.

1. Sexual Violence

In every conflict considered here, sexual violence played a role. Any court that prosecutes the accused in the Darfur conflict should be prepared to prosecute sexual violence in the most serious categories of crimes. Courts and truth commissions working on Darfur should also provide adequate measures to protect rape survivors that testify, both physically and emotionally.

The International Criminal Tribunal for Rwanda provides a good example of how these problems can be addressed. After being criticized for failing to take sexual violence seriously, the court changed how it treated victims of sexual violence. Through appointment of a gender expert, the use of female investigators to take witness statements, and the provision of counseling services for rape victims, the ICTR made some progress in this regard. Similarly, Sierra Leone's work with international women's

organizations to advise and train members of its truth commission dramatically increased its ability to account for sexual violence during the conflict. Special attention and acknowledgment of sexual abuse suffered by children in Canada was made, and an extra allowance given for suffering such crimes was included in its reparations scheme.

These sorts of steps should be taken both by courts and truth commissions working with victims of the Darfur conflict because of the prevalence of sexual violence. As is seen in the case examples, civil society can be particularly helpful here in terms of providing education on sexual violence.

2. Witness Safety

Witness safety must also be considered in any plan for transitional justice. Particularly seen in Sierra Leone, witness intimidation and killing has an incredibly negative effect on progress, be it in the courts or in reconciling factions of society. Security for everyone involved in transitional justice is likely to be a major concern in Darfur as stability is still uncertain. Any plan undertaken by the government or civil society should contain adequate security precautions such as creating procedures for in camera proceedings to protect both victim and witness safety, as was done at the International Criminal Tribunal for the former Yugoslavia.⁶⁹²

3. Public Perception

Public perception of transitional justice efforts is also important. Education is paramount so that the public understands why certain measures are taken. For example, the scorn behind the nicknames given to various detention facilities could be eliminated through education about the effects of incarceration on individuals and international standards regarding detention. Special attention in any educational effort to the literacy levels of those expected to understand the material. Cambodia publishes posters explaining concepts such as the jurisdiction of the court that contain both lettering and pictorial descriptions.⁶⁹³ This kind of accessible outreach campaign is possible in various media formats, such as radio, television, and newspapers. As Sudan embarks upon the path to reconciliation, it should address the outreach needs most appropriate for its citizenry.

⁶⁹² See Updated Statute ICTY, *supra* note 632, art. 22 (Sept. 2009), available at http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf.

⁶⁹³ *Poster Series*, EXTRAORDINARY CHAMBERS IN THE CTS. OF CAMBODIA, old.eccc.gov.kh/english/publications.poster.aspx (last visited July 6, 2010).

4. Reconstruction

While it is outside the scope of this report, reconstruction is a key part of transitioning out of conflict. In Sierra Leone, victims of the conflict and civil society groups criticized the money spent on transitional justice, arguing that it should have been used for social service programs. This dissent underscores that need for comprehensive reconstruction programs in addition to mechanisms that seek retributive justice.

The needs of Darfuris should be examined and incorporated into a reconstruction plan. One particularly pressing issue is resettlement of the enormous amount of internally displaced people and refugees now located abroad. Some form of monetary compensation may also be considered, if feasible, in light of the widespread destruction of property caused by the conflict. The needs of those physically and mentally affected by the conflict and the possibility of social services programs to meet those needs seem especially relevant. Finally, rebuilding the region through improved infrastructure, educational systems, and economic opportunities may also be issues Darfuris will wish to address in a reconstruction plan.

5. Legacy of Transitional Justice

A final issue to consider is the legacy of the work of transitional justice, even after it has concluded. The information uncovered during transitional justice work is a vital part of a nation's history. In part that is the idea behind creating a truth commission in the first place, to preserve this historical record. However, in some cases, as in Sierra Leone, after the Truth Commission finished operating, it literally shut its doors, and even took down its website. This lack of concern for the availability of information discovered by the Commission is troubling. Continued access to the work of a court or truth commission is imperative to securing a legacy.

Relatedly, continued education about the conflict, potentially for many generations may be required. DC-Cam has undertaken a project to include genocide education in the Cambodian curriculum for children. These kinds of programs are necessary because of the human tendency to engage in the discourse of revisionist history, which has historically often led to negationism.⁶⁹⁴ In Peru, for example, "Fujimoristas" look wistfully upon the days of the oppressive Fujimori regime, praising it for being a time of order, when things got done. They keep the dream of this reality alive in supporting Alberto Fujimori's daughter, Keiko Fujimori, in her candidacy for the Presidency of Peru. These long-term legacy issues associated with

⁶⁹⁴ This is seen for example in groups that now deny the Holocaust occurred, or in modern romanticism about oppressive rulers such as Stalin or Mussolini.

transitional justice should be part of the equation for government and civil society groups during the entire process.

VII. CONCLUSION

This report examined the current situation in Darfur, the international, regional, and national law that binds Sudan, and a series of seven nations' transitional justice experiences. It finds that there are ample models on which to draw when developing the methods of prosecutions and truth-seeking to be employed in Sudan as Darfur transitions from conflict to peace.

Prosecutions for atrocity committed in Darfur will likely need to proceed at different levels according to the type of perpetrator. Those high-level perpetrators that cooperate with the International Criminal Court may be tried there. For the remaining high-level and mid-level perpetrators that it is practical to prosecute, an internationalized tribunal or strengthened national court system may be good venues in which to pursue justice. A prosecution strategy could also include a modified and formalized sub-national *judiyya* reconciliation program designed to deal with low-level perpetrators.

A truth seeking body could also be established that would inquire into the atrocities committed during the conflict, as well as the underlying causes of the tensions in the region, with the goal of recommending reforms to meaningfully alleviate these problems. This commission could operate in tandem with the courts, but consideration must be had to whether the two bodies will share information. Finally, this report raised a number of additional issues that ought to be considered by those designing a transitional justice plan for Darfur, such as how victims of sexual violence are treated, the safety of witnesses, public perception of transitional justice efforts, reconstruction programs, and the legacy of the conflict.

These recommendations for a transitional justice plan for Darfur are attainable, but Sudan will need to summon the political will to come into compliance with its international obligations to make them a reality. Sudan should also consider engagement with the international community and seek assistance with both developing the capacity of its judicial system and finding an efficient and culturally appropriate system to prosecute all alleged perpetrators of atrocity, whether state or non-state actors, that comport with its international obligations. Should Darfuris move forward with the creation of a truth commission, it is essential that the recommendations of International Commission of Inquiry on Darfur to the United Nations Secretary-General and the Fact-Finding Committee Report on Allegations of Human Rights Violations in Darfur be taken into consideration.

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Civil society can support and encourage the government of Sudan to take these strides. Assistance in the form of election monitoring, rule of law development, and organization around local justice programs will serve a crucial role in developing Sudan's capacity to prosecute. The independent and organized collection of documents, personal stories, and data can start the process of healing, and may also serve a prosecutorial function in the future. This report concludes by cautioning that civil society needs to aspire to conduct all its activities according to standards of international law and custom.

Ultimately, it will be a combination of desire within the government of Sudan, the leadership of international and regional bodies, and the support of local and international civil society that will implement mechanisms that not only render justice and foster healing, but that ensure that the atrocities that befell Darfur will never be repeated.

Appendix

TABLE OF ACRONYMS AND TERMS

| | |
|---------------------|--|
| ADR | Alternative Dispute Resolution |
| AFN | Assembly of First Nations |
| AFRC | Armed Forces Revolutionary Council |
| American Convention | The American Convention on Human Rights |
| ASEAN | Association of South-East Asian Nations |
| AU | African Union |
| AUPD | African Union High-Level Panel on Darfur |
| CAT | Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment |
| CDF | Civil Defence Forces |
| CEDAW | Convention on the Elimination of All Forms of Discrimination Against Women |
| CERD | Convention on the Elimination of All Forms of Racial Discrimination |
| CPP | Cambodia People's Party |
| CRC | Convention on the Rights of the Child |
| DC-CAM | Documentation Center of Cambodia |
| ECCC | Extraordinary Chambers of the Courts of Cambodia |
| ECOWAS | Economic Community of West African States |
| IA Court | Inter-American Court of Human Rights |
| ICC | International Criminal Court |
| ICCPR | International Covenant on Civil and Political Rights |
| ICTR | International Criminal Tribunal for Rwanda |
| ICTY | International Criminal Tribunal for the former Yugoslavia |
| INCHR | The Independent National Commission on Human Rights |
| IRS | Indian Residential Schools |
| JEM | Justice and Equality Movement |
| MRND | <i>Mouvement Républicain pour la Démocratie et le Développement</i> |
| MRTA | Tupac Amaru Revolutionary Movement |
| NATO | North Atlantic Treaty Organization |
| OAU | Organization of African Unity |
| OIC | Organization of the Islamic Conference |
| PDF | Popular Defence Forces |
| RFP | Rwandan Patriotic Front |
| RUF | Revolutionary United Front |
| SCCED | Special Criminal Court for the Events of Darfur |
| SLM/A | Sudan Liberation Movement/Army |
| TRC | Truth and Reconciliation Commission |
| UN | United Nations |
| UNIFEM | UN Development Fund for Women |
| UNMIK | Interim Administration Mission in Kosovo |
| UNTAC | UN Transitional Authority in Cambodia |

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PERTINENT HUMAN RIGHTS AND HUMANITARIAN LAW

| Instrument | Status | Date Action Taken |
|--|--|--------------------------|
| African Charter on Human and People's Rights | Ratified | 1986 |
| Arab Charter on Human Rights | Sudan has not ratified the latest version that went into effect in 2008 | — |
| Cairo Declaration on Human Rights in Islam | Nonbinding | — |
| Convention Against All Forms of Discrimination Against Women (CEDAW) | — | — |
| Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT) | Signed | 1986 |
| Convention on the Elimination of All Forms of Racial Discrimination (CERD) | Acceded | 1977 |
| Convention on the Prevention and Punishment of the Crime of Genocide | Acceded | 2003 |
| Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities | Acceded | 2009 |
| Convention on the Rights of the Child (CRC) | Ratified | 1990 |
| Draft Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity | Nonbinding | — |
| Geneva Conventions | Ratified, except Geneva Convention relative to the Protection of Civilian Persons in Time of War | 1957 |
| Guiding Principles on Internal Displacement | Nonbinding | — |
| International Covenant of Civil and Political Rights (ICCPR) | Acceded | 1986 |
| Optional Protocol to the Convention on the Rights of the Child | Ratified | 2005 |
| Rome Statute of the International Criminal Court | Signed (Also obligated pursuant to S.C. Res. 1593, 2005). | 2000 |
| Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery | Ratified | 1957 |
| UN Charter | Member State | November 12, 1956 |
| Universal Declaration of Human Rights | Nonbinding | — |

DEDICATIONS AND ACKNOWLEDGMENTS

The California International Law Center at King Hall, University of California, Davis, School of Law and the Robert F. Kennedy Center for Justice and Human Rights, would like to express their deep gratitude to the following individuals, who helped to develop this project and prepare this report.

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Toward Peace With Justice in Darfur

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University of California, Davis, Journal of International Law & Policy

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Arabic Translator—TransPerfect Translations