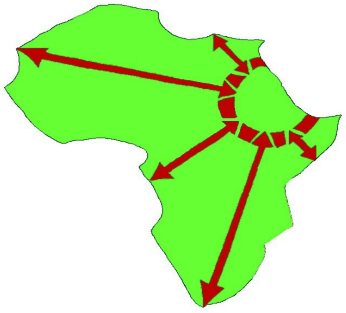

The Darfur Consortium

African and International
Civil Society Action for Darfur

Submission to Africa Union High Level Panel on Darfur

AFRICAN MECHANISMS TO ADDRESS INTERNATIONAL CRIMES IN DARFUR

1. Introduction

On 14 July 2008, the Prosecutor of the International Criminal Court (ICC or the Court) charged President Omar Bashir of Sudan with war crimes, crimes against humanity and genocide.[1] There were divergent responses across Africa to the announcement, some in support of the action, others arguing that the timing of the charges would compromise peace efforts in Darfur. African leaders in general did not welcome the Prosecutor's charges against Bashir, questioning the Prosecutor's motives` and suggesting that Africa's judicial mechanisms were the appropriate venue to pursue accountability. The African Union (AU) Peace and Security Council (the PSC) and the AU Assembly of Heads of State and Government (the Assembly) also expressed their concerns, calling for an Article 16 deferral of the investigation and establishing an expert panel to explore the challenges of accountability and reconciliation in Darfur. Sudan itself denounced the move, stating categorically that its own courts were equipped and ready to prosecute any crimes committed in Darfur. Nine months later, on 4 March 2009, the ICC issued a warrant of arrest for President Bashir citing crimes against humanity and war crimes.

[1] Press release: ICC Prosecutor presents case against Sudanese President, Hassan Ahmad Al Bashir, for genocide, crimes against humanity and war crimes in Darfur, ICC-OTP-20080714-PR341-ENG, the Hague, 14 July 2008.

Critics of the direction of the Court's investigation in Darfur had warned prior to the issuance of the arrest warrant that such a move would likely provoke a violent response from the government; expose peacekeepers and humanitarian workers to additional risk;[2] and embolden rebel groups, or indeed the government, to obstruct and derail the peace process, not just in Darfur but *vis-à-vis* the Comprehensive Peace Agreement (CPA) between North and South Sudan.[3] In fact, immediately following the Court's decision, 13 major humanitarian organisations working in Darfur and elsewhere in Sudan were expelled and three local organisations were suspended from operation on the basis, *inter alia*, of their alleged collaboration with the ICC.[4] Human rights defenders were detained, some tortured and others forced to flee. The joint United Nations (UN) and AU peacekeeping mission (UNAMID) on the ground in Darfur continues to struggle to provide much needed protection to civilians as both government and rebel groups continue their offensives and humanitarian space contracts.[5] Meanwhile the criminal justice system in Sudan is failing to prosecute those suspected of having committed abuses in Darfur, and the political process is in stalemate. With no enforcement cooperation expected from Sudan and many in Africa divided on the proper course of action in response to a warrant of arrest for a sitting head of state, the debate around the pursuit of justice for crimes in Darfur through the ICC has intensified.

This memorandum explores options other than the ICC for pursuing acknowledgement of accountability (whether state or individual) for, and redress with respect to, international crimes committed in Darfur, providing an overview of the judicial and investigative mechanisms available, or which could be made available. The memorandum particularly draws on the finding of a workshop of African legal experts held in Nairobi on 6 June 2009 by the Darfur Consortium, *Justice for International Crimes in Darfur: Confronting the Complementarity Challenge*.[6]

2. Context

Those in support of the work of the ICC in Darfur argue that there can be no doubt that serious international crimes have been committed in Darfur and that their perpetrators must be held accountable. Frustration with the lack of progress made by peace negotiators and peacekeeping forces positions the ICC as a beacon of hope in the context of an otherwise failed international strategy.[7] Others take the view that while justice is necessary, it should not be

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[2] In November 2008, three well-known human rights activists and members of the Darfur Consortium were detained, and two of them tortured, in Sudan. The interrogation focused on the question of their support for the Court's investigation in Darfur.

[3] Alex de Waal, "Sudan and the International Criminal Court: a guide to the controversy" 17 July 2008, available at http://www.opendemocracy.net/article/sudan-and-the-international-criminal-court-a-guide-to-the-controversy.

[4] See Darfur Consortium note on the impact of the expulsions of international organisations and the campaign against indigenous human rights organisations, and Sudanese legal obligations, *One Month on in Darfur and Sudan: The Expulsion and Suspension of International and National Human Rights and Humanitarian Organisations,* available at http://www.darfurconsortium.org/darfur_consortium_actions/statements/2009/HUM%20and%20HRD%20in%20Sudan.042309.pdf

[5] UNAMID is authorised to constitute 26,000 personnel, yet it only has around 10,000 military and police on the ground. A lack of resources from the international community and co-operation from the Sudanese authorities has hampered the mission's efforts. For a review of the first six months of UNAMID's operation see Darfur Consortium, *Putting People First: the Protection Challenge facing UNAMID in Darfur,* 28 July 2008 available at http://www.darfurconsortium.org/darfur_consortium_actions/reports/2008/Putting_People_First_UNAMID_report.pdf.

[6] Available upon request from the International Refugee Rights Initiative.

[7] The role of the ICC is to supplement domestic courts that are unable or unwilling to prosecute perpetrators of war crimes, crimes against humanity and genocide. States can refer situations for investigation to the Court. Where states are not party to the Rome Statute of the International Criminal Court (Rome Statute), Article 13 of the Statute provides that the UN Security Council can activate its Chapter VII peace and security responsibilities as grounds for referring a case for investigation. Although Sudan has signed, it has not ratified, the Rome Statute. In March 2005, further to the report of the UN Commission of Inquiry on Darfur, the Security Council referred the situation in Darfur to the Court. *See* UN Security Council, Resolution 1593 (2005). Further to preliminary investigation, if the ICC Prosecutor takes the view that there are reasonable grounds for believing that crimes within the Court's jurisdiction have been committed, this must be confirmed by the Pre-Trial Chamber before the full investigation can commence. Once the Court is seized of the case, the UN Security Council does not have any further role in the investigation or prosecution, although it may have a role in enforcement of judgements. There is one exception to this general

pursued at a time when peace is elusive. Indeed the ICC's Darfur investigation has polarised the debate around the appropriate place of international justice in situations of ongoing conflict. In the wake of the announcement by the ICC Prosecutor that he was bringing charges against President Bashir, the AU PSC issued a communiqué cautioning that the issue of a warrant would threaten peace efforts in Darfur.[8] The communiqué called explicitly for the suspension of the ICC investigation through invocation of Article 16 of the Rome Statute by the UN Security Council. At the same time, the PSC established an independent High Level Panel of Experts (the High Level Panel) to explore "options that reconcile the imperatives of accountability and the fight against impunity, reconciliation and healing in Sudan". The High Level Panel began its work in March 2009, subsequent to the confirmation of charges by the Court against President Bashir. Headed by former South African President Thabo Mbeki,[9] the High Level Panel has been tasked with considering issues such as the establishment of truth and/or reconciliation commissions, taking into account work done by the AU and its institutions including the African Commission.

Over the last decade African States have indicated strong support for international justice and the importance of the ICC. As of December 2008, 30 African states had ratified the Rome Statute and although South Africa and Senegal are the only two African states to have incorporated it into national law, draft legislation is under development in a number of countries.[10] Of the four situations under consideration by the Court, three of the investigations were commenced at the behest of African states themselves. The timing of the issue of an arrest warrant for President Bashir, against the background of a series of controversial decisions by European judicial mechanisms to pursue African officials using universal jurisdiction and exacerbated by the arrest of Jean Pierre Bemba in Belgium, and perceived missteps by the ICC Prosecutor in other cases under his charge, however, have raised questions for many in Africa as to the legitimacy of international justice, and the ICC in particular, in meting out justice in Africa.[11]

Some African leaders have posited the identification of an African mechanism as the solution to the impasse. Ugandan President Yoweri Museveni, for example, has noted that the "position of the AU should be to investigate ourselves. We don't condemn the [ICC] indictments but the AU should conduct investigations itself so that we decide on our own."[12] At the January 2009 AU Summit, in response to what it has termed the "abuse" of universal jurisdiction by European powers and the Darfur situation, the AU Assembly requested that the AU Commission, "in consultation with the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights, examine the implications of the Court being empowered to try international crimes such as genocide, crimes against humanity and war crimes, and report thereon to the Assembly in 2010".[13] While expressing its commitment to combating impunity, promoting democracy, the rule of law and good governance and condemning human rights violations in Darfur,[14] the Assembly also called for a meeting of African states parties to the Rome Statute "to exchange views on the work of the ICC in relation to Africa, in particular in the light of the processes initiated against

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rule. Article 16 of the Rome States provides that the UN Security Council can, by Chapter VII resolution, defer an investigation or prosecution underway at the ICC for 12 months. This request may be renewed.

[8] AU Peace and Security Council, Communiqué of the 142nd meeting of the Peace and Security Council, PSC/MIN/Comm (CXLII), 21 July 2008.

[9] Two other former heads of state, Burundi's Pierre Buyoya and Nigeria's General Abu-Salam Abu-Bakr, are on the panel. Other members of the panel are African Rights Director Rakiya Abdullahi Omaar of Somalia, former minister Tiéblé Dramé from Mali, Al-Hajji Mohammed of Nigeria, Judge Florence Mumba of Zambia and former Foreign Minister of Egypt Ahmed Maher.

[10] ISS publication, Max du Plessis and Jolyon Ford, eds. "Unable or Unwilling: Case Studies on Domestic Implementation of the ICC Statute in Selected African Countries," ISS Monograph Series No. 141, March 2008 at 115-118.

[11] For a general review of the experience of international justice in action in Africa to date see *In the Interests of Justice? Prospects and Challenges for International Justice in Africa*, International Refugee Rights Initiative at http://www.refugee-rights.org/Publications/2008/In%20the%20Interests%20of%20Justice.November%202008.pdf

[12] "Ugandan President does not Condemn ICC Indictments against Bashir," *Sudan Tribune*, 3 August 2008.

[13] Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction (Assembly/AU3(XII)).

[14] *Ibid.*

African personalities, and to submit recommendations thereon..."[15] The outcomes of this meeting, held in Addis Ababa on 7-8 June 2009, reaffirmed AU member states' commitment to fighting impunity and upholding their obligations under the Rome Statute while undertaking to promote the capacity of regional and national jurisdictions to respond to serious violations of international criminal law.[16]

3. Accountability Options

3.1. Opportunities in Sudan

Since the launch of the ICC's investigation in Darfur, Sudan has maintained that it is willing and able to investigate and prosecute crimes under ICC jurisdiction. An assessment of this claim requires an understanding of the origins and development of Sudan's modern legal system and its relationship with *Sharia* law. During the period of Condominium Rule (1899-1956), a legal system based on English common law was established. This system covered all civil and criminal matters except family law, which was covered by *Sharia* under the Grand Qadi. The two systems were unified in 1983.

Sharia experienced a resurgence in September 1983 when then President Nimeiry amended a range of laws to further enshrine *Sharia* principles in what became known as the September laws. The Source of Judicial Rulings Act, for example, stipulates that in the absence of specific legislation, *Sharia* trumps common law principles.[17] In 1991, the Criminal and Criminal Procedures Acts were replaced with acts that maintained crimes based on *Sharia*. In 2005, the National Interim Constitution (the Constitution) created a new governance framework that impacted the applicable sources of law differentially by region. While each of the four levels of legislative authority (national, Southern Sudan, state and local) has a certain degree of autonomy, Article 5 of the Constitution stipulates that the principal source of law for Northern Sudan is "S*haria* and the consensus of the people".

Article 27(3) of the Constitution stipulates that the rights and freedoms enshrined in international human rights instruments ratified by Sudan "shall be an integral part of the Bill of Rights in the Constitution".[18] Beyond the special constitutional position afforded to such instruments, none of the various Sudanese constitutions since independence have specified whether Sudan follows the dualist or monist system. Practice, however, indicates that Sudan is dualist – prior to domestication, Sudanese courts have never applied any international treaty.

A number of recent legislative developments do incorporate recognition of elements of international humanitarian law. The new Armed Forces Act 2007, for example, criminalises serious violations of international humanitarian law and human rights law, including rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilisation or

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[15] Decision of the Application by the International Criminal Court (ICC) Prosecutor for the Indictment of the President of the Republic of the Sudan (Assembly/AU/Dec.221(XII)).

[16] Report of the Meeting of African State Parties to the Rome Statute of the International Criminal Court, 8-9 June 2009, Addis Ababa, Ethiopia, MinICC/Rpt.

[17] *Sharia* law is based on the Quran, the Suna (Prophet Mohammed's sayings and deeds) and Islamic jurisprudence developed by medieval scholars. In Islamic penal theory, crimes are categorised in three ways. Hudud crimes include, for example, *hadd al-zina* (adultery or fornication); *hadd al-qadf* (false accusation of adultery or fornication); *hadd al–shurb* (drinking of alcoholic drink); and *hadd al-ridda* (apostasy). The second class of crimes is Qisas (retribution), which covers homicide and personal injuries criminally sustained. With respect to punishment for Qisas crimes, the victim has the right to choose between retribution (imprisonment/physical punishment including, where relevant, the death penalty) and *dia* (blood money). The third class of crimes, Tazir, covers all other crimes. The substantive scope and related procedures relating to Hudud and Qisas crimes are determined by the Quran and Suna and hence cannot be altered by legislation.

[18] One of the outstanding questions is the extent to which international instruments addressing issues of international justice such as the Protocol on the Prevention and Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and the Protocol on the Prevention and Suppression of Sexual Violence Against Women and Children, two instruments recently ratified by Sudan, might be considered as "international human rights treaties".

perversion when committed as part of a widespread and systematic attack against a civilian population a crime against humanity.[19] Sudan has also proposed a number of amendments to its criminal law although a number of shortcomings in those proposals may impede effective domestic prosecutions.[20]

- The definition of genocide is not in conformity with that of the 1948 Genocide Convention. The 1948 definition provides that a range of acts may constitute genocide, whereas the suggested definition makes "homicide" the essential act narrowing the definition;[21]
- Inclusion of a number of key war crimes, many of which are alleged to have been committed in Darfur, is not contemplated. The omitted war crimes include sexual slavery, making improper use of a flag or military insignia and forcible transfer of population;
- While Sudanese criminal law recognises criminal liability for anyone who orders, aids and abets an offence and for those who engage in criminal conspiracy in relation to certain offences, the proposals do not appear to provide for command responsibility;[22]
- The amendments will not have retroactive effect; and do not remove procedural immunities that are elsewhere granted to members of state security (more detail on such immunities is provided below).

As recently as 25 May 2009, the National Assembly (parliament) did approve amendments to the 1991 Criminal Act which added war crimes, crimes against humanity and genocide to the range of justiciable crimes, but it is understood that the shortcomings noted above have not been rectified. Thus, for example, those acts currently under scrutiny before the ICC cannot be the subject of prosecution under the Act as war crimes or crimes against humanity will be time barred. Further, almost at the same time, a number of days previously, the Assembly also passed amendments to the 1991 Criminal Procedures Act which prohibit investigations or proceedings outside Sudan against any Sudanese national accused of committing violations of international humanitarian law. There have also been reports that a new criminal offence of cooperating with the ICC has been added to the Criminal Act, but this has not been confirmed.

There remain, therefore, a number of severe challenges in terms of substantive and procedural law and institutional capacity to ensuring accountability for serious crimes in Sudan, such as: immunities; rape; the independence of the judiciary, and limitations of the Special Criminal Court on the Events in Darfur.

Immunities : Sudanese law provides extensive immunities to members of police, security and armed forces for crimes committed in the course of their duties.[23] According to the legislation governing each of these forces, no criminal or civil procedures against security, and no criminal procedures against police or armed forces may be commenced without permission from the head of the relevant force, which permission is not subject to judicial review.[24] In practice, the security and armed forces rarely waive immunity. The police have lifted immunity in some exceptional cases. On 6 November 2008 the Constitutional Court ruled against an appeal challenging the constitutionality of

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[19] Armed Forces Act 2007, Article 153.2.

[20] Redress, "Comments on the Proposed Amendment of the Sudanese Criminal Act," September 2008.

[21] *Ibid.*

[22] *Ibid.*

[23] See, for example, Redress and Khartoum Centre for Human Rights and Environmental Development, "Police Forces Act Falls Short of the Bill of Rights", 18 June 2008.

[24] Section of 32(b) of Security and Intelligence Act of 1999 stipulates, for example, that "no civil, or criminal proceedings shall be instituted, against a member, or collaborator, for any act committed in the official work of the member, save upon approval of the director, and the Director shall grant this approval, whenever there transpires that the subject of responsibility is not connected with the same." Although the Armed Forces and Police Acts were repealed and new legislation passed in 2007 and 2008 respectively, significant immunity provisions have been maintained. Section 45(1) of the new Police Forces Act provides, "[s]ave in cases of *flagrante delicto*, criminal procedures cannot be initiated against any policeman for an act that constitutes a crime that took place while he was performing his duty or because of his official act except upon a permission issued by the Minister of Interior or his delegate." The Armed Forces Act stipulates the same.

immunities granted under the 1991 Security Forces Act. Finally, according to the Sudanese Interim Constitution, head of state immunity may be waived only by a resolution passed by three-quarters of the National Legislature, and the president may be charged only by the Sudanese Constitutional Court.[25]

Rape: Sudan's 1991 Criminal Act defines rape in accordance with *Sharia*, as a form of adultery. The commission of adultery must be proved before coercion is addressed. To prove adultery, the 1993 Evidence Act requires that four male witnesses testify to penetration. Any unsuccessful allegation of rape may render the person alleging it liable to *Khazf* (defamation), which is punishable by flogging. If coercion is not proved, the accuser may be prosecuted for adultery or sodomy under *Sharia*. The practical implication is that rape convictions are almost impossible to achieve.[26] Amendments to the Criminal Act passed by the Parliament at the end of May 2009 do not delink the definition of rape or lower the evidentiary requirements from the *Sharia* offences of adultery and sodomy.

Independence of the Judiciary: There are serious and persistent questions about the independence of the judiciary in Sudan. The constitutional orders that existed between 1990 and 2005 permitted control of the judiciary by the executive. The interference of the executive was evident in a series of cases against political opponents, and many judges were dismissed for their lack of acquiescence to the executive's directives.

Limitations of the Special Criminal Court on the Events of Darfur: Within days of the announcement that the ICC would open an investigation into Dafur, the Special Criminal Court on the Events of Darfur (the Special Court) was established. It began its work at Al Fashir in Northern Darfur on 2 July 2005 under the Chairmanship of Judge Muhammad Said Abkam.[27] Section 5 of the decree establishing the Special Court set out the offences over which the Special Court would have jurisdiction: offences under the Sudanese penal code, violations specified in the reports of the investigations committee on crimes in Darfur[28] and any other charges specified by the Chief Justice. An amended decree issued on 10 November 2005 extended the jurisdiction of the Court to crimes under international humanitarian law. No guidelines were, however, provided with respect to how a Sudanese Court should apply such law; it is understood that charges on this basis have not been brought.

Although some aspects of the applicable law and procedure represent improvements on the law in force in other courts with jurisdiction over Darfur, key issues of concern remain. These include the scope of the Special Court's substantive jurisdiction, stringent evidentiary burdens, the persistence of immunities from prosecution for police, armed and security forces, the absence of fair trial guarantees for the accused, a lack of special protections for vulnerable victims, witnesses and minors, inadequate guarantees of judicial independence and lack of adequately skilled legal personnel.

It is from the perspective of practice, however, that the complete inability of the Special Court to deliver justice becomes clear. Only a limited number of cases have been tried before the Special Court despite overwhelming reports of mass atrocities in Darfur. Of the cases before the Special Court, charges are almost exclusively based in domestic criminal law, as opposed to international humanitarian law. Further, a report by the International Commission of Jurists (ICJ) examining the crimes handled by the Special Court between 2005 and 2007 found that no rape or sexual violence convictions had been obtained.[29]

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[25] Sudanese Interim Constitution, 2005, Article 60(2).

[26] For a detailed discussion of the prosecution of sexual crimes in Sudan, see Khartoum Centre for Human Rights and Environmental Development and Redress, *Time for Change, Reforming Sudan's Legislation on Rape and Sexual Violence*, November 2008.

[27] Lawyers from the Darfur Consortium produced the first analysis of the framework and operation of the Special Court. See *Unwilling and Unable? The Special Criminal Court on the Events in Darfur*, available upon request from the International Refugee Rights Initiative.

[28] This is the "Committee established pursuant to the decision of the Minister of Justice No 3/2005 of 19 January 2005, concerning investigations into the violations cited in the report of the Commission of Inquiry".

[29] International Commission of Jurists, *Administration of Justice in Sudan: the Case of Darfur*, August 2007.

The appointment of a Special Prosecutor on 5 August 2008 has not led to significant improvement. During a public plenary session of the 45th Session of the African Commission on Human and Peoples' Rights, which was held 13-27 May, Special Prosecutor Nimir Ibrahim stated that numerous difficulties, including logistical and security concerns in traversing Darfur, and the perceptions of victims and witnesses which resulted in unwillingness to cooperate with his office, had plagued his investigations. A number of investigations had been opened but no charges brought. Initial investigations by the Special Prosecutor suggested that there was insufficient evidence to try Ahmed Haroun and Ali Kushayb, the first two individuals indicted by the ICC in its Darfur investigation. Neither have the other committees set up by the government to identify violations held perpetrators accountable, leading the Special Rapporteur on the situation of human rights in the Sudan to conclude in her recent report that "there were no thorough investigations, in accordance with relevant international standards, into all reported cases of human rights abuses and breaches of international humanitarian law".[30]

3.2. Regional Opportunities

This section explores mechanisms under the AU's Constitutive Act and African Charter on Human and Peoples' Rights that may have a role to play in providing redress for international crimes.

African Commission on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights (the African Charter), to which all 53 AU member states, including Sudan, are party, guarantees fundamental human rights, including the right to freedom and security of the person, the right to be protected from torture, cruel, inhuman and degrading treatment or punishment, the right to peace and security, the right to equality before the law and the right to a fair trial.[31] The African Commission on Human and Peoples Rights (the African Commission), the human rights mechanism created by the African Charter, is the principle regional human rights body tasked with promotion and protection of human and peoples' rights. In addition to monitoring state compliance with the African Charter, the body can "perform any other tasks...entrusted to it by the Assembly of Heads of State and Government".[32]

As part of its quasi–judicial role, the African Commission considers complaints, instituted by states or individuals, arising from violations under the African Charter. It then makes recommendations, which states parties are bound to implement. However, the Commission's principal weakness is that it has no enforcement mechanism with the exception of referral to the AU Assembly of Heads of State and Government (the AU Assembly),[33] and compliance with decisions has been a significant challenge.[34] The decisions of the African Commission, both in individual cases and with respect to its human rights monitoring and promotion roles, are documented in its annual report to the AU Assembly.[35] Cases alleging human rights violations in Darfur have been presented to the Commission.

In addition to considering cases, the African Commission can undertake protective missions *proprio motu* or at the behest of the AU Assembly. The African Charter provides that the AU Assembly can "request the [African]

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[30] See Addendum (A/HRC/11/14/Add.1) to the Report of the Special Rapporteur on the Situation of Human Rights in the Sudan, Sima Samar**,** A/HRC/11/14, June 2009**.**

[31] African Charter on Human and Peoples' Rights, Articles 23, 3, 7.

[32] African Charter on Human and Peoples' Rights, Article 45(4).

[33] The AU Assembly is yet to sanction a state for failure to adhere to an African Commission decisions. It was in response to this problem of enforcement that the African Court on Human and Peoples' Rights was established in 1998.

[34] Frans Viljoen, "State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights, 1994-2004," 101 American Journal of International Law 1, January 2007 (stating that roughly 30 percent of decisions between 1994 and 2004 were not complied with by states).

[35] African Charter on Human and Peoples' Rights, Article 59.

Commission to take an in-depth study in cases [of serious or massive violations of human and peoples' rights] and make a factual report".[36] The AU has yet to invoke this provision. Of its own accord, however, in July 2004, the African Commission conducted a fact-finding mission into massive human rights violations in Darfur. In its report, the African Commission called on Sudan to adhere to its international obligations, including those under the African Charter, to guarantee the enjoyment of the fundamental rights by its people regardless of ethnic group and origin.[37] In particular, the report called for the cessation of aerial bombardment of civilian populations and for Sudan to investigate and prosecute cases of rape lodged with the police. In observing incidents of arbitrary arrest and detention, which are contrary to the African Charter, the report urged Sudan to release political prisoners. Sudan, as a state party to the African Charter, is obliged to implement the Commission's recommendations. The following are accountability options under the African Commission:

- The African Commission may, of its own initiative, submit cases of massive human rights violations in Sudan for consideration by the African Court.
- The African Commission may request the African Court to provide an advisory opinion on the extent to which the Pact for Security, Stability and Development in the Great Lakes Region's (the Great Lakes Pact) Protocol for the Prevention and Punishment of the Crime of Genocide, War Crimes, Crimes Against Humanity and All Forms of Discrimination (see Section 3.3. on the Great Lakes Pact below) can be included within its jurisdiction and consider cases against Sudan with respect to its obligations under the Protocol.
- The African Commission may undertake a follow up mission to Darfur to assess the human rights situation and the extent to which recommendations made during its 2004 mission have been implemented by Sudan and bring issues of non-implementation of recommendations with the AU.

African Court on Human and Peoples' Rights

The African Court on Human and Peoples' Rights (the African Court) became operational, at least theoretically, in 2006. It has jurisdiction over the African Charter and "any other relevant human rights instrument ratified by States [Parties]".[38] These instruments include the African Charter on the Rights and Welfare of the Child, the African Charter on the Rights of Women in Africa and the Convention Governing the Specific Aspects of Refugee Problems in Africa. The extent to which the Court's jurisdiction over "any other relevant human rights instrument" can be stretched to cover sub-regional protocols addressing impunity (such as the Protocol for the Prevention and Punishment of the Crime of Genocide, War Crimes, Crimes Against Humanity and All Forms of Discrimination, ratified by states in the region, including Sudan, under the Pact for Security, Stability and Development in the Great Lakes Region) is an open question.[39] The interim rules of procedure of the Court, which were adopted at its ninth session in June 2008, do not elaborate on this. Similarly, the Court's enabling protocol is not explicit as to whether the Court's jurisdiction could extend to the consideration of international crimes. In the context of discussions surrounding the ICC's Darfur investigation, in January 2009, the AU Assembly directed the AU Commission, "in consultation with the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights, to examine the implications of the Court being empowered to try international crimes such as genocide, crimes against humanity and war crimes, and report thereon to the Assembly in 2010".[40] This request reflects one of the recommendations of the Committee of Eminent African Jurists (CEAJ) appointed by the AU Assembly in January 2006 to consider "all aspects

[36] African Charter on Human and Peoples' Rights, Article 58(1) and (2).

[37] Report of the African Commission on Human and Peoples' Rights fact-finding mission to the Republic of Sudan in the Darfur region, 8-18 July 2004, EX.CL/364(XI), Annex III.

[38] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Article 7.

[39] Note on the Pact on Security, Stability and Development in the Great Lakes Region Pact which came into force in early 2008.

[40] Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction (Assembly/AU3(XII)).

and implications of the Hissène Habré case as well as the options available for his trial".[41] In its report to the Assembly, the CEAJ urged that granting of such jurisdiction would "make the respect for human rights at national, regional and continental levels a fundamental tenet of African governance".[42]

African inter-governmental organisations, states parties, individuals and non-governmental organisations duly recognised by the AU can litigate before the African Court. Individuals and non-governmental organisations must, however, be from states parties that have made a declaration allowing direct petitioning.[43] The African Court can also give advisory opinions upon request of AU member states or "African organisations". The African Court's rules of procedure do not define "African organisations", which includes arguably non-governmental organisations and certainly intergovernmental bodies.

The rules regulating the relationship between the African Commission and the African Court are still being drafted, and a meeting to begin harmonisation of the respective rules has still not been held; however, it is expected that the African Commission will be able to make referrals to the African Court in two circumstances: cases which the African Commission has decided on the merits but where states have not complied with the decisions and cases of massive human rights violations which are not the subject of a communication but which the Commission decides should be dealt with by the Court. The jurisdiction of the African Court is binding on states that have ratified its enabling protocol. As of March 2009, Sudan was not a party to the protocol creating the African Court. The following are accountability options under the African Court:

- African inter-governmental organisations, the African Commission, states parties and individuals and NGOs where a declaration has been made may take cases of human rights violations in Sudan to the African Court, provided that the Sudan is a party to the enabling protocol.

African Court of Justice and Human Rights

In a further development aimed at strengthening regional judicial mechanisms, in July 2008, the AU Assembly decided to merge the African Court on Human and Peoples' Rights with the new African Court of Justice (not yet operational), with a view to constituting the AU judicial organ envisaged under Article 5 of the AU Constitutive Act. The Protocol on the Statute of the African Court of Justice and Human Rights was adopted in July 2008 but is yet to enter into force.[44] Once it does, there will be a transitional period of a year during which the African Court on Human and Peoples' Rights winds up its activities. The new court will have jurisdiction to interpret the AU Constitutive Act and treaties and conventions of the AU. In addition, states may confer jurisdiction on the Court by agreement.[45] The new Court may rule on any question of international law, including through advisory opinions and may award reparations for the breach of international obligations.[46] Once operational, the Court will be able to adjudicate matters of international law, which may include international crimes and to give advisory opinions.

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[41] African Union, "Declaration on the Hissène Habré Case and the African Union," 24 January 2006, Assembly/AU/Dec.103 (VI).

[42] African Union, "Report of the Committee of Eminent African Jurists on the Case of Hissène Habré," May 2006. The CEAJ also urged that the necessary enabling texts be "adopted through the quickest procedures possible" and called for the creation of "a rapid response mechanism within the Court to ensure that Africa can act with dispatch in situations of gross violations and so give teeth to the notion of 'total rejection of impunity'".

[43] Protocol to the African Charter on Human and Peoples' Rights establishing the African Court on Human and Peoples' Rights, Article 34(6).

[44] The Protocol is yet to come into force. Thereafter, there will be a year given to the phasing out of the African Court on Human and Peoples' Rights.

[45] Statute of the African Court of Justice and Human Rights, Article 28(f).

[46] Statute of the African Court of Justice and Human Rights, Articles 28(d) and (h).

AU Political Organs

One of the principles of the AU's Constitutive Act is the right of the AU to "intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity".[47] This marks a shift from the international legal framework governing AU's predecessor, the Organisation for African Unity, which guarded state sovereignty by applying the principle of non-interference. It is significant to note that the principle of "non-indifference", which was adopted by the AU in 2000, predates the responsibility to protect doctrine endorsed by the UN in October 2005. African states have thus embraced the principle of accountability for serious crimes and the threat to peace and security of civilians. Provision is made for a member state to "request intervention from the [African] Union in order to restore peace and security".[48] Member states are further obliged to respect the rule of law and reject impunity.[49]

The AU PSC is the key AU organ charged with ensuring peace, security and stability in the region, in particular securing civilian protection. It is the main body tasked with the "prevention, management and resolution of conflicts".[50] With respect to Darfur, it has consistently reiterated its "unflinching commitment to combating impunity" and a "conviction that, in order to achieve long-lasting peace and reconciliation in Darfur, it is imperative to uphold the principles of accountability and bring to justice the perpetrators of gross human rights violations in that region".[51] At the same time it has also requested that the UN Security Council defer the proceedings against President Bashir under Article 16 of the Rome Statute and established the High Level Panel on Darfur.[52]

Within the AU's peace and security architecture is the Panel of the Wise, an independent advisory five-member body that bolsters the work of the Council. Included in its functions is conducting fact-finding missions in situations of conflict or potential conflict.[53] Institutions such as the African Commission can also make presentations before the PSC on the human rights situation in a particular country. Civil society organisations can make suggestions to the agenda of the Panel of the Wise.

The AU Assembly of Heads of State and Government has also exercised responsibilities relating to combating impunity. In 2006, during its consideration of the question of the best location for the trial of former Chadian President Hissène Habré for serious international crimes, a case referred to it by Senegal, the AU Assembly took the view that the case "fell within the competence of the African Union" in accordance with "the terms of Articles 3(h), 4(h) and 4(o) of the Constitutive Act". The Assembly took jurisdiction therefore on the basis of the protection of human rights as an AU objective, coupled with two new AU operational principles: the right to intervene in "grave circumstances" and the "condemnation and rejection of impunity" (Articles 4(h) and 4(o)). The following are some of the accountability options available to the AU's political organs:

- The Panel of the Wise may on its own initiative conduct a fact-finding mission to Darfur and/or communicate with the AU Commission and its organs, including special envoys, on peace, security and justice matters in Darfur.
- The AU Assembly could request an African State with a universal jurisdiction capability to exercise it with respect to the situation in Darfur or with respect to particular alleged crimes, similar to its decision in the Habré case.

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47 Constitutive Act of the AU, Article 4 (h).

48 Constitutive Act of the AU, Article 4 (j).

49 Constitutive Act of the AU, Article 4 (m) and (o).

50 Protocol on Amendments to the Constitutive Act of the African Union, Article 9.

51 PSC/MIN/Comm(CXLII).

52 See discussion in Section 1 above.

53 Modalities for the functioning of the Panel of the Wise as adopted by the Peace and Security Council at its 100th meeting held on 12 November 2007.

- The Assembly could, in collaboration with the relevant decision-making body of an appropriate sub-regional organisation, confer on an existing judicial mechanism an additional temporary criminal jurisdiction to prosecute crimes arising from the conflict in Darfur.
- The Assembly could establish an *ad hoc* judicial mechanism (see discussion in Section 4.1 below) to contribute to the combating of impunity in Darfur. (The Constitutive Act makes provision for the establishment by the Assembly of "any other organ" of the AU.)

3.3. Sub-regional Opportunities

There are at least three sub-regional courts that have jurisdiction over human rights violations: the Court of Justice of the East African Community (EAC), the Court of Justice of the Economic Community for West African States (ECOWAS) and the Southern African Development Community (SADC) Tribunal. The decisions of these courts are binding on states that are members of the relevant sub-regional configuration. All have jurisdiction over certain areas of human rights by virtue of their stewardship of their organisation's founding treaty; however, none have criminal jurisdiction. At the EAC Court of Justice, however, a zero draft Protocol for the operationalisation of extended jurisdiction will make the Court an explicit court of human and peoples' rights, in addition to functioning as an appellate court for Community member states. There is also discussion of the addition of criminal jurisdiction. Sudan is not a member of any of these treaty regimes (although it was indicated at one point that Sudan was interested in exploring EAC membership).

The AU has recognised eight sub-regional political configurations that have been termed the "building blocs" of the AU.[54] In East Africa and the horn, there are four such inter-governmental organisations and arrangements dealing with peace, security and development: the Inter-Governmental Authority on Development, the East African Community, the Common Market for East and Southern Africa (COMESA) and the International Conference on the Great Lakes Region (ICGLR). Of particular relevance are COMESA and the ICGLR, as Sudan is party to both.

The Great Lakes Pact

The Great Lakes Pact provides a framework to end impunity and insecurity and promote human rights and development in the sub-region. ICGLR member states are Angola, Burundi, the Central African Republic, the Democratic Republic of Congo (DRC), Kenya, the Republic of Congo, Rwanda, Sudan, Uganda and Zambia.[55] The Protocols adopted under the Pact, *inter alia*, provide protection to civilians in their enjoyment of fundamental human rights and hold member states accountable for prosecution of and compensation for international crimes. The Protocols are directly enforceable at national law in states that take a monist approach to international law such as Burundi, Central African Republic, DRC, the Republic of Congo and Rwanda. Sudan has signed and ratified the Pact and its Protocols. Further, Article 27(3) of Sudan's Constitution stipulates that the rights and freedoms enshrined in international human rights treaties, covenants and instruments ratified by the Republic of the Sudan "shall be an integral part of the Bill of Rights in the Constitution".[56]

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[54] The Protocol on the Relations between the African Union and the Regional Economic Communities aims to strengthen co-operation between the AU and the sub-regional groupings, particularly at the institutional and decision-making level. See Protocol on the Relations between the African Union and the Regional Economic Communities, EX.CL/348 (IX).

[55] It should be recalled that all four of the ICC's current investigations centres on four contiguous countries in the Great Lakes region, namely the Democratic Republic of the Congo, Uganda, the Sudan and CAR.

[56] In addition to the recent ratification (in February 2009) of the Great Lakes Pact, according to the High-Level Mission on the situation of human rights in Darfur appointed by the UN Human Rights Council, Sudan has ratified the following treaties: International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the International Convention on the Elimination of All Forms of Racial Discrimination; and the Convention on the Rights of the Child; the African Charter on Human and Peoples' Rights; and the four Geneva Conventions of 1949. International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 999 U.N.T.S. 171 (18 March 1986); International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 993 U.N.T.S. 3 (18 March 1986); International Covenant on the Elimination of all Forms of

The Pact's Protocol for the Prevention and Punishment of the Crime of Genocide, War Crimes, Crimes Against Humanity and All Forms of Discrimination (IC Protocol) addresses impunity for serious crimes, in particular providing:

> Member States undertake to take appropriate measures to neutralise, disarm, arrest, and bring before competent courts the perpetrators of genocide, in accordance with the Convention on the Prevention and Punishment of the Crime of Genocide, the authors of war crimes or crimes against humanity in accordance with the statute of the International Criminal Court and the relevant resolutions of the United Nations Security Council.

Importantly, the IC Protocol stipulates that there is to be no immunity relating to a person's status whether as head of state or government or other official and that no statute of limitations shall apply.[57] While the IC Protocol is far-reaching towards peace, stability and holding perpetrators accountable, it does not create institutions to adjudicate violations, nor does it confer jurisdiction on existing judicial mechanisms such as the African Court on Human and Peoples' Rights, the East African Court of Justice or the COMESA Court of Justice. The IC Protocol does, however, urge the adoption of the Rome Statute and the domestication of the Protocol's provisions to facilitate national proceedings.

Other Protocols of the Pact bolster the undertakings of the IC Protocol relating to accountability for international crimes, such as the Protocol on Judicial Cooperation, which creates a regional framework for the handling of extradition requests and cooperation in respect of investigations and prosecutions. The Protocol on the Prevention and Suppression of Sexual Violence against Women and Children contains a comprehensive set of measures for tackling sexual violence, from prosecution to compensation, and extends the range of acts that can be the subject of criminal penalty under national law.

The Pact's Protocol on Non-Aggression and Mutual Defence also contributes to the prevention of international crime by explicitly acknowledging the obligation of states to intervene to protect against its commission in certain circumstances. Article 4(8) stipulates that the prohibition on the threat or use of force by a member state "shall not impair the exercise of their [Member States'] responsibility to protect populations from genocide, war crimes, ethnic cleansing, crimes against humanity and gross violations of human rights committed by, or within a State". What type of action might be entailed by this provision is not spelled out, but it could certainly include the setting up or promotion of international justice mechanisms in line with the AU Assembly's interpretation of the very similar powers enshrined in the AU Constitutive Act.[58] The Pact stipulates explicitly that if states fail to comply with the Non-Aggression and Mutual Defence Protocol, an extraordinary summit may be convened to consider appropriate action.[59] Chapter X of the Protocol on Democracy and Good Governance also envisages the convening of an extraordinary session of the heads of state summit of the ICGLR in the event of "threats to democracy and a beginning of its breakdown by whatever process and in the event of massive violations of human rights in a Member State".[60] Article 49 of the same Protocol provides that a series of "urgent and appropriate measures" should be taken

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Racial Discrimination, G.A. res. 2106 (XX), 660 U.N.T.S. 195 (21 March 1977); Convention on the Rights of the Child (CRC), G.A. res. 44/25, UN Doc. A/44/49 (3 August 1990); the African Charter on Human and People's Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), ***entered into force*** 21 Oct 1986 (11 March 1986); *Report of the High-Level Mission on the situation of human rights in Darfur pursuant to Human Rights Council decision S-4/101*, available at http://www.unhcr.org/refworld/country,,UNHRC,,SDN,456d621e2,46237e782,0.html.

[57] Protocol for the Prevention and Punishment of the Crime of Genocide, War Crimes, Crimes Against Humanity and All Forms of Discrimination, Articles 11 and 12.

[58] The contours of the circumstances which may trigger the exercise of the Article 4(8) responsibility to protect are more expansive than those described in the AU Constitutive Act, in particular including gross violations of human rights.

[59] Great Lakes Pact, Article 5(1)(d).

[60] Protocol on Democracy and Good Governance, Article 48.

by the summit to put an end to the situation, "with a view to returning to normal institutional life and the respect of human rights". The following are accountability options under the Great Lakes Pact:

- Member states of the Great Lakes Pact that domesticate the IC Protocol could be fora for the exercise of universal jurisdiction;
- Under Articles 9(2) and 9(3) of the IC Protocol, member states that find a person suspected of having committed an international crime on their territory are obliged to arrest the person and extradite him or her to the State on whose territory the crime was committed or a competent international judicial body;
- Member states of the Great Lakes Pact could confer jurisdiction under the IC Protocol to an existing judicial mechanism. However, not all member states of the ICGLR are also members of the EAC (Sudan is not a member of the EAC),[61] so the East African Court of Justice would not be an option. The other fora available are the COMESA Court of Justice (see following section) or the African Court.

Common Market for East and Southern Africa

COMESA brings together 20 states,[62] including Sudan, to co-operate largely on economic issues, but also peace, security and stability. One of the principles of COMESA under Article 6 of the treaty is to promote and protect human and peoples' rights in accordance with the African Charter and to uphold the rule of law.[63] The Treaty makes provision for a Court of Justice that has jurisdiction on all matters relating to the Treaty. Member states can refer another member state to the Court if that state has failed to fulfil its obligations under the Treaty.[64] Legal and natural persons who are resident in a member state may refer a matter to the Court provided they have exhausted local remedies.[65] The reality is, however, that the jurisprudence of the COMESA Court of Justice indicates that the requirement of exhaustion of local remedies is stringent.[66] Under Article 34 of the Treaty, the Court may determine sanctions where a member state fails to implement its decision. The COMESA Court of Justice sits in Khartoum. The following are accountability options under COMESA:

- A member state may wish to seek clarity on whether the Great Lakes Pact's IC Protocol falls within COMESA Court of Justice jurisdiction;
- A member state may refer Sudan to the COMESA Court of Justice for failing to adhere to the fundamental principles contained in the African Charter;
- Individuals from COMESA may take a case against Sudan to the COMESA Court of Justice.

3.4. African Domestic Opportunities

The exercise of universal jurisdiction for international crimes by domestic courts with the institutional and legal capacity to hear cases of international crimes is another option. States that have incorporated the Rome Statute into domestic law and/or have ratified the Convention Against Torture and Other Forms of Cruel, Inhuman and Degrading Treatment or Punishment (the Convention Against Torture) or the Convention on the Prevention and Punishment of

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[61] Members of the East Africa Community are: Burundi, Kenya, Tanzania, Rwanda and Uganda.

[62] Members states of the Common Market for East and Southern Africa are: Burundi, the Comoros, the Democratic Republic of the Congo, Djibouti, Eritrea, Egypt, Ethiopia, Kenya, Libya, Malawi, Mauritius, Madagascar, Rwanda, the Seychelles, Swaziland, Somalia, Sudan, Uganda, Zambia and Zimbabwe.

[63] COMESA Treaty, Article 6.

[64] COMESA Treaty, Article 24.

[65] COMESA Treaty, Article 26.

[66] In *The Republic of Kenya and Commissioner of Lands vs. Coastal Acquaculture*, Ref No 3 of 2001 [judgment of 26/4/2002], the Court held that Coastal Acquaculture, despite attempting to follow the legal procedures under the Kenyan Land Acquisition Act unsuccessfully for eight years, failed to exhaust local remedies in Kenya because the action was not "persecuted to finality". The Court left no room for exceptions on the basis that domestic remedies were ineffective or unavailable in practice.

the Crime of Genocide (the Genocide Convention) are best placed to assume universal jurisdiction.[67] 44 African states have ratified the Convention Against Torture, meaning that they are obliged to prosecute or extradite in cases of torture.[68] Similarly, states that have ratified the Genocide Convention (such as Sudan) must prosecute or extradite where genocide is suspected.[69] Few African states have, however, put in place the domestic mechanisms required to operationalise the obligations under these treaties. At least 30 AU member states may exercise universal jurisdiction on the basis of grave breaches of the Geneva Conventions of 1949.[70]

Senegal is one country with the capacity to prosecute international crimes and provides a recent example of the potential exercise of universal jurisdiction in Africa upon the direction of the AU Assembly – with respect to the prosecution of a former head of state. In May 2006, the UN Committee Against Torture found that Senegal was in violation of its obligations under the Convention Against Torture for failing to prosecute Hissène Habré for massive human rights violations or to extradite him to Belgium, which had issued a warrant based on its universal jurisdiction law. Further to a decision of the AU Assembly, Senegal was mandated to prosecute Habré "on behalf of Africa", with all "necessary assistance" to be provided by "the Chairperson of the Union, in consultation with the Chairperson of the Commission".[71] The government of Senegal has now amended its constitution to allow it to prosecute crimes of genocide, war crimes and crimes against humanity committed before they were officially incorporated into Senegalese law in February 2007 but requires that the suspect be in its territory at the time of the initiation of criminal proceedings.[72]

South Africa, which has ratified the Rome Statute, the Convention Against Torture and the Genocide Convention, permits the exercise of universal jurisdiction, even abrogating immunities that may otherwise bar the prosecution of foreign state officials in respect of charges of genocide, crimes against humanity and war crimes, but restricts jurisdiction to persons on its territory.[73] Kenya and Uganda have draft legislation criminalizing international crimes pending in their respective parliaments, providing further possible fora to address impunity in Sudan in the domestic courts of Africa. Other AU member states which provide for the exercise of universal jurisdiction over genocide, crimes against humanity and war crimes include DRC, Republic of Congo, Ethiopia, Ghana, Niger and Rwanda.[74]

4. Transitional Justice Options

In post-conflict countries, addressing issues of justice and peace have brought up the viability of truth commissions or a truth commission operating simultaneously with a special, or *ad hoc*, court. Truth commissions generally take on a quasi-judicial role with a specific mandate over a limited period. Crucially, truth commissions and the *ad hoc* court are put in place once a country has reached a cessation of hostilities – or relative peace. In the Darfur case, this would imply that there has to be a cessation of hostilities and a fully deployed UNAMID presence in Darfur for a transitional justice mechanism to be adopted. A further requirement for such mechanisms to operate and indeed have a modicum of success is consensus by all stakeholders. A truth commission should not be seen as circumventing

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[67] See Report of the Committee of Eminent Jurists on the case of Hissène Habré, para 21.

[68] The AU-EU Expert Report on the Principle of Universal Jurisdiction, 16 April 2009.

[69] Sudan acceded to the Genocide Convention on 13 October 2003. The convention entered into force for Sudan on 11 Jan 2004, http://www.preventgenocide.org/law/convention/newparties.htm.

[70] These states include the following with common law traditions: Botswana, Kenya, Lesotho, Malawi, Mauritius, Namibia, Nigeria, Seychelles, Sierra Leone, Swaziland, Tanzania, Uganda and Zimbabwe; and the following with civil law traditions: Algeria, Angola, Burkina Faso, Burundi, Cameroon, CAR, Chad, Comoros, Cote d'Ivoire, DRC, Djibouti, Egypt, Eritrea, Gabon, Libya, Republic of Congo and Tunisia. The AU-EU Expert Report on the Principle of Universal Jurisdiction, 16 April 2009.

[71] Assembly of the African Union, "Decision on the Hissène Habre Case and the African Union," July 2, 2006, AU Doc. no. Assembly/Au/3 (Vii).

[72] The AU-EU Expert Report on the Principle of Universal Jurisdiction, 16 April 2009.

[73] *Ibid.*

[74] *ibid.*

justice, but rather as complementary to prosecutions. Transitional justice mechanisms are effective where there is a real threat of prosecution and remedy of reparations.

Ad Hoc Tribunal

Sierra Leone's post-conflict response to justice issues was an *ad hoc* tribunal.[75] The Special Court of Sierra Leone (SCSL) is the first such tribunal to have been created through an amalgam of international and national law and jurisdiction, a so-called "hybrid tribunal", mandated by the Sierra Leone Ratification Act to prosecute "persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone".[76] Arguments in support of hybrid tribunals have included the lower cost for them than wholly international tribunals, closer physical proximity to witnesses and victims and more local accountability and investment in the outcomes. However, the domestic government apparatus, while important in ensuring that the work of the judicial mechanism proceeds unhindered, can also exercise undue influence on the justice process. Under the Constitutive Act, the AU Assembly may establish an *ad hoc* judicial mechanism to investigate and try crimes in Darfur,[77] and there have been a number of suggestions for the creation of a tribunal composed of Arab, African and Sudanese judges.[78]

Truth Commission

Uncovering the truth rather than apportioning blame is a primary focus of a truth commission. Parties agree to a truth commission on the basis that it will aid in the achievement of peace and stability in the transitional phase after conflict. Reconciliation and unity in the South African context formed the basis for seeking truth, documenting injustices of the past, providing a forum for accountability and reparations for victims. The South African Truth and Reconciliation Commission was established on the condition that prosecutions would take place in instances where perpetrators were not granted amnesty under the enabling law or where they chose not to apply for amnesty. However, eight years since the completion of the work of the Truth and Reconciliation Commission, there has been apparent reluctance on the part of the authorities in South Africa to prosecute perpetrators. The Commission was useful in uncovering the extent of abuses which may not have come to the fore in a court of law.

5. Conclusion

It is the Darfur Consortium's belief that the victims of Darfur should feel that they are an integral part of the process of healing, the achievement of accountability and redress for violations. Having effective safeguards in place to protect the security of victims, reforming the Sudanese justice system in order to address questions of justice and a comprehensive peace process and political settlement of the Darfur crisis are critical for long-term resolution.

The voices of victims, muted amid the discourses about a comprehensive peace agreement, must be amplified and heard as they are the ones facing the challenges of healing and reconciliation. All, victims and non-victims alike, are in need of an end to impunity. The achievement of fair and effective accountability and redress mechanism are crucial if Darfur and Darfurians are to see the security, justice and peace they have long yearned for.

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[75] Operating simultaneously with the Special Court of Sierra Leone was the Sierra Leone Truth and Reconciliation Commission.

[76] Statute of the Special Court for Sierra Leone, Article 1.

[77] The Constitutive Act, Article 9(1)(d) makes provision for the establishment by the Assembly of "any organ" of the AU.

[78] "Sudan Ex-PM Proposes Hybrid Court to try Darfur Suspects," *Sudan Tribune*, 28 March 2009.